Australian Government
Australian Law Reform Commission

NSW Law Reform Commission
Justice & Attorney General

Family Violence: Improving Legal Frameworks

CONSULTATION PAPER

ALRC CP 1
NSWLRC CP 9

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The Australian Law Reform Commission was established on 1 January 1975 by the *Law Reform Commission Act 1973* (Cth) and reconstituted by the *Australian Law Reform Commission Act 1996* (Cth). The office of the ALRC is at Level 25, 135 King Street, Sydney, NSW, 2000, Australia.

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Making a submission

Making a Submission to the Inquiry

Any public contribution to an inquiry is called a submission and these are actively sought by the Australian Law Reform Commission and the New South Wales Law Reform Commission (the Commissions) from a broad cross-section of the community, as well as those with a special interest in the particular inquiry.

The closing date for submissions in response to the Consultation Paper is 4 June 2010.

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Written submissions addressing the questions and proposals in the Consultation Paper can be mailed, faxed or emailed to the ALRC.

Submissions should be sent to:

The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001
Email: violence@alrc.gov.au

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The Commissions also accept submissions made in confidence. Any request for access to a confidential submission is determined in accordance with the *Freedom of Information Act 1982* (Cth), which has provisions designed to protect sensitive information given in confidence.

In the absence of a clear indication that a submission is intended to be confidential, the Commissions will treat the submission as non-confidential.

Contents

Terms of Reference

Reducing Violence against Women and their Children

Terms of reference

The 2009 report of the National Council to Reduce Violence against Women and their Children, *Time for Action*, acknowledged the complex interraction between State and Territory family/domestic violence and child protection laws and the *Family Law Act 1975* (Cth). The National Council also stressed the importance of consistent interpretation and application of laws relating to family/domestic violence and sexual assault, including rules of evidence, in ensuring justice for victims of such violence.

At its meeting of 16–17 April 2009, the Standing Committee of Attorneys-General agreed that Australian law reform commissions should work together to consider these issues.

I refer to the Australian Law Reform Commission for inquiry and report pursuant to subsection 20(1) of the *Australian Law Reform Commission Act 1996* the issues of:

1) the interaction in practice of State and Territory family/domestic violence and child protection laws with the Family Law Act and relevant Commonwealth, State and Territory criminal laws; and
2) the impact of inconsistent interpretation or application of laws in cases of sexual assault occuring in a family/domestic violence context, including rules of evidence, on victims of such violence.

In relation to both issues I request that the Commission consider what, if any, improvements could be made to relevant legal frameworks to protect the safety of women and their children.

Scope of the reference

In undertaking this reference, the Commission should be careful not to duplicate:

a) the other actions being progressed as part of the Immediate Government Actions announced by the Prime Minister on receiving the National Council's report in April 2009;
b) the evaluation of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* reforms being undertaken by the Australian Institute of Family Studies; and

c) the work being undertaken through SCAG on the harmonisation of uniform evidence laws, in particular the development of model sexual assault communications immunity provisions and vulnerable witness protections.

Collaboration and consultation

In undertaking this reference, the Commission should:

a) have regard to the National Council's report and any supporting material in relation to domestic violence and sexual assault laws;

b) work jointly with the New South Wales Law Reform Commission with a view to developing agreed recommendations and consult with other State and Territory law reform bodies as appropriate;

c) work closely with the Australian Government Attorney-General's Department to ensure the solutions identified are practically achievable and consistent with other reforms and initiatives being considered in relation to the development of a National Plan to Reduce Violence against Women and their Children or the National Framework for Protecting Australia's Children, which has been approved by the Council of Australian Governments; and

d) consult with relevant courts, the Australian Government Department of Families, Housing, Community Services and Indigenous Affairs, relevant State and Territory agencies, State and Territory Legal Aid Commissions, the Family Law Council, the Australian Domestic Violence Clearinghouse and similar bodies in each State and Territory.

Timeframe

Considering the scale of violence affecting Australian women and their children and acknowledging the Australian Government's commitment to developing a National Plan through COAG for release in 2010, the Commission will report no later than 31 July 2010.

Dated: 17 July 2009

Robert McClelland

Attorney-General

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List of Questions and Proposals

Part B – Family Violence

4. Family Violence: A Common Interpretative Framework?

Proposal 4–1 (a) State and territory family violence legislation should contain the same definition of family violence covering physical and non-physical violence, including conduct the subject of Proposals 4–3 to 4–5 and 4–7 to 4–10 below. The definition of family violence in the *Family Violence Protection Act 2008* (Vic) should be referred to as a model.

OR

(b) The definitions of family violence in state and territory family violence legislation should recognise the same types of physical and non-physical violence, including conduct the subject of Proposals 4–3 to 4–5 and 4–7 to 4–10 below. The definition of family violence in the *Family Violence Protection Act 2008* (Vic) should be referred to as a model.

Question 4–1 Should the definition of family violence in state and territory family violence legislation, in addition to setting out the types of conduct that constitute violence, provide that family violence is violent or threatening behaviour or any other form of behaviour that coerces, controls or dominates a family member or causes that family member to be fearful?

Proposal 4–2 The *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should be amended to include a definition of 'domestic violence', in addition to the current definition of 'domestic violence offence'.

Proposal 4–3 State and territory family violence legislation should expressly recognise sexual assault in the definition of family violence to the extent that it does not already do so.

Proposal 4–4 State and territory family violence legislation should expressly recognise economic abuse in the definition of family violence to the extent that it does not already do so.

Proposal 4–5 State and territory family violence legislation should include specific examples of emotional or psychological abuse or intimidation or harassment that illustrate acts of violence against certain vulnerable groups including: Indigenous persons; those from a culturally and linguistically diverse background; the aged; those with a disability; and those from the gay, lesbian, bisexual and transgender community.

Instructive models of such examples are in the *Family Violence Protection Act 2008* (Vic) and the *Intervention Orders (Prevention of Abuse) Act 2009* (SA). In each case, state and territory family violence legislation should make it clear that such examples are illustrative and not exhaustive of the prohibited conduct.

Question 4–2 Some state and territory family violence legislation lists examples of types of conduct that can constitute a category of family violence. In practice, are judicial officers and lawyers treating such examples as exhaustive rather than illustrative?

Proposal 4–6 The definition of family violence in state and territory family violence legislation should not require a person to prove emotional or psychological harm in respect of conduct which, by its nature, could be pursued criminally—such as sexual assault. In particular, the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) should be amended to ensure that sexual assault of itself is capable of meeting the definition of 'abuse' without having to prove emotional abuse.

Proposal 4–7 The *Domestic Violence and Protection Orders Act 2008* (Qld) and *Domestic and Family Violence Act 2007* (NT) should be amended expressly to recognise kidnapping or deprivation of liberty as a form of family violence.

Proposal 4–8 The *Family Violence Act 1994* (Tas) should be amended to recognise damage to property and threats to commit such damage as a form of family violence.

Proposal 4–9 The *Crimes (Domestic and Personal Violence) Act 2007* (NSW), *Domestic Violence and Protection Orders Act 2008* (Qld), *Restraining Orders Act 1997* (WA), and *Domestic and Family Violence Act 2007* (NT) should be amended to ensure that their definitions of family violence capture harm or injury to an animal irrespective of whether that animal is technically the property of the victim.

Proposal 4–10 State and territory family violence legislation should include in the definition of family violence exposure of children to family violence as a category of violence in its own right.

Proposal 4–11 Where state or territory family violence legislation sets out specific criminal offences that form conduct constituting family violence, there should be a policy reason for the categorisation of each such offence as a family violence offence. To this end, the governments of NSW and the ACT should review the offences categorised as 'domestic violence offences' in their respective family violence legislation with a view to (a) ensuring that such categorisations are justified and appropriate; and (b) ascertaining whether or not additional offences ought to be included.

Proposal 4–12 Incidental to the proposed review of 'domestic violence offences' referred to in Proposal 4–11 above, s 44 of the *Crimes Act 1900* (NSW)—which deals

with the failure to provide any wife, apprentice, servant or insane person with necessary food, clothing or lodgings—should be amended to ensure that its underlying philosophy and language are appropriate in a modern context.

Proposal 4–13 The definitions of family violence in a state or territory's family violence legislation and criminal legislation—in the context of defences to homicide—should align, irrespective of whether the criminal legislation limits the availability of defences to homicide in a family violence context to cases involving 'serious' family violence.

Proposal 4–14 The definition of 'family violence' in s 9AH of the *Crimes Act 1958* (Vic)—which largely replicates the definition in s 3 of the *Domestic Violence Act 1995* (NZ)—should be replaced with the definition of 'family violence' in s 5 of the *Family Violence Protection Act 2008* (Vic). Alternatively, the definition of family violence in s 9AH of the *Crimes Act 1958* (Vic) should be amended to include economic abuse.

Question 4–3 Are there any other examples where the criminal law of a state or territory would allow for prosecution of conduct constituting family violence in circumstances where a state or territory's family violence legislation would not recognise the same conduct as warranting a protection order?

Proposal 4–15 State and territory governments should review their family violence and criminal legislation to ensure that the interaction of terminology or definitions of certain conduct constituting family violence would not prevent a person obtaining a protection order in circumstances where a criminal prosecution could be pursued. In particular,

(a) the definition of stalking in *Domestic and Family Violence Act* (NT) s 7 should be amended to include all stalking behaviour referred to in the *Criminal Code Act* (NT) s 189; and

(b) the Queensland government should review the inclusion of the concepts of 'wilful injury' and 'indecent behaviour without consent' in the definition of 'domestic violence' in s 11 of the *Domestic and Family Violence Protection Act 1989* (Qld), in light of how these concepts might interact with the *Criminal Code* (Qld).

Proposal 4–16 The South Australian Government should review whether the interaction of the definition of 'emotional or psychological harm' in the definition of 'abuse' in s 8 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA), and 'mental harm' in s 21 of the *Criminal Law Consolidation Act 1935* (SA) is likely to confuse victims and their legal representatives involved in both civil family violence and criminal proceedings. In particular, the review should consider whether it would be desirable for:

(a) the *Intervention Orders (Prevention of Abuse) Act* to distinguish between emotional and psychological harm;

(b) the *Criminal Law Consolidation Act 1935* to define 'psychological harm'; and

(c) both above mentioned Acts to adopt a commonly shared understanding of the meaning of 'psychological harm'.

Question 4–4 In practice, what effect do the different definitions of family violence in the *Family Law Act 1975* (Cth) and in state and territory family violence legislation have in matters before federal family courts:

(a) where a victim who has suffered family violence

(i) has obtained a state or territory protection order; or

(ii) has not obtained a state or territory protection order; and

(b) on the disclosure of evidence or information about family violence?

Question 4–5 Does the broad discretion given to courts exercising jurisdiction under the *Family Law Act 1975* (Cth) and the approach taken in the Family Court of Australia's Family Violence Strategy overcome, in practice, the potential constraints posed by the definition of 'family violence' in the *Family Law Act*?

Proposal 4–17 The definition of family violence in the *Family Law Act 1975* (Cth) should be expanded to include specific reference to certain physical and non-physical violence—including conduct the subject of Proposals 4–3 to 4–5 and 4–7 to 4–10 above—with the definition contained in the *Family Violence Protection Act 2008* (Vic) being used as a model.

Proposal 4–18 The definition of 'family violence' in the *Family Law Act 1975* (Cth) should be amended by removing the semi-objective test of reasonableness.

Question 4–6 How is the application of the definition of 'relevant family violence' in the *Migration Regulations 1994* (Cth) working in practice? Are there any difficulties or issues arising from its application?

Proposal 4–19 The Tasmanian Government should review the operation of the *Family Violence Act 2004* (Tas) and the *Justices Act 1959* (Tas) pt XA to establish equality of treatment of family members who are victims of family violence.

Proposal 4–20 State and territory family violence legislation should include as protected persons those who fall within Indigenous concepts of family, as well as those who are members of some other culturally recognised family group. In particular, the

Family Violence Act 2004 (Tas) and the *Restraining Orders Act 1997* (WA) should be amended to capture such persons.

Question 4–7 Should state and territory family violence legislation include relationships with carers—including those who are paid—within the category of relationships covered?

Proposal 4–21 State and territory family violence legislation should contain guiding principles, which should include express reference to a human rights framework. The preamble to the *Family Violence Protection Act 2008* (Vic) provides an instructive model, although it would be preferable if the principles also referred expressly to relevant international conventions such as the *Declaration on the Elimination of Violence against Women*, and the United Nations *Convention on the Rights of the Child*.

Proposal 4–22 State and territory family violence legislation should contain a provision that explains the nature, features and dynamics of family violence including: its gendered nature; detrimental impact on children; and the fact that it can involve exploitation of power imbalances; and occur in all sectors of society. The preamble to the *Family Violence Protection Act 2008* (Vic) and s 9(3) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) provide instructive models in this regard. In addition, family violence legislation should refer to the particular impact of family violence on: Indigenous persons; those from a culturally and linguistically diverse background; those from the gay, lesbian, bisexual and transgender community; older persons; and people with disabilities.

Proposal 4–23 The *Family Law Act 1975* (Cth) should be amended to include a provision that explains the nature, features and dynamics of family violence.

Proposal 4–24 The *Restraining Orders Act 1997* (WA) should be amended to include an objects clause.

Proposal 4–25 State and territory family violence legislation should articulate a common set of core purposes which address the following aims:

(a) to ensure or maximise the safety and protection of persons who fear or experience family violence;

(b) to ensure that persons who use family violence accept responsibility—or are made accountable—for their conduct; and

(c) to reduce or prevent family violence and the exposure of children to family violence.

Proposal 4–26

(a) The objects clause in the *Domestic and Family Violence Protection Act 1989* (Qld) should be amended to specify core purposes, other than the existing main purpose of providing for the safety and protection of persons in particular relationships; and

(b) the objects clause in the *Family Violence Act 2004* (Tas) should be amended to specify more clearly the core purposes of the Act.

Question 4–8 Are there any other 'core' purposes that should be included in the objects clauses in the family violence legislation of each of the states and territories? For example, should family violence legislation specify a purpose about ensuring minimal disruption to the lives of those affected by family violence?

Proposal 4–27 State and territory family violence legislation should adopt the same grounds for obtaining a protection order.

Proposal 4–28 The grounds for obtaining a protection order under state and territory family violence legislation should not require proof of likelihood of repetition of family violence, unless such proof is an alternative to a ground that focuses on the impact of the violence on the person seeking protection.

Question 4–9 Which of the following grounds for obtaining a protection order under state and territory family violence legislation should be adopted:

(a) a person has reasonable grounds to fear, and, except in certain cases, in fact fears family violence, along the lines of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW);

(b) a person has reasonable grounds to fear family violence;

(c) there are reasonable grounds to suspect that further family violence will occur and the Court is satisfied that making an order is appropriate in all the circumstances, along the lines of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA); or

(d) either the person seeking protection has reasonable grounds to fear family violence or the person he or she is seeking protection from has used family violence and is likely to do so again.

5. Family Violence Legislation and the Criminal Law—An Introduction

Question 5–1 How are matters dealt with in practice that involve:

(a) an overlap between state or territory family violence legislation and federal criminal law; and

(b) a joint prosecution of state or territory and federal offences arising in a family violence context?

In particular, do state and territory prosecutors seek the consent of the Commonwealth Director of Public Prosecutions to prosecute federal offences arising in a family violence context, and inform it of the outcomes of any such prosecutions?

Question 5–2 Are you aware of any cases where an offence against federal criminal law has formed the basis for obtaining a protection order under state or territory family violence legislation?

Proposal 5–1 The definition of family violence in state and territory family violence legislation should be broad enough to capture conduct the subject of potentially relevant federal offences in the family violence context—such as sexual servitude.

Proposal 5–2 The Commonwealth Director of Public Prosecutions—either by itself or in conjunction with other relevant bodies—should establish and maintain a centralised database of statistics that records the number of times any federal offence has been prosecuted in a family violence context including when such an offence is prosecuted:

(a) in addition to proceedings for the obtaining of a protection order under state or territory family violence legislation;

(b) jointly with a state or territory offence in a family violence context; and

(c) in the absence of any other criminal or civil proceeding.

Proposal 5–3 In order to facilitate the establishment and maintenance of the centralised database referred to in Proposal 5–2, state and territory prosecutors—including police and directors of public prosecution—should provide the Commonwealth Director of Public Prosecutions with information about:

(a) federal offences in a family violence context which they prosecute, including the outcomes of any such prosecutions;

(b) the prosecution of any federal offence in a family violence context conducted jointly with a prosecution of any state or territory family-violence related offence; and

(c) whether the prosecution of the federal offence is in addition to any protection order proceedings under state or territory family violence legislation.

Question 5–3 Is there a need for lawyers involved in family violence matters to receive education and training about the potential role of federal offences in protection order proceedings under state and territory family violence legislation? How is this best achieved?

Question 5–4 As a matter of practice, are police or other participants in the legal system treating the obtaining of protection orders under family violence legislation and a criminal justice response to family violence as alternatives rather than potentially co-existing avenues of redress? If so, what are the practices or trends in this regard and how can this best be addressed?

Question 5–5 Are criminal offences for economic and emotional abuse in a family violence context necessary or desirable?

Question 5–6 In practice, where police have powers to issue protection orders under family violence legislation, has the exercise of such powers increased victim safety and protection?

Proposal 5–4 State and territory family violence legislation which empowers police to issue protection orders should provide that:

(a) police are only able to impose protection orders to intervene in emergency or crisis situations in circumstances where it is not reasonably practicable or possible for the matter to be dealt with at that time by a court; and

(b) police-issued protection orders are to act as an application to the court for a protection order as well as a summons for the person against whom it is issued to appear before the court within a short specified time period. In particular, s 14(6) of the *Family Violence Act 2004* (Tas)—which allows police-issued protection orders to last for 12 months—should be repealed

Proposal 5–5 State and territory family violence legislation, to the extent that it does not already do so, should

(a) impose a duty on police to investigate family violence where they have reason to suspect or believe that family violence has been, is being or is likely to be committed; and

(b) following an investigation, require police to make a record of their reasons not to take any action such as apply for a protection order, if they decide not to take action.

Question 5–7 In what circumstances, if any, should police be required to apply for protection orders on behalf of victims? Should such a requirement be imposed by state and territory family violence legislation or by police codes of practice?

Question 5–8 Should all state and territory governments ensure that there are Indigenous-specific support services in courts to enable Indigenous people to apply for protection orders without police involvement?

Question 5–9 In what circumstances, if any, has the NSW Director of Public Prosecutions instituted and conducted protection order proceedings under family violence legislation or conducted a related appeal on behalf of a victim? Do Directors of Public Prosecutions in other states and territories play a role in protection order proceedings under family violence legislation?

Question 5–10 Do any issues arise in relation to the availability, scope and exercise in practice of police powers in connection with family violence to:

(a) enter premises;

(b) search for and seize firearms or other articles; and

(c) arrest and detain persons?

Proposal 5–6 State and territory legislation which confers on police powers to detain persons who have used family violence should empower police to remove such persons from the scene of the family violence or direct them to leave the scene and remain at another specified place for the purpose of the police arranging for a protection order.

Question 5–11 Should state and territory legislation which confers on police power to detain persons who have used family violence empower police to detain such persons for a reasonably short period for the purpose of making arrangements to secure the safety of victims and affected children to the extent that it does not already do so?

Question 5–12 Is there a need for legislative amendments to provide guidance in identifying the primary aggressor in family violence cases?

Question 5–13 In practice, does the application of provisions which contain a presumption against bail, or displace the presumption in favour of bail in family violence cases, strike the right balance between ensuring the safety and wellbeing of victims, and safeguarding the rights of accused persons?

Question 5–14 How often are victims of family violence involved in protection order proceedings under family violence legislation not informed about a decision to release the offender on bail and the conditions of release?

Proposal 5–7 State and territory legislation, to the extent that it does not already do so, should impose an obligation on the police and prosecution to inform the victim of a family violence offence of: (a) decisions to grant or refuse bail to the offender; and (b) where bail is granted, the conditions of release. The *Bail Act 1992 (*ACT) provides an instructive model in this regard. Police codes of practice or operating procedures and prosecutorial guidelines or policies as well as appropriate education and training programs should also address the obligation to inform victims of family violence of bail decisions.

Question 5–15 How often are inconsistent bail requirements and protection order conditions imposed on a person accused of committing a family violence offence?

Proposal 5–8 Judicial officers should be allowed, on a grant of bail, to consider whether the purpose of ensuring that the offender does not commit an offence while on bail or endanger the safety, welfare or property of any person might be better served or assisted by a protection order, protective bail conditions or both, as recommended by the Law Reform Commission WA in relation to the *Bail Act 1982* (WA).

6. Protection Orders and the Criminal Law

Proposal 6–1 State and territory family violence legislation should be amended, where necessary, to make it clear that the making, variation or revocation of a protection order or the refusal to make, vary or revoke such an order does not affect the civil or criminal liability of a person bound by the order in respect of the family violence the subject of the order.

Question 6–1 Is it common for victims in criminal proceedings to be cross-examined about evidence that they have given in support of an application to obtain a protection order under family violence legislation when the conduct the subject of the criminal proceedings and the protection order is substantially the same?

Proposal 6–2 State and territory family violence legislation should be amended to clarify whether, in the trial of an accused for an offence arising out of conduct which is the same or substantially similar to that upon which a protection order is based, references can be made to:

(a) the making, variation, and revocation of protection orders in proceedings under family violence legislation;

(b) the refusal of a court to make, vary or revoke a protection order in proceedings under family violence legislation;

(c) the existence of current proceedings for a protection order under family violence legislation against the person the subject of the criminal proceedings;

(d) the fact that evidence of a particular nature or content was given in proceedings under family violence legislation.

Such provisions will need to address separately the conduct which constitutes a breach of a protection order under family violence legislation.

Question 6–2 How is s 62 of the *Domestic and Family Violence Protection Act 1989* (Qld)—which renders inadmissible in criminal proceedings certain evidence about protection orders where those proceedings arise out of conduct upon which a protection order is based—working in practice? In particular:

(a) how is it interacting in practice with s 18 of the *Evidence Act 1977* (Qld) which states that 'proof may be given' of a previous inconsistent statement;

(b) does it provide a model for other states and territories to adopt in their family violence legislation in order to provide legislative clarity about the matters raised in Proposal 6–2 above; and

(c) is there a need to make express exception for bail, sentencing and breach of protection order proceedings?

Question 6–3 In practice, to what extent are courts exercising their powers to make protection orders in criminal proceedings on their own initiative where a discretion to do so is conferred on them?

Question 6–4 Are current provisions in family violence legislation which mandate courts to make either interim or final protection orders on: charging; a finding or plea of guilt; or in the case of serious offences, working in practice? In particular:

(a) have such provisions resulted in the issuing of unnecessary or inappropriate orders; and

(b) in practice, what types of circumstances satisfy judicial officers in NSW that such orders are not required?

Question 6–5 If provisions in state and territory family violence legislation mandating courts to make protection orders in certain circumstances remain, is it appropriate for such provisions to contain an exception for situations where a victim objects to the making of the order?

Question 6–6 To what extent are prosecutors in the Northern Territory making applications for protection orders where a person pleads guilty or is found guilty of an offence that involves family violence? Is it desirable for legislation to empower

prosecutors in other states and territories to make an application for protection orders where a person pleads guilty or is found guilty of such an offence?

Proposal 6–3 State and territory family violence legislation should include an express provision conferring on courts a power to make a protection order on their own initiative at any stage of a criminal proceeding—including prior to a plea or finding of guilt.

Proposal 6–4 State and territory legislation should provide that a court, before which a person pleads guilty or is found guilty of an offence involving family violence, must consider any existing protection order obtained under family violence legislation and whether, in the circumstances, that protection order needs to be varied to provide greater protection for the person against whom the offence was committed, irrespective of whether an application has been made to vary the order.

Question 6–7 In practice, are the conditions which judicial officers attach to protection orders under state and territory family violence legislation sufficiently tailored to the circumstances of particular cases?

Proposal 6–5 State and territory family violence legislation should provide expressly that one of the conditions that may be imposed by a court making a protection order is to prohibit the person against whom the order is made from locating or attempting to locate the victim of family violence.

Proposal 6–6 Application forms for protection orders in each state and territory should clearly set out the full range of conditions that a court may attach to a protection order. The forms should be drafted to enable applicants to indicate the types of conditions that they would like imposed. In particular, the application form for a protection order in Western Australia should be amended in this regard.

Proposal 6–7 State and territory family violence legislation should require judicial officers considering the making of protection orders to consider whether or not to make an exclusion order—that is, an order excluding a person against whom a protection order is made from premises shared with the victim, even if the person has a legal or equitable interest in such premises.

Proposal 6–8 State and territory family violence legislation should specify the factors that a court is to consider in making an exclusion order—that is, an order excluding a person against whom a protection order is made from premises shared with the victim, even if the person has a legal or equitable interest in such premises. Judicial officers should be required to consider the effect that making or declining to make an exclusion order will have on the accommodation needs of the parties to the proceedings and on any children, as recommended by the ALRC in the Report *Domestic Violence* (ALRC 30) 1986.

Question 6–8 If state or territory family violence legislation empowers police officers to make an order excluding a person who has used family violence from premises in which he or she has a legal or equitable interest, should they be required to take reasonable steps to secure temporary accommodation for the excluded person?

Proposal 6–9 State and territory family violence legislation should require a court to give reasons for declining to make an exclusion order—that is, an order excluding the person against whom a protection order is made from premises in which he or she has a legal or equitable interest—where such order has been sought.

Question 6–9 How is the presumption in the family violence legislation of the Northern Territory—that where a victim, person who uses family violence and child reside together, the protection of the victim and child is best achieved by their remaining in the home—working in practice? In particular, has the application of the presumption resulted in the making of exclusion orders?

Question 6–10 Should state and territory family violence legislation include an express presumption that the protection of victims is best served by their remaining in the home in circumstances where they share a residence with the persons who have used violence against them?

Proposal 6–10 State and territory family violence legislation should be amended, where necessary, to allow expressly for courts making protection orders to impose conditions on persons against whom protection orders are made requiring them to attend rehabilitation or counselling programs, where such persons are suitable and eligible to participate in such programs.

Proposal 6–11 Application forms for protection orders should specify conditions relating to rehabilitation or counselling or allow a victim to indicate whether she or he wishes the court to encourage the person who has used violence to contact an appropriate referral service.

Question 6–11 Do judicial officers in jurisdictions, such as NSW and Queensland, in which family violence legislation does not specify expressly rehabilitation or counselling programs as potential conditions attaching to a protection order, in fact, impose such conditions as part of their general power to impose any orders that they consider to be necessary or desirable?

Question 6–12 Are overlapping or conflicting obligations placed on persons as a result of conditions imposed by protection orders under family violence legislation requiring attendance at rehabilitation or counselling programs and any orders to attend such programs either pre-sentencing or as part of the sentencing process?

Question 6–13 In practice, are courts sentencing offenders for family-violence related offences made aware of, and do they take into account, any protection order conditions to which the offender to be sentenced is or has been subject?

Question 6–14 Have there been cases where there has been overlap or conflict between place restriction or area restriction orders imposed on sentencing and protection order conditions which prohibit or restrict the same person's access to certain premises?

Proposal 6–12 State and territory legislation should provide that a court sentencing an offender for a family-violence related offence should take into account in sentencing the offender:

(a) any protection order conditions to which the person being sentenced is subject, where those conditions arise out of the same or substantially the same conduct giving rise to the prosecution for the offence; and

(b) the duration of any protection order to which the offender is subject.

Proposal 6–13 State and territory legislation should be amended, where necessary, to provide that a person protected by a protection order under family violence legislation cannot be charged with or guilty of an offence of aiding, abetting, counselling or procuring the breach of a protection order.

Proposal 6–14 State and territory family violence legislation should empower a court hearing an allegation of breach of a protection order to grant leave to proceed in an application to vary or cancel a protection order of its own motion where:

(a) there is evidence that the victim for whose benefit the protection order was made gave free and voluntary consent to the breach; and

(b) the court is satisfied that the victim wants to vary or revoke the protection order.

Proposal 6–15 State and territory criminal legislation should be amended to ensure that victims of family violence cannot be charged with, or be found guilty of, offences—such as conspiracy or attempt to pervert the course of justice—where the conduct alleged to constitute such offences is essentially conduct engaged in by a victim to reduce or mitigate the culpability of the offender. Legislative reform in this area should be reinforced by appropriate directions in police codes of practice, or operating procedures and prosecutorial guidelines or policies.

Question 6–15 In practice: (a) are persons who breach protection orders raising consent of the victim to the breach as a mitigating factor in sentencing; and (b) are courts treating consent of a victim to a breach of a protection order as a mitigating factor in sentencing?

Question 6–16 Should state and territory family violence or sentencing legislation prohibit a court from considering the consent of a victim to breach of a protection order as a mitigating factor in sentencing?

Question 6–17 In practice, where breach of a protection order also amounts to another criminal offence to what extent are police in each state and territory charging persons with breach of a protection order, as opposed to any applicable offence under state or territory criminal law?

Question 6–18 If there is a practice of police preferring to lay charges for breach of a protection order, as opposed to any applicable underlying criminal offence, how can this practice best be addressed to ensure victims' experiences of family violence are not underrated?

Proposal 6–16 State and territory courts, in recording and maintaining statistics about criminal matters lodged or criminal offences proven in their jurisdiction should ensure that such statistics capture separately criminal matters or offences that occur in a family-violence related context.

Question 6–19 Should there be consistency of maximum penalties for breach of protection orders across the jurisdictions? If so, why, and what should the maximum penalty be?

Question 6–20 In practice, what issues or concerns arise about the sentences actually imposed on offenders for breach of protection orders?

Question 6–21 Should state and territory family violence legislation contain provisions which direct courts to adopt a particular approach on sentencing for breach of a protection order—for example, a provision such as that in s 14(4) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), which requires courts to sentence offenders to imprisonment for breach of protection orders involving violence, unless they otherwise order and give their reasons for doing so?

Question 6–22 What types of non-financial sanctions are appropriate to be imposed for breach of protection orders where the breach does not involve violence or involves comparatively low levels of violence?

7. Recognising Family Violence in Criminal Law

Question 7–1 Is it necessary or feasible for state and territory criminal laws to introduce a specific offence of committing family violence? If so, how should such an offence be conceptualised? For example, would it be feasible to create a two-tiered offence which captures both coercive conduct and physical violence in a family violence context?

Question 7–2 Which, if either, of the following options for reform should be adopted:

(a) state and territory criminal legislation should provide that an offence is aggravated—and therefore a higher maximum penalty applies—if an offender is

in a family relationship with the victim and the offence committed formed part of a pattern of controlling, coercive or dominating behaviour; or

(b) state and territory criminal legislation should be amended to include specific offences—such as assault and sexual assault—which are committed by an offender who is in a family relationship with the victim, but which do not attract a higher maximum penalty?

Question 7–3 What kind of family relationships should be included for the purposes of the offences referred to in Question 7–2?

Question 7–4 Should federal criminal legislation be amended to include specific offences committed by an offender who is in a family relationship with the victim? If so, which offences should be included and should they carry a higher maximum penalty?

Question 7–5 In practice, are representative charges in family-violence related offences under-utilised? If so, why, and how can this best be addressed?

Question 7–6 In practice, are courts imposing sentences for family-violence related offences taking into account, where applicable, the fact that the offence formed part of a course of conduct of family violence? If so, are courts taking into account (a) uncharged criminal conduct; or (b) non-criminal family violence? Should they do so?

Question 7–7 In practice, to what extent are guilty pleas entered to a family-violence related charge accompanied by an acknowledgement that they are representative of criminality, comprising uncharged conduct as well as charged conduct?

Proposal 7–1 Commonwealth, state and territory governments, and Commonwealth, state and territory directors of public prosecution respectively, should ensure that police and prosecutors are encouraged by appropriate prosecutorial guidelines, and training and education programs, to use representative charges to the maximum extent possible in family-violence related criminal matters where the charged conduct forms part of a course of conduct.

Question 7–8 Should the sentencing legislation of states and territories be amended to allow expressly for a course of conduct to be taken into account in sentencing, to the extent that it does not already do so?

Question 7–9 Should the fact that an offence was committed in the context of a family relationship be an aggravating factor in sentencing? If so, to which family relationships should this apply? Is making a specific link between a family relationship and the escalation of violence an appropriate model?

Proposal 7–2 State and territory sentencing legislation should provide that the fact that an offence was committed in the context of a family relationship should not be considered a mitigating factor in sentencing.

Proposal 7–3 The Australian Government—in conjunction with state and territory governments, the National Judicial College of Australia, the Judicial Commission of NSW, and the Judicial College of Victoria—should develop, and maintain the currency of, a model bench book on family violence, which incorporates a section on sentencing in family violence matters.

Question 7–10 Are current defences to homicide for victims in violent family relationships adequate in each Australian state and territory?

Proposal 7–4 State and territory criminal legislation should provide defences to homicide which accommodate the experiences of family violence victims who kill, recognising the dynamics and features of family violence.

Proposal 7–5 State and territory criminal legislation should expressly allow defendants to lead evidence about family violence in the context of a defence to homicide. Section 9AH of the *Crimes Act 1958* (Vic) is an instructive model in this regard.

Question 7–11 How can the criminal law best recognise family violence as relevant to a defence to homicide? For example, should family violence be expressly accommodated within an expanded concept of self-defence or should jurisdictions introduce a separate defence of family violence? What problems or issues arise from current models which recognise family violence as relevant to a defence to homicide?

8. Family Violence Legislation and Parenting Orders

Proposal 8–1 State and territory child protection laws should be amended to require a child protection agency that advises a parent to seek a protection order under state or territory family violence legislation for the purpose of protecting the child to provide written advice to this effect to ensure that a federal family court does not construe the parent's action as a failure to 'facilitate, and encourage, a close and continuing relationship between the child and the other parent' pursuant to s 60CC(3)(c) of the *Family Law Act 1975* (Cth).

Proposal 8–2 Application forms for initiating proceedings in the federal family courts and the Family Court of Western Australia should clearly seek information about existing protection orders obtained under state and territory family violence legislation or pending proceedings for such orders.

Proposal 8–3 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. This could be achieved by:

(a) imposing a legally enforceable obligation on parties to proceedings for a protection order to inform the court about any such parenting orders or proceedings;

(b) requiring courts making protection orders to inquire as to any such parenting orders or proceedings; or

(c) both of the above.

Question 8–1 In practice, what steps does a police officer who issues a protection order have to take in order to make 'reasonable enquiries' about the existence or otherwise of a 'family law order', pursuant to the *Domestic and Family Violence Act 2007* (NT)? Should this requirement apply to police who issue protection orders in other states and territories?

Proposal 8–4 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.

Proposal 8–5 The 'additional consideration' in s 60CC(3)(k) of the *Family Law Act 1975* (Cth), which directs a court to consider only final or contested protection orders when determining the best interests of a child in making a parenting order, should be:

(a) repealed, and reliance placed instead on the general criterion of family violence contained in s 60CC(3)(j);

OR

(b) amended to provide that any family violence, including evidence of such violence given in any protection order proceeding—including proceedings in which final or interim protection orders are made either by consent or after a contested hearing—is an additional consideration when determining the best interests of a child.

Proposal 8–6 Rule 10.15A of the *Family Law Rules 2004* (Cth) should apply to allegations of family violence in addition to allegations of child abuse. A substantially equivalent rule should apply to proceedings in the Federal Magistrates Court.

Question 8–2 How often do federal family courts make consent orders that are inconsistent with current protection orders without requiring parties to institute

parenting proceedings? Are additional measures needed to prevent this—for example, by including a requirement in the *Family Law Rules 2004* (Cth) for parenting proceedings to be initiated where parties propose consent orders that are inconsistent with current protection orders?

Question 8–3 Are additional measures necessary to ensure that allegations of family violence in federal family courts are given adequate consideration in interim parenting proceedings? If so, what measures would be beneficial?

Proposal 8–7 State and territory courts hearing protection order proceedings should not significantly lower the standard of protection afforded by a protection order for the purpose of facilitating consistency with a current parenting order. This could be achieved by:

(a) a prohibition to this effect in state and territory family violence legislation; or

(b) guidance in relevant state and territory bench books.

Question 8–4 Is s 68P of the *Family Law Act 1975* (Cth), which requires a family court to specify any inconsistency between a family law order and a family violence protection order, working in practice? Are any reforms necessary to improve the section's operation?

Question 8–5 Is s 68Q(2) of the *Family Law Act 1975* (Cth), which permits certain persons to apply for a declaration of inconsistency between a family law order and a family violence protection order, working in practice? How frequently is this provision used?

Question 8–6 Do state and territory courts exercise their power under s 68R of the *Family Law Act 1975* (Cth) to revive, vary, discharge or suspend a parenting order to give effect to a family violence protection order?

Proposal 8–8 Family violence legislation should refer to the powers under s 68R of the *Family Law Act 1975* (Cth) to revive, vary, discharge or suspend a parenting order to give effect to a family violence protection order by:

(a) referring to the powers—the South Australian model; or

(b) requiring the court to revive, vary, discharge or suspend an inconsistent parenting order to the extent that it is inconsistent with a family violence protection order—the Victorian model.

Question 8–7 Should proceedings for a protection order under family violence legislation, where there is an inconsistent parenting order, be referred to a specialist state and territory court?

Proposal 8–9 Application forms for protection orders under state and territory family violence legislation should include a clear option for an applicant to request a variation, suspension, or discharge of a current parenting order.

Question 8–8 Are legal practitioners reluctant to seek variation of parenting orders in state and territory courts? If so, what factors contribute to this reluctance?

Proposal 8–10 The *Jurisdiction of Courts of Summary Jurisdiction (Children) Proclamation 2006* (Cth) should be reviewed to clarify its intended application to magistrates courts in Western Australia seeking to exercise their powers under div 11 of the *Family Law Act 1975* (Cth).

Question 8–9 Should the *Family Law Act 1975* (Cth) be amended to direct state and territory courts varying parenting orders to give priority to the protection of family members against violence and the threat of family violence over a child's interest in having contact with both parents?

Question 8–10 Should s 68R of the *Family Law Act 1975* (Cth) be amended to empower state and territory courts to make parenting orders in those circumstances in which they can revive, vary, discharge or suspend such orders?

Question 8–11 Do applicants for interim protection orders who seek variation of a parenting order have practical difficulties in obtaining new orders from a court exercising family law jurisdiction within 21 days? If so, what would be a realistic time within which such orders could be obtained?

Question 8–12 Should there be a defence to a breach of a parenting order where a parent withholds contact beyond 21 days due to family violence concerns while a variation or suspension of a parenting order made by a state or territory court is awaiting hearing in a federal family court or the Family Court of Western Australia?

Proposal 8–11 The Tasmanian Government should undertake an evaluation of the protocol negotiated between the Magistrates Court of Tasmania and the Tasmanian Registry of the Family Court in relation to coexisting family violence protection orders and parenting orders. On the basis of this evaluation, other states and territories should consider whether adopting cooperative models would be an effective strategy to deal with coexisting orders.

Proposal 8–12 Application forms for family violence protection orders should include an option for applicants to indicate their preference that there should be no exception in the protection order for contact required or authorised by a parenting order.

Question 8–13 Should contact required or authorised by a parenting order be removed from the standard exceptions to prohibited conduct under state and territory protection orders?

Proposal 8–13 The Australian Government—in conjunction with state and territory governments, the National Judicial College of Australia, the Judicial Commission of NSW and the Judicial College of Victoria—should provide ongoing training and development for judicial officers in state and territory courts who hear proceedings for protection orders on the exercise of their powers under the *Family Law Act 1975* (Cth).

Question 8–14 Should the provisions for resolving inconsistent orders under pt VII div 11 of the *Family Law Act 1975* (Cth) be expanded to include inconsistencies resulting from:

(a) a party's rights or responsibilities under the *Family Law Act* other than those pursuant to an order, injunction or undertaking, such as those deriving from the concept of parental responsibility; and/or

(b) laws other than family violence laws prescribed in reg 12BB of the *Family Law Regulations 1984* (Cth), such as protective bail conditions?

9. Family Violence Legislation and the *Family Law Act:* Other *Family Law Act* Orders

Question 9–1 In order to improve the accessibility of injunctions for personal protection under the *Family Law Act 1975* (Cth) to victims of family violence, should the *Family Law Act* provide separate procedures in relation to injunctions for personal protection and other family law injunctions available under s 114 of the Act? If so, what procedures would be appropriate?

Proposal 9–1 The *Family Law Act 1975* (Cth) should be amended to provide that a wilful breach of an injunction for personal protection under ss 68B and 114 is a criminal offence, as recommended by the ALRC in *Equality Before the Law* (ALRC 69).

Question 9–2 In practice, how often does a person who has obtained an injunction under the *Family Law Act 1975* (Cth) subsequently need to seek additional protection under state or territory family violence legislation?

Question 9–3 Should a person who has sought or obtained an injunction for personal protection under the *Family Law Act 1975* (Cth) also be able to seek a protection order under state or territory family violence legislation?

Question 9–4 In practice, do problems arise from the provisions dealing with inconsistencies between injunctions granted under ss 68B and 114 of the *Family Law Act 1975* (Cth) and protection orders made under state and territory family violence legislation?

Proposal 9–2 The *Family Law Act 1975* (Cth) should be amended to provide that in proceedings to make or vary a protection order, a state or territory court with jurisdiction may revive, vary, discharge or suspend a *Family Law Act* injunction for the personal protection of a party to a marriage or other person.

Proposal 9–3 Section 114(2) of the *Family Law Act 1975* (Cth), which permits a court to make an order relieving a party to a marriage from any obligations to perform marital services or render conjugal rights, should be repealed.

Question 9–5 Is evidence of violence given in protection order proceedings being considered in the context of property proceedings under pt VIII of the *Family Law Act 1975* (Cth)? If so, how?

Proposal 9–4 The provisions of the *Family Law Act 1975* (Cth) dealing with the distribution of property should refer expressly to the impact of violence on past contributions and on future needs, as recommended by the ALRC in *Equality Before the Law* (ALRC 69).

Proposal 9–5 The Australian Government should commission an inquiry into the treatment of family violence in property proceedings under pt VIII of the *Family Law Act 1975* (Cth). The inquiry should consider, among other issues, the manner in which family violence should be taken into account in determining a party's contribution under s 79(4) and future needs under s 75(2); the definition of family violence for the purpose of pt VIII proceedings; and interaction with other schemes—for example, victims' compensation.

Question 9–6 How often are persons who have been the subject of exclusion conditions in protection orders made under family violence legislation or victims of family violence taking possession of property which they do not own or have a right to possess, or denying the other person access to property? If so, what impact does this have on any property proceedings or orders relating to property under the *Family Law Act 1975* (Cth)?

Proposal 9–6 Provisions in state and territory family violence legislation dealing with exclusion orders should:

(a) limit the types of property which a court may order an excluded person to recover to clothes, tools of trade, personal documents and other personal effects, and any other items specified by the court; and

(b) provide that any order to recover property should not include items—

  (i) which are reasonably needed by the victim or a child of the victim; or

  (ii) in which title is genuinely in dispute; and

(c) provide that an order to recover property should not be made where other more appropriate means are available for the issue to be addressed in a timely manner.

Question 9–7 Are there any types of property other than those set out in Proposal 9–6 which should, or should not, be subject to recovery by an excluded person under state and territory family violence legislation—for example, should an excluded person be able to recover property of his or her child?

Proposal 9–7 State and territory family violence legislation should require applicants for protection orders to inform courts about, and courts to consider, any agreement or order for the division of property under the *Family Law Act 1975* (Cth), or any pending application for such an order.

Proposal 9–8 Application forms for protection orders in family violence proceedings should clearly seek information about any agreement or order for the division of property under the *Family Law Act 1975* (Cth) or any pending application for such an order.

Proposal 9–9 State and territory family violence legislation should provide that personal property directions made in protection order proceedings are subject to orders made by a federal family court or another court responsible for determining property disputes. Section 87 of the *Family Violence Protection Act 2008* (Vic) should be referred to as a model in this regard.

Proposal 9–10 State and territory family violence legislation should provide that personal property directions do not affect any ownership rights. Section 88 of the *Family Violence Protection Act 2008* (Vic) should be referred to as a model in this regard.

Question 9–8 In practice, what issues arise from the interaction between relocation orders and protection orders or allegations of family violence? If so, what legal or practical reforms could be introduced to address these issues? For example, should there be a presumption that, in some or all cases where a family court determines there has been family violence, it is likely to be in the best interests of a child to be able to relocate to a safe distance from the person who has used violence? If so, to which type of case should such a presumption apply?

Question 9–9 Should the *Family Law Act 1975* (Cth) be amended to include provisions dealing with family violence in relocation matters in addition to the provisions of the Act that apply to family violence in parenting proceedings?

Question 9–10 In practice, what issues arise from the interaction between protection orders under state and territory family violence legislation and recovery orders under div VII of the *Family Law Act 1975* (Cth) for return of a child pursuant to the *Convention on the Civil Aspects of International Child Abduction*, as implemented by the *Family Law (Child Abduction Convention) Regulations 1986* (Cth)? If so, what legal or practical reforms could be introduced to address these issues?

Question 9–11 Should the *Family Law Act 1975* (Cth) be amended to include provisions dealing with family violence in recovery matters, in addition to the provisions of the Act that apply to family violence in parenting proceedings?

10. Improving Evidence and Information Sharing

Proposal 10–1 Judicial officers, when making a protection order under state or territory family violence legislation by consent without admissions, should ensure that:

(a) the notation on protection orders and court files specifically states that the order is made by consent 'without admission as to criminal liability of the allegations in the application for the protection order';

(b) the applicant has an opportunity to oppose an order being made by consent without admissions;

(c) the order gives attention to the safety of victims, and, if appropriate, requires that a written safety plan accompanies the order; and

(d) the parties are aware of the practical consequences of consenting to a protection order without admission of liability.

Proposal 10–2 Before accepting an undertaking to the court from a person against whom a protection order is sought, a court should ensure that:

(a) the applicant for the protection order understands the implications of relying on an undertaking to the court given by the respondent, rather than continuing with their application for a protection order;

(b) the respondent understands that the applicant's acceptance of an undertaking does not preclude further action by the applicant to address family violence, if necessary; and

(c) the undertaking is in writing.

Question 10–1 What practical reforms could be implemented in order to achieve the objectives set out in Proposal 10–2?

Question 10–2 In practice, do victims of family violence, who rely on undertakings to the court from a person against whom a protection order is sought, often return to court because the undertaking has been breached, or to seek further protection from family violence?

Question 10–3 In practice, do victims of family violence who rely on undertakings to the court from a person against whom a protection order is sought inform federal family courts of the existence of such undertakings during family law proceedings?

Proposal 10–3 Court forms for applications for a protection order under state and territory family violence legislation should include information about the kinds of conduct that constitute family violence in the relevant jurisdiction.

Question 10–4 In order to improve the evidentiary value of information contained in applications for protection orders under state and territory family violence legislation, would it be beneficial for such legislation to:

(a) require that applications for protection orders be sworn or affirmed; or

(b) give applicants for protection orders the opportunity of providing affidavit evidence in support of their application?

Question 10–5 What are the advantages or disadvantages of providing written rather than oral evidence to a court when seeking a protection order? Would a standard form of affidavit be of assistance to victims of family violence?

Question 10–6 Are there any other ways to facilitate the use of evidence given in proceedings for a protection order under state and territory family violence legislation in pending, concurrent or subsequent family law proceedings where family violence is alleged?

Question 10–7 Are the provisions in state and territory family violence legislation that allow the court to hear protection order proceedings in closed court effective in protecting vulnerable applicants and witnesses?

Question 10–8 How is the requirement in s 81 of the *Domestic and Family Violence Protection Act 1989* (Qld), that a court hearing an application for a protection order should not generally be open to the public, working in practice?

Proposal 10–4 State and territory family violence legislation should:

(a) prohibit a person who has allegedly used family violence from personally cross-examining, in protection order proceedings, a person against whom he or she has allegedly used family violence; and

(b) provide that any person conducting such cross-examination be a legal practitioner representing the interests of the person who has allegedly used family violence.

Question 10–9 Should state and territory family violence legislation allow a court to:

(a) make an order that a person who has made two or more vexatious applications for a protection order against the same person may not make a further application without the leave of the court; and/or

(b) dismiss a vexatious application for a protection order at a preliminary hearing before a respondent is served with that application?

Proposal 10–5 State and territory family violence legislation should provide that mutual protection orders may only be made by a court if it is satisfied that there are grounds for making a protection order against each party.

Proposal 10–6 State and territory family violence legislation should require the respondent to a protection order to seek leave from the court before making an application to vary or revoke the protection order.

Question 10–10 In practice, are records of proceedings under the *Family Law Act 1975* (Cth) accessible—in a timely fashion—to persons seeking access for the purpose of protection order proceedings under state and territory family violence legislation? If not, are any amendments to the *Family Law Act* or the *Family Law Rules 2004* (Cth) necessary or desirable—for example, to impose an obligation on federal family courts to provide details of injunctions or orders to a state or territory court hearing proceedings under family violence legislation involving one or more of the parties to the family law proceedings?

Question 10–11 In practice, does the prohibition on publication set out in s 121 of the *Family Law Act 1975* (Cth) unduly restrict communication about family law proceedings to persons involved in protection order proceedings under state and territory family violence legislation, including police who enforce such orders? If so, are any amendments to s 121 necessary or desirable?

Proposal 10–7 Certificates issued under s 60I of the *Family Law Act 1975* (Cth) should include information about why family dispute resolution was inappropriate or unsuccessful—for example, because there has been, or is a future risk of, family violence by one of the parties to the proceedings.

Question 10–12 If more information is included in certificates issued under s 60I of the *Family Law Act 1975* (Cth) pursuant to Proposal 10–7, how should this information be treated by family courts? For example, should such information only be used for the purposes of screening and risk assessment?

Question 10–13 Are the confidentiality provisions in ss 10D and 10H of the *Family Law Act 1975 Act* (Cth) inappropriately restricting family counsellors and family dispute resolution practitioners from releasing information relating to the risks of family violence to:

(a) courts exercising family law jurisdiction; and

(b) state and territory courts exercising jurisdiction under family violence legislation?

Proposal 10–8 Sections 10D(4)(b) and 10H(4)(b) of the *Family Law Act 1975* (Cth) should be amended to permit family counsellors and family dispute resolution practitioners to disclose communications where they reasonably believe that disclosure is necessary to prevent or lessen a serious threat to a person's life, health or safety.

Proposal 10–9 Sections 10D(4)(c) and 10H(4)(c) of the *Family Law Act 1975* (Cth) should permit family counsellors and family dispute resolution practitioners to disclose communications where they reasonably believe that disclosure is necessary to report conduct that they reasonably believe constitutes grounds for a protection order under state and territory family violence legislation.

Question 10–14 Should there be any other amendments to ss 10D and 10H of the *Family Law Act 1975* (Cth) enabling the release of any other types of information obtained by family counsellors or family dispute resolution practitioners? For example, should the legislation permit release where it would prevent or lessen a serious threat to a child's welfare?

Proposal 10–10 Sections 10E and 10J of the *Family Law Act 1975* (Cth) should enable the admission into evidence of disclosures made by an adult or child that a child has been exposed to family violence, where such disclosures have been made to family counsellors and family dispute resolution practitioners.

Question 10–15 Should ss 10E and 10J of the *Family Law Act 1975* (Cth) permit the admission into evidence of communications made to family counsellors and family dispute resolution practitioners which disclose family violence? If so, how should such an exception be framed?

Question 10–16 Should ss 10E and 10J of the *Family Law Act 1975* (Cth) be amended to apply expressly to state and territory courts when they are not exercising family law jurisdiction?

Question 10–17 In practice, do prohibitions on publication in state and territory family violence legislation unduly restrict communication about protection order proceedings which may be relevant to proceedings in federal family courts?

Question 10–18 Should prohibitions on publication of identifying information about adults involved in protection order proceedings under state and territory family violence legislation be modified in one or more of the following ways to

(a) require the prohibition on disclosure to be activated by a court order;

(b) impose a requirement that the disclosure of identifying information must be reasonably likely to expose a person to risk of harm as a precondition for a court to issue an order prohibiting publication; and/or

(c) include an exception to prohibitions on publication for disclosure of pleadings, transcripts of evidence or other documents to police or other persons concerned in any court proceedings, for use in connection with those proceedings—for example, the exception set out in s 82(3)(a) of the *Domestic and Family Violence Protection Act 1989* (Qld)?

Question 10–19 Are there any situations in which state and territory family violence legislation should require courts to provide details of protection order proceedings or orders to federal family courts?

Question 10–20 Do privacy and/or secrecy laws unduly impede agencies from disclosing information which may be relevant to:

(a) protection order proceedings under state and territory family violence legislation; and/or

(b) family law proceedings in federal family courts?

Proposal 10–11 Legislative privacy principles applying to the use and disclosure of personal information by Australian Government and state and territory government agencies should permit use or disclosure where an agency reasonably believes it is necessary to lessen or prevent a serious threat to an individual's life, health or safety, as recommended by the ALRC in the report *For Your Information: Australian Privacy Law and Practice* (ALRC 108).

Proposal 10–12 State and territory family violence legislation should authorise agencies in that state or territory to use or disclose personal information for the purpose of ensuring the safety of a victim of family violence or the wellbeing of an affected child.

Proposal 10–13 Information-sharing provisions introduced pursuant to Proposal 10–12 should permit disclosure to, at least, relevant government officers in other jurisdictions and federal, state and territory court officers.

Proposal 10–14 Courts that hear protection order proceedings in each state and territory should enter into an information-sharing protocol with the Family Court of Australia, Federal Magistrates Court, police, relevant government departments and other organisations that hold information in relation to family violence.

Proposal 10–15 A national protection order database should be established as a component of the Australian Government's commitment to the implementation of a national registration system for protection orders. At a minimum, information on the database should:

(a) include protection orders made under state and territory family violence legislation as well as orders and injunctions made under the *Family Law Act 1975* (Cth); and

(b) be available to federal, state and territory police officers, federal family courts, and state and territory courts that hear protection order proceedings.

Question 10–21 Is there any other information which should be included on, or are there any other persons who should have access to, the national protection order database, over and above those set out in Proposal 10–15?

11. Alternative Processes

Question 11–1 Should any amendments be made to the provisions relating to family dispute resolution in the *Family Law Act 1975* (Cth)—and, in particular, to s 60I of that Act—to ensure that victims of family violence are not inappropriately attempting or participating in family dispute resolution? What other reforms may be necessary to ensure the legislation operates effectively?

Proposal 11–1 Australian governments, lawyers' organisations and bodies responsible for legal education should develop ways to ensure that lawyers who practice family law are given adequate training and support in screening and assessing risks in relation to family violence.

Proposal 11–2 The Australian Government should promote the use of existing screening and risk assessment frameworks and tools for family dispute resolution practitioners through, for example, training, accreditation processes, and audit and evaluations.

Proposal 11–3 Measures should be taken to improve collaboration and cooperation between family dispute resolution practitioners and lawyers, as recommended by the Family Law Council.

Question 11–2 Does the definition of family violence in the *Family Law Act 1975* (Cth) cause any problems in family dispute resolution processes?

Question 11–3 In practice, are protection orders being used appropriately in family dispute resolution processes to identify family violence and manage the risks associated with it? Are any reforms necessary to improve the use of protection orders in such processes?

Proposal 11–4 State and territory courts should ensure that application forms for protection orders include an exception allowing contact for the purposes of family dispute resolution processes.

Question 11–4 In practice, are alternative dispute resolution mechanisms used in relation to protection order proceedings under family violence legislation? If so, are reforms necessary to ensure these mechanisms are used only in appropriate circumstances?

Question 11–5 How can the potential of alternative dispute resolution mechanisms to improve communication and collaboration in the child protection system best be realised?

Question 11–6 Is there a need for legislative or other reforms to ensure that alternative dispute resolution mechanisms in child protection address family violence appropriately?

Question 11–7 Is it appropriate for restorative justice practices to be used in the family violence context? If so, is it appropriate only for certain types of conduct or categories of people, and what features should these practices have?

Question 11–8 Is it appropriate for restorative justice practices to be used for sexual assault offences or offenders? If so, what limits (if any) should apply to the classes of offence or offender? If restorative justice practices are available, what safeguards should apply?

Part C – Child Protection

13. Child Protection and the Criminal Law

Question 13–1 Should offences against children for abuse and neglect be contained in child protection legislation or in general criminal laws?

Question 13–2 In practice, what issues, if any, arise from the way in which the offence provisions are currently drafted?

Question 13–3 In those jurisdictions where the same conduct may give rise to an offence under both child protection or criminal legislation, what factors are taken into account in practice when determining whether to bring an action against an alleged offender under child protection or criminal legislation?

Question 13–4 What range of penalties should be available to courts for offences under child protection legislation?

Question 13–5 In practice, what range of penalties are most regularly imposed, and if conditional, what are the most usual conditions imposed by the court?

Question 13–6 In what circumstances is it appropriate for police to make child protection notifications when responding to incidents of family violence?

Proposal 13–1 State and territory child protection legislation should contain an exemption from the prohibition on the disclosure of the identity of the reporter, or of information from which the reporter's identity could be deduced, for information disclosed to a law enforcement agency where:

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

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

Proposal 13–2 State and territory child protection legislation should also provide that the exemption in Proposal 13–1 does not apply unless a senior officer of the law enforcement agency to which the disclosure is made has certified in writing beforehand that:

(a) obtaining the reporter's consent would prejudice the investigation of the serious offence concerned; or

(b) it is impractical to obtain the consent.

Proposal 13–3 State and territory child protection legislation should define law enforcement agency to be the police force of the relevant state, the Australian Federal Police and the police force of any other state and territory.

Proposal 13–4 State and territory child protection legislation should provide that the person or body that discloses the identity of a reporter—or the information in a report from which the reporter's identity can be deduced— should notify the reporter of the disclosure unless it is impractical to do so, or would prejudice the investigation of the serious offence concerned.

Question 13–7 In practice, are the inter-agency protocols and memorandums of understanding between key agencies involved in child protection—such as the police and child protection agencies—effective to ensure that professionals in each part of the system understand the consequences of their actions for other parts of the system?

Question 13–8 What legal changes are required to facilitate effective relationships between agencies to ensure that evidence is obtained in a way that is appropriate not only for child protection purposes but also for family law purposes?

Question 13–9 Should child protection legislation be amended to require police to consult with the child protection agency before deciding to investigate an alleged offence against a child where the child is suspected of being in need of care and protection?

Question 13–10 Should child protection legislation be amended to require police to consult with the child protection agency before initiating proceedings in relation to an alleged offence against a child?

Proposal 13–5 States and territories should ensure that best practice features of collaborative models of child protection are adopted, including:

(a) legislative provisions that allow agencies (including federal agencies) to share relevant information about children and families to make accurate assessments of the needs of children and families and to ensure that appropriate programs relative to those needs are delivered in a timely and coordinated way;

(b) the establishment of a shared database which contains basic information about a child or family and that authorised agencies can access to see quickly which other agencies may be dealing with a particular child or family; and

(c) the development of guidelines to assist agencies to clarify their respective roles and functions, to assist them when performing functions under the legislation, and to assist them to resolve any issues that may arise.

Question 13–11 In care proceedings under child protection legislation, where final orders are pending, should children's courts in all states and territories be given power to make protection orders in favour of the child who is the subject of proceedings before it, where the court considers a protection order necessary to protect the child from serious harm arising from the child's exposure to family violence?

Question 13–12 Should a children's court be able to make protection orders in favour of siblings of the child who is the subject of care proceedings before it? If so, should it be able to make such an order of its own motion or should it be by application by a party to the proceedings or an advocate for the child?

Proposal 13–6 State and territory child protection legislation should be amended to allow a court, in the exercise of its criminal jurisdiction where a child or young person who is a defendant before it, to refer a matter to the child protection agency for investigation where it considers that there are legislative grounds for a protection application, or an application for a therapeutic treatment order, to be made.

Proposal 13–7 State and territory child protection legislation should require the child protection agency to provide, within 21 days of the referral, a report to the court setting out the outcomes of its investigation into the matter, and specifying whether a care and protection order or a therapeutic treatment order is being sought, or if the investigation reveals that such an order is not warranted.

Proposal 13–8 A court exercising care jurisdiction under state and territory child protection legislation should have a power to refer its concerns for the safety of other children or siblings of the child or young person the subject of care proceedings before it to the child protection agency for investigation, and to require the child protection agency to furnish it with a report of its investigation within a certain time period specified in the legislation.

Question 13–13 In practice, when sentencing young offenders, how often does the court request information held by the child protection agency about the offender to be provided to it?

14. Child Protection and the *Family Law Act*

Question 14–1 Can children's courts be given more powers to ensure orders are made in the best interests of children that deal with parental contact issues? If so, what powers should the children's courts have, and what resources would be required?

Question 14–2 Should the *Family Law Act 1975* (Cth) be amended to extend the jurisdiction which state and territory courts already have under pt VII to make orders for a parent to spend time with a child?

Question 14–3 When should state and territory children's courts have power to determine contact between one parent and another in matters that are before the court in child protection proceedings?

Question 14–4 What features of the Family Court of Western Australia should be replicated in other jurisdictions?

Question 14–5 Is there any role for a referral of legislative power to the Commonwealth in relation to child protection matters? If so, what should such a referral cover?

Proposal 14–1 To ensure appropriate disclosure of safety concerns for children, the *Initiating Application (Family Law)* form should be amended by adding an additional part headed 'Concerns about safety' which should include a question along the lines of 'Do you have any significant fears for the safety of you or your child(ren) that the court should know about?'.

Question 14–6 What other practical changes to the applications forms for initiating proceedings in federal family courts and the Family Court of Western Australia would make it clear to parties that they are required to disclose current or prior child protection proceedings and current child protection orders?

Question 14–7 In what other ways can family law processes be improved to ensure that any child safety concerns that may need to be drawn to the attention of child protection agencies are highlighted appropriately upon commencement of proceedings under the *Family Law Act 1975* (Cth)?

Proposal 14–2 Screening and risk assessment frameworks developed for federal family courts should closely involve state and territory child protection agencies.

Question 14–8 In what ways can cooperation between child protection agencies and family courts be improved with respect to compliance with subpoenas and s 69ZW of the *Family Law Act 1975* (Cth)?

Question 14–9 What role should child protection agencies play in family law proceedings?

Question 14–10 Are amendments to the *Family Law Act 1975* (Cth) and state and territory child protection legislation required to encourage prompt and effective intervention by child protection agencies in family law proceedings? For example, should the *Family Law Act* be amended to provide that the court may, upon finding that none of the parties to the proceedings is a viable carer, on its own motion join a child protection agency or some other person (for example, a grandparent) as a party to proceedings? Should federal family courts have additional powers to ensure that intervention by the child protection system occurs when necessary in the interests of the safety of children?

Question 14–11 What are the advantages of registration of state and territory child protection orders under ss 70C and 70D of the *Family Law Act 1975* (Cth)? What are the interactions in practice of the registration provisions and s 67ZK of the *Family Law Act*?

Question 14–12 How, in practice, can information exchange best be facilitated between family courts and child protection agencies to ensure the safety of children? Are changes to the *Family Law Act 1975* (Cth) necessary to achieve this?

Proposal 14–3 All states and territories should develop a Memorandum of Understanding or Protocol to govern the relationship between federal family courts and child protection agencies.

Question 14–13 Does the variation in the content of the protocols cause any difficulties and, if so, what changes should be made to facilitate the flow of information between the family courts and child protection agencies? What measures should be taken to ensure that the protocols are effective in practice?

Question 14–14 How could the Memorandums of Understanding and Protocols for exchange of information between federal family courts, child protection agencies and legal aid commissions be better known within courts, and beyond them?

Proposal 14–4 The Australian Government should encourage all jurisdictions to develop consistent protocols between federal family courts and state and territory child protection agencies which include procedures:

(a) for electing the jurisdiction in which to commence proceedings;

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

(c) for responding to subpoenas issued by federal family courts; and

(d) which permit a federal family court to invite a child protection agency to consent to an order being made which allocates parental responsibility in the child protection agency's favour, in circumstances where it determines that no order should be made in favour of either parent.

Question 14–15 In what ways can the principles of the Magellan project be applied in the Federal Magistrates Court?

Question 14–16 What changes to law and practice are required to prevent children falling through the gaps between the child protection and family law systems?

Question 14–17 Can the problems of the interactions in practice between family law and child protection systems be resolved by collaborative arrangements such as the Magellan project? Are legal changes necessary to prevent systemic problems and harm to children, and, if so, what are they?

Part D – Sexual Assault

16. Sexual Offences

Question 16–1 Do significant gaps or inconsistencies arise among Australian jurisdictions in relation to sexual offences against adults in terms of the:

(a) definition of sexual intercourse or penetration;

(b) recognition of aggravating factors;

(c) penalties applicable if an offence is found proven;

(d) offences relating to attempts; or

(e) definitions of indecency offences?

Question 16–2 Do these gaps or inconsistencies have a disproportionate impact on victims of sexual assault occurring in a family violence context? If so, how?

Proposal 16–1 Commonwealth, state and territory sexual offences legislation should provide that the age of consent for all sexual offences is 16 years.

Question 16–3 How should 'similarity in age' of the complainant and the accused be dealt with? Should it be a defence, or should lack of consent be included as an element of the offence in these circumstances?

Question 16–4 At what age should a defendant be able to raise an honest and reasonable belief that a person was over a certain age?

Question 16–5 Has the offence of 'persistent sexual abuse' or 'maintaining a relationship' achieved its aims in assisting the prosecution of sexual offences against children in the family context, where there are frequently multiple unlawful acts? If not, what further changes are required?

Proposal 16–2 Commonwealth, state and territory sexual offences legislation should provide statutory definitions of consent based on 'free and voluntary agreement'.

Proposal 16–3 Commonwealth, state and territory sexual offences legislation should prescribe a non-exhaustive list of circumstances where there is no consent to sexual activity, or where consent is vitiated. These need not automatically negate consent, but the circumstances must in some way be recognised as potentially vitiating consent. At a minimum, the non-exhaustive list of vitiating factors should include:

(a) lack of capacity to consent, including because a person is asleep or unconscious, or so affected by alcohol or other drugs as to be unable to consent;

(b) the actual use of force, threatened use of force against the complainant or another person, which need not involve physical violence or physical harm;

(c) unlawful detention;

(d) mistaken identity and mistakes as to the nature of the act (including mistakes generated by the fraud or deceit of the accused); and

(e) any position of authority or power, intimidation or coercive conduct.

Question 16–6 To what extent are the circumstances vitiating consent set out in current legislation appropriate to sexual assaults committed in a family violence context? Are any amendments required to draw attention to the coercive environment created by family violence, or are the current provisions sufficient?

Proposal 16–4 Commonwealth, state and territory sexual offences legislation should provide that a person who performs a sexual act with another person, without the consent of the other person, knows that the other person does not consent to the act if the person has no reasonable grounds for believing that the other person consents. For the purpose of making any such finding, the trier of fact must have regard to all the circumstances of the case including any steps taken by the person to ascertain whether the other person consents, but not including any self-induced intoxication of the person.

Question 16–7 Is an honest belief in consent more likely to be raised in cases where the complainant has or has had an intimate relationship with the accused? If so, will the insertion of an objective element assist in these cases? Are other measures required to clarify or restrict the defence of honest belief in these cases?

Proposal 16–5 State and territory legislation should provide that a direction must be made to the jury on consent in sexual offence proceedings where it is relevant to a fact in issue. Such directions must be related to the facts in issue and the elements of the offence and expressed in such a way as to aid the comprehension of the jury. Such directions should cover:

(a) the meaning of consent (as defined in the legislation);

(b) the circumstances that vitiate consent, and that if the jury finds beyond reasonable doubt that one of these circumstances exists then the complainant was not consenting;

(c) the fact that the person did not say or do anything to indicate free agreement to a sexual act when the act took place is enough to show that the act took place without that person's free agreement; and

(d) that the jury is not to regard a person as having freely agreed to a sexual act just because she or he did not protest or physically resist, did not sustain physical injury, or freely agreed to engage in another sexual act (whether or not of the same type) with that person, or a sexual act with another person, on an earlier occasion.

Where the defence asserts that the accused believed that the complainant was consenting to the sexual act then the judge must direct the jury to consider:

(e) any evidence of that belief; and

(f) whether that belief was reasonable in all the relevant circumstances having regard to (in a case where one of the circumstances that vitiate consent exists) whether the accused was aware that that circumstance existed in relation to the complainant;

(g) whether the accused took any steps to ascertain whether the complainant was consenting or might not be consenting, and if so, the nature of those steps; and

(h) any other relevant matters.

Proposal 16–6 State and territory sexual offences legislation should include a statement that the objectives of the legislation are to:

(a) uphold the fundamental right of every person to make decisions about his or her sexual behaviour and to choose not to engage in sexual activity;

(b) protect children and persons with a cognitive impairment from sexual exploitation.

Proposal 16–7 State and territory sexual offences, criminal procedure or evidence legislation, should provide for guiding principles, to which courts should have regard when interpreting provisions relating to sexual offences. At a minimum, these guiding principles should refer to the following:

(a) there is a high incidence of sexual violence within society;

(b) sexual offences are significantly under-reported;

(c) a significant number of sexual offences are committed against women, children and other vulnerable persons, including persons with a cognitive impairment;

(d) sexual offenders are commonly known to their victims; and

(e) sexual offences often occur in circumstances where there are unlikely to be any physical signs of an offence having occurred.

Question 16–8 Should such a statement of guiding principles make reference to any other factors, such as recognising vulnerable groups of women, or specifically acknowledging that sexual violence constitutes a form of family violence?

17. Reporting, Prosecution and Pre-trial Processes

Proposal 17–1 The Australian Centre for the Study of Sexual Assault, the Australian Institute of Criminology and similar state and territory agencies should prioritise the collection of comprehensive data on attrition rates and outcomes in sexual assault cases, including in relation to sexual assault perpetrated in a family violence context.

Question 17–1 Have specialist police squads for sex crimes increased the policing and apprehension of sexual assault offenders, including in a family violence context?

Question 17–2 To what extent is the work of specialist police hampered by lack of training and resources? In what ways can improvements be made?

Question 17–3 Are specialised police and integrated agency responses effective in reducing the attrition of sexual assault cases during the police investigation phase? If not, what further measures should be taken?

Question 17–4 What impact are specialised police units having on improving collection of admissible evidence and support for victims of sexual assault in a family violence context?

Question 17–5 Should specialised sexual assault police units be established in jurisdictions that do not have them?

Proposal 17–2 Commonwealth, state and territory Directors of Public Prosecution should ensure that prosecutorial guidelines and policies:

(a) facilitate the referral of victims and witnesses of sexual assault to appropriate welfare, health, counselling and other support services;

(b) require consultation with victims of sexual assault about key prosecutorial decisions including whether to prosecute, discontinue a prosecution or agree to a charge or fact bargain;

(c) require the ongoing provision of information to victims of sexual assault about the status and progress of proceedings;

(d) facilitate the provision of assistance to victims and witnesses of sexual assault in understanding the legal and court process;

(e) ensure that family violence protection orders or stalking intervention orders are sought in all relevant circumstances; and

(f) require referral of victims and witnesses of sexual assault of victims to providers of personal legal advice in related areas, such as family law and victims' compensation.

Question 17–6 What measures should be taken to reduce the attrition of sexual assault cases during the prosecution phase, including in relation to sexual assault committed in a family violence context?

Question 17–7 Are there any further prosecutorial guidelines and policies that could be introduced to reduce the attrition of cases of sexual assault committed in a family violence context?

Proposal 17–3 State and territory legislation should prohibit any complainant in sexual assault proceedings from being required to attend to give evidence at committal proceedings. Alternatively, child complainants should not be required to attend committal proceedings and, for adult complainants, the court should be satisfied that there are special reasons for the complainant to attend.

Proposal 17–4 Commonwealth, state and territory legislation should:

(a) create a presumption that when two or more charges for sexual offences are joined in the same indictment, it is presumed that those charges are to be tried together; and

(b) state that this presumption is not rebutted merely because evidence on one charge is inadmissible on another charge.

Question 17–8 What impact has *Phillips v The Queen* had on the prosecution of sexual assaults where there are multiple complaints against the same defendant and consent is a fact in issue?

Question 17–9 Is there a need to introduce reforms to overturn the decision in *Phillips v The Queen*?

Proposal 17–5 Commonwealth, state and territory legislation should allow the tendering of pre-recorded audiovisual material of interview between investigators and a sexual assault complainant as the complainant's evidence-in-chief.

Proposal 17–6 Commonwealth, state and territory legislation should permit child victims of sexual assault and victims of sexual assault who are vulnerable as a result of mental or physical impairment to provide an audiovisual record of evidence at a pre-trial hearing attended by the judge, the prosecutor, the defence lawyer, the defendant and any other person the court deems appropriate. Adult victims of sexual assault should also be permitted to provide evidence in this way, by order of the court. Audiovisual evidence should be replayed at the trial as the witness's evidence.

Recorded evidence should be available for use at any re-trial following an appeal or in other proceedings in appropriate circumstances.

Proposal 17–7 Commonwealth, state and territory governments should ensure that participants in the criminal justice system receive comprehensive education about legislation authorising the use of pre-recorded evidence in sexual assault proceedings, and training in relation to interviewing victims of sexual assault and creating pre-recorded evidence.

18. Trial Processes

Question 18–1 Should Commonwealth, state and territory evidence law and procedural rules limit cross-examination and the admission of evidence about the sexual reputation and prior sexual history of all witnesses in sexual assault proceedings?

Question 18–2 How best can judicial officers and legal practitioners be assisted to develop a consistent approach to the classification of evidence as being either of 'sexual reputation', 'sexual disposition' and 'sexual experience' (or 'sexual activities')?

Proposal 18–1 Commonwealth, state and territory legislation should provide that a court must not allow any questions as to, or admit any evidence of, the sexual reputation of the complainant.

Question 18–3 Under discretionary models, is evidence of a complainant's prior sexual history admitted more or less often in proceedings concerning offences perpetrated in a family violence context, as compared to other sexual assault proceedings?

Proposal 18–2 Commonwealth, state and territory legislation should provide that complainants of sexual assault must not be cross-examined, and the court must not admit any evidence, as to the sexual activities (whether consensual or non-consensual) of the complainant other than those to which the charge relates, without the leave of the court.

Proposal 18–3 Commonwealth, state and territory legislation should provide that the court shall not grant leave for complainants of sexual assault to be cross-examined about their sexual activities unless it is satisfied that:

(a) the evidence has significant probative value to a fact in issue; and

(b) the probative value of the evidence substantially outweighs the danger of unfair prejudice to the proper administration of justice, taking into account the matters in Proposal 18–4 below.

Proposal 18–4 Commonwealth, state and territory legislation should provide that the court, in deciding whether the probative value of the evidence substantially outweighs the danger of unfair prejudice to the proper administration of justice, must have regard to:

(a) the distress, humiliation, or embarrassment which the complainant may suffer as a result of the cross-examination or the admission of the evidence, in view of the age of the complainant and the number and nature of the questions that the complainant is likely to be asked;

(b) the risk that the evidence may arouse in the jury discriminatory belief or bias, prejudice, sympathy or hostility;

(c) the need to respect the complainant's personal dignity and privacy;

(d) the right of the accused to make a full answer and defence; and

(e) any other factor which the court considers relevant.

Question 18–4 Should Commonwealth, state and territory legislative provide that 'sexual history evidence' or sexual experience evidence is not:

(a) admissible to support an inference that the complainant is the type of person who is more likely to have consented to the sexual activity to which the charge relates; and/or

(b) to be regarded as having substantial probative value by virtue of any inference it may raise as to general disposition.

Proposal 18–5 Commonwealth, state and territory legislation should provide that 'sexual history evidence' or sexual experience evidence is not to be regarded as being proper matter for cross-examination as to credit unless, because of special circumstances, it would be likely materially to impair confidence in the reliability of the evidence of the complainant.

Proposal 18–6 Commonwealth, state and territory legislation should require an application for leave to admit or adduce sexual history evidence to be:

(a) made in writing; and

(b) filed with the relevant court and served on the informant or the Director of Public Prosecutions within a prescribed minimum number of days,

and prescribe:

(a) the required contents of such an application;

(b) the circumstances in which leave may be granted out of time;

(c) the circumstances in which the requirement that an application for leave be made in writing may be waived; and

(d) that the application is to be determined in the absence of the jury, and if the accused requests, in the absence of the complainant.

Proposal 18–7 Commonwealth, state and territory legislation should require a court to give reasons for its decision whether or not to grant leave, and if leave is granted to question the complainant, to state the nature of the evidence which may be elicited by that questioning.

Proposal 18–8 Commonwealth, state and territory Directors of Public Prosecution should introduce and implement a policy of writing to the defence in sexual assault matters and informing them of the procedural application requirements imposed under the relevant legislation in relation to admitting and adducing sexual experience evidence.

Question 18–5 In sexual assault proceedings, the sexual assault communications privilege must generally be invoked by the complainant, who is legally unrepresented. Assuming complainants continue to be unrepresented in such sexual assault proceedings, what procedures and services would best assist them to invoke the privilege?

Proposal 18–9 State and territory evidence legislation should provide that

(a) the opinion rule does not apply to evidence of an opinion of a person based on that person's specialised knowledge of child development and child behaviour; and

(b) the credibility rule does not apply to such evidence given concerning the credibility of children.

Question 18–6 Should Commonwealth, state and territory legislation provide for mandatory jury directions, containing prescribed information about children's abilities as witnesses or children's responses to sexual abuse?

Proposal 18–10 Commonwealth, State and territory legislation should provide that, in sexual assault proceedings, a court should not have regard to the possibility that the evidence of a witness or witnesses is the result of concoction, collusion or suggestion when determining the admissibility of tendency or coincidence evidence.

Question 18–7 To what extent does the 'striking similarities' test impede the ordering of joint trials in relation to sex offences?

Question 18–8 Should the Western Australian reforms in relation to the cross-admissibility of evidence be adopted in other jurisdictions?

Question 18–9 Should the 'no rational view of the evidence' (*Pfennig*) test be applied to determine the admissibility of relationship evidence at common law?

Question 18–10 Should Commonwealth, state and territory legislation provide that, where complainants in sexual assault proceedings are called to give evidence, the hearsay rule does not apply to evidence of a preliminary complaint, regardless of when the preliminary complaint was made?

Proposal 18–11 Commonwealth, state and territory legislation should prohibit a judge in any sexual assault proceeding from:

(a) warning a jury, or making any suggestion to a jury, that complainants as a class are unreliable witnesses; and

(b) warning a jury of the danger of convicting on the uncorroborated evidence of any complainant.

Proposal 18–12 Commonwealth, state and territory legislation should provide that:

(a) if the court, on application by the defendant, is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must inform the jury of the nature of the disadvantage and the need to take that disadvantage into account when considering the evidence;

(b) the judge need not comply with (a) if there are good reasons for not doing so; and

(c) no particular form of words needs to be used in giving the warning pursuant to (a), but in warning the jury, the judge should not suggest that it is 'dangerous to convict' because of any demonstrated forensic disadvantage.

Question 18–11 What issues arise in practice pursuant to s 165B of the uniform Evidence Acts? Is the s 165B(5) abrogation of the trial judge's obligation and power to give a *Longman* warning sufficiently explicit?

Question 18–12 Are warnings about the effect of delay on the credibility of complainants necessary in sexual assault proceedings?

Proposal 18–13 Commonwealth, state and territory legislation should provide that, in sexual assault proceedings:

(a) (i) the issue of any delay in complaint, or absence of complaint, on the credibility of the complainant should be a matter for argument by counsel and for determination by the jury;

(ii) subject to paragraph (iii), save for identifying the issue for the jury and the competing contentions of counsel, the trial judge must not give a direction regarding the effect of delay in complaint, or absence of complaint, on the credibility of the complainant, unless satisfied it is necessary to do so in order to ensure a fair trial; and

(iii) if evidence is given, or a question is asked, or a comment is made that tends to suggest that the person against whom the offence is alleged to have been committed either delayed making or failed to make a complaint in respect of the offence, the judge must tell the jury that there may be good reasons why a victim of a sexual offence may delay making or fail to make a complaint in respect of the offence.

OR

(b) the judge:

(i) must inform the jury that there may be good reasons why a victim of a sexual assault may delay or hesitate in complaining about it;

(ii) must not warn or suggest in any way to the jury that the law regards the complainant's evidence to be more reliable or less reliable only because of the length of time before the complainant made a preliminary or other complaint;

(iii) maintains a discretion to give appropriate directions to correct statements by counsel that conflict with the evidence or are based upon stereotypical assumptions about reporting of sexual offences; and

(iv) maintains a discretion to comment on the reliability of the complainant's evidence in the particular case if the judge considers it is appropriate to do so in the interests of justice.

Proposal 18–14 Commonwealth, state and territory legislation should:

(a) prohibit an unrepresented defendant from personally cross-examining any complainant or other witness in sexual assault proceedings; and

(b) provide that any person conducting such cross-examination is a legal practitioner representing the interests of the defendant.

Question 18–13 Are there significant gaps or inconsistencies among Australian jurisdictions in relation to 'alternative' or 'special' arrangements for the giving of evidence by complainants or other witnesses in sexual offence proceedings?

Question 18–14 Should Commonwealth, state and territory legislation permit prosecutors to tender a record of the original evidence of the complainant in any re-trial ordered on appeal?

Part E – Existing and Potential Responses

19. Integrated Responses and Best Practice

Proposal 19–1 State and territory governments should establish and further develop integrated responses to family violence in their respective jurisdictions, building on best practice. The Australian Government should also foster the development of integrated responses at a national level. These integrated responses should include the following elements:

(a) common policies and objectives;

(b) mechanisms for inter-agency collaboration, including those to ensure information sharing;

(c) provision for legal and non-legal victim support, and a key role for victim support organisations;

(d) training and education programs; and

(e) provision for data collection and evaluation.

Question 19–1 Should state and territory legislation support integrated responses to family violence within their jurisdictions and, if so, what should this legislation address? For example, should responsibility for coordinating integrated responses within a jurisdiction be placed on a statutory office-holder or agency?

Proposal 19–2 State and territory governments should, to the extent feasible, make victim support workers and lawyers available at family violence-related court

proceedings, and ensure access to victim support workers at the time the police are called out to family violence incidents.

Proposal 19–3 The Australian Government should ensure that court support services for victims of family violence are available nationally in federal family courts.

Proposal 19–4 State and territory victims' compensation legislation should:

(a) provide that evidence of a pattern of family violence may be considered in assessing whether an act of violence or injury occurred;

(b) define family violence as a specific act of violence or injury, as in s 5 and the Dictionary in the *Victims Support and Rehabilitation Act 1996* (NSW) and cl 5 of the *Victims of Crime Assistance Regulation* (NT); or

(c) extend the definition of injury to include other significant adverse impacts, as is done in respect of some offences in ss 3 and 8A of the *Victims of Crime Assistance Act 1996* (Vic) and s 27 of the *Victims of Crime Assistance Act 2009* (Qld).

Proposal 19–5 State and territory victims' compensation legislation should provide that:

(a) acts are not 'related' merely because they are committed by the same offender; and

(b) applicants should be given the opportunity to object if multiple claims are treated as 'related', as in s 4(1) of the *Victims of Crime Assistance Act 1996* (Vic) and s 70 of the Victims *of Crime Assistance Act 2009* (Qld).

Proposal 19–6 State and territory victims' compensation legislation should not require that a victim report a crime to the police, or provide reasonable cooperation with law enforcement authorities, as a condition of such compensation for family violence-related claims.

Proposal 19–7 State and territory legislation should provide that, when deciding whether it was reasonable for the victim not to report a crime or cooperate with law enforcement authorities, decision makers must consider factors such as the nature of the relationship between the victim and the offender in light of the nature and dynamics of family violence.

Proposal 19–8 State and territory victims' compensation legislation should require decision makers, when considering whether victims contributed to their injuries, to consider the relationship between the victim and the offender in light of the nature and dynamics of family violence. This requirement should also apply to assessments of the reasonableness of victims' failures to take steps to mitigate their injuries, where the

legislation includes that as a factor to be considered. Section 30(2A) of the *Victim Support and Rehabilitation Act 1996* (NSW), which makes such provision in relation to a failure to mitigate injury, should be referred to as a model.

Proposal 19–9 State and territory victims' compensation legislation should not enable claims to be excluded on the basis that the offender might benefit from the claim.

Proposal 19–10 State and territory victims' compensation legislation should ensure that time limitation clauses do not apply unfairly to victims of family violence. These provisions may take the form of providing that:

(a) decision makers must consider the fact that the application involves family violence, sexual assault, or child abuse in deciding to extend time, as set out in s 31 of the *Victims of Crime* Assistance *Act 2006* (NT); or

(b) decision makers must consider whether the offender was in a position of power, influence or trust in deciding to extend time, as set out in s 29 of the *Victims of Crime Assistance Act 1996* (Vic) and s 54 of the *Victims of Crime Assistance Act 2009* (Qld).

Proposal 19–11 State and territory victims' compensation legislation should ensure that victims of family violence are not required to be present at a hearing with an offender in victims' compensation hearings.

Proposal 19–12 State and territory governments should ensure that data is collected concerning the claims and awards of compensation made to victims of family violence under statutory victims' compensation schemes. The practice of the Victims' Compensation Tribunal in NSW provides an instructive model.

Proposal 19–13 State and territory governments should provide information about victims' compensation in all courts dealing with family violence matters. The Australian Government should ensure that similar information is available in federal family courts.

Question 19–2 In practice, are the current provisions for making interim compensation awards working effectively for victims of family violence?

Question 19–3 Should measures be adopted to ensure that offenders do not have access to victims' compensation awards in cases of family violence? If so, what measures should be introduced?

Proposal 19–14 Australian universities offering law degrees should review their curriculums to ensure that legal issues concerning family violence are appropriately addressed.

Proposal 19–15 Australian law societies and institutes should review continuing professional development requirements to ensure that legal issues concerning family violence are appropriately addressed.

Proposal 19–16 The Australian Government and state and territory governments should collaborate in conducting a national audit of family violence training conducted by government and non-governmental agencies, in order to:

(a) ensure that existing resources are best used;

(b) evaluate whether such training meets best practice principles; and

(c) promote the development of best practice in training.

Proposal 19–17 The Australian Government and state and territory governments should ensure the quality of family violence training by:

(a) developing minimum standards for assessing the quality of family violence training, and regularly evaluating the quality of such training in relevant government agencies using those standards;

(b) developing best practice guidelines in relation to family violence training, including the content, length, and format of such training;

(c) developing training based on evidence of the needs of those being trained, with the ultimate aim of improving outcomes for victims; and

(d) fostering cross-agency and collaborative training, including cross-agency placements.

20. Specialisation

Proposal 20–1 Each state and territory police force should ensure that:

(a) victims have access to a primary contact person within the police, who specialises and is trained in family violence issues;

(b) a police officer is designated as a primary point of contact for government and non-government agencies involved in responding to family violence;

(c) specially trained police have responsibility for supervising, monitoring or assuring the quality of police responses to family violence incidents, and providing advice and guidance to operational police and police prosecutors in this regard; and

(d) there is a central forum or unit responsible for policy and strategy concerning family violence within the police.

Question 20–1 What issues arise in practice concerning the role and operations of police who specialise in family violence matters?

Question 20–2 What are the benefits of specialised family violence prosecutors, and the disadvantages or challenges associated with them, if any? Could the benefits of specialised prosecutors be achieved in other ways, such as by training or guidelines on family violence?

Proposal 20–2 State and territory governments should ensure that specialised family violence courts determine matters relating to protection orders and criminal proceedings related to family violence. State and territory governments should review whether specialised family violence courts should also be responsible for handling related claims:

(a) for civil and statutory compensation; and

(b) in child support and family law matters, to the extent such jurisdiction is conferred in the state or territory.

Proposal 20–3 State and territory governments should establish mechanisms for referral of cases involving family violence to specialised family violence courts. There should be principled criteria for determining which cases could be referred to such courts. For example, these criteria could include:

(a) where there are concurrent family-related claims or actions in relation to the same family issues;

(b) where there have been multiple family-related legal actions in relation to the same family in the past;

(c) where, for exceptional reasons, a judicial officer considers it necessary.

Proposal 20–4 State and territory governments should establish or further develop specialised family violence courts in their jurisdictions, in close consultation with relevant stakeholders. These courts should have, as a minimum:

(a) especially selected judicial officers;

(b) specialised and ongoing training on family violence issues for judicial officers, prosecutors, registrars, and police;

(c) victim support workers;

(d) arrangements for victim safety; and

(e) mechanisms for collaboration with other courts, agencies and non-government organisations.

Proposal 20–5 State and territory governments should review whether, and to what extent, the following features have been adopted in the courts in their jurisdiction dealing with family violence, with a view to adopting them:

(a) identifying, and listing on the same day, protection order matters and criminal proceedings related to family violence, as well as related family law act and child protection matters;

(b) providing victim and defendant support, including legal advice, on family violence list days;

(c) assigning selected and trained judicial officers to work on cases related to family violence;

(d) adopting practice directions for family violence cases;

(e) ensuring that facilities and practices secure victim safety at court; and

(f) establishing a forum for feedback from, and discussion with, other agencies and non-government organisations.

Proposal 20–6 State and territory governments should establish centres providing a range of family violence services for victims, which would have the following functions:

(a) recording victim statements and complaints;

(b) facilitating access to victim support workers for referrals to other services;

(c) filing all claims relating to family violence from victims on behalf of the victim in relevant courts; and

(d) acting as a central point of contact for victims for basic information about pending court proceedings relating to family violence.

Proposal 20–7 The Australian Government should assist state and territory governments in the establishment, development and maintenance of specialist family violence courts by, for example, facilitating the transfer of specialised knowledge and expertise in dealing with family violence and sexual assault across federal and state and territory jurisdictions; and establishing and maintaining national networks of judicial officers and staff specialising in family violence or family law.

Proposal 20–8 The Australian Government should create positions for Family Law Courts liaison officers. These officers should have the following functions:

(a) facilitating information sharing between federal family law courts and state and territory courts;

(b) developing and promoting best practice in relation to information sharing between the federal family law courts and state and territory courts; and

(c) representing the federal family law courts in relevant forums for collaboration with agencies, courts and non-government organisations.

Part A

Introduction

1. Introduction to the Inquiry

Contents

Background

1.1 On 17 July 2009, the Attorney-General of Australia, the Hon Robert McClelland MP, asked the Australian Law Reform Commission (ALRC) to conduct an Inquiry together with the New South Wales Law Reform Commission (NSWLRC) into particular questions in relation to family violence that had arisen from the 2009 report of the National Council to Reduce Violence against Women and their Children, *Time for Action*.[1] At its meeting on 16–17 April 2009, the Standing Committee of Attorneys-General (SCAG) agreed that Australian law reform commissions should work together to consider these issues.

1.2 The ALRC was asked to consider the issues of:

1) the interaction in practice of State and Territory family/domestic violence and child protection laws with the Family Law Act and relevant Commonwealth, State and Territory criminal laws; and

2) the impact of inconsistent interpretation or application of laws in cases of sexual assault occurring in a family/domestic violence context, including rules of evidence, on victims of such violence.

1.3 In relation to both these issues, the ALRC was asked to consider 'what, if any, improvements could be made to relevant legal frameworks to protect the safety of women and their children'.[2]

1.4 On 14 July 2009, the NSWLRC received terms of reference in parallel terms from the New South Wales Attorney General, the Hon J Hatzistergos.[3] A joint project of this nature, involving a state law reform body in conjunction with the ALRC, is a practical way of tackling an Inquiry in relation to matters many of which lie at the intersections—or indeed fall between—federal and state/territory laws.

Time for Action

1.5 The National Council to Reduce Violence against Women and their Children (the National Council), established in May 2008, was given the role of drafting a national plan to reduce violence against women and their children.[4]

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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).

2 The Terms of Reference for this Inquiry are set out at the front of this Consultation Paper.

3 New South Wales Law Reform Commission, *Family Violence Inquiry—Terms of Reference* (2009) <www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_cref125> at 19 January 2010.

4 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), 11.

1.6 The *Time for Action* report, released in March 2009, identified six core areas for improvement and strategies and actions to achieve them.[5] The report focused on 'strategies and actions for prevention, early intervention, improved service delivery, and justice'[6] and identified twenty-five outcomes with 117 strategies to achieve them. While the report concentrated on 'preventative measures that challenge the values and attitudes that support violence in the community' and the need 'to develop respectful relationships',[7] it included recommendations that the ALRC be given references on two specific tasks, which are reflected in the Terms of Reference.[8] It was accompanied by a background paper providing a fuller discussion of the matters in the report, with more detailed references.[9]

1.7 Further background documents include: *Domestic Violence Laws in Australia*,[10] published by the Australian Government Solicitor in September 2009, providing an overview and comparative analysis of Commonwealth, state and territory and New Zealand domestic violence legislation; and a report, *The Cost of Violence against Women and their Children*,[11] published in March 2009 at the same time as *Time for Action*.

The extent of the problem

1.8 *Time for Action* provided a summary of the extent of the problem of violence against women in the Australian community. It reported the estimate that '[a]bout one in three Australian women experience physical violence and almost one in five women experience sexual violence over their lifetime';[12] and that while violence 'knows no geographical, socio-economic, age, ability, cultural or religious boundaries',[13] the experience of violence is not evenly spread.

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5 Ibid, 16–20. The six 'outcome areas' listed are that: communities are safe and free from violence; relationships are respectful; services meet the needs of women and their children; responses are just; perpetrators stop their violence; and systems work together effectively.

6 Ibid, 10.

7 Ibid, iv.

8 Ibid, 119: Strategies for Action 4.2.1 and 4.1.2 are the background for the first limb and second limbs of the Terms of Reference, respectively.

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

10 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009).

11 KPMG, *The Cost of Violence against Women and their Children* Department of Families, Housing, Community Services and Indigenous Affairs on behalf of the National Council to Reduce Violence Against Women and their Children (2009).

12 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), 9.

13 The National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), 16.

1.9 For example, Indigenous women reported higher levels of physical violence during their lifetime than did non-Indigenous women, and the violence was more likely to include sexual violence.[14] Other groups may also experience violence in a different and/or disproportionate way, for example: women with disability;[15] women who identify themselves as lesbian, bisexual, transgender or intersex;[16] and immigrant women.[17]

1.10 The National Council responded to this diversity of experience of violence not by taking a 'one size fits all approach', but rather by focusing

> on helping women in different circumstances and from different backgrounds to live free from violence and the threat of violence. It uses an intersectional analysis to enhance our understanding of the way lifestyle factors affect women. This is because the ways in which women and their children experience violence, the options open to them in dealing with violence, and their access to services that meet their needs in all their diversity, are shaped by the intersection of gender with factors such as disability, English language fluency, ethnicity, geographical location and migration experience.[18]

The gendered nature of the problem

1.11 The National Council acknowledged that while women as well as men can commit—as well as be victims of—family violence or sexual assault, the research shows that 'the overwhelming majority of violence and abuse is perpetrated by men against women'.[19] Put very simply, '[t]he biggest risk factor for becoming a victim of sexual assault and/or domestic and family violence is being a woman'.[20]

1.12 The experience of violence in childhood also has a profound and compounding effect on the adult data:

> Witnessing or experiencing violence as a child increases sharply the risk of becoming a perpetrator or victim of violence in later life. Women who experience abuse as a child are one-and-a-half times more likely to experience violence, and twice as likely to experience sexual violence as an adult than those who have not. Women who are physically and sexually abused in childhood also have an increased risk of being sexually abused in adulthood.[21]

1.13 The gendered nature of family violence lies behind the National Council's strategies that, in turn, led to the Terms of Reference for this Inquiry being focused on the reduction of violence against 'women and their children'.

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14 Ibid, 17.
15 Ibid, 18.
16 Ibid.
17 Ibid.
18 Ibid, 19.
19 Ibid, 25.
20 Ibid, 26.
21 Ibid, 25.

Compounding factors

1.14 The National Council also pointed to a range of compounding factors in the presentation of violence, especially alcohol,[22] and geographical and social isolation.[23] Moreover, both have been identified as critical issues for Indigenous women and children:

> Some groups of women within rural and remote communities experience particularly high rates of domestic violence. For example, the proportion of Aboriginal and Torres Strait Islander Australians who reported being victims of physical or threatened violence has been found to be similar in remote and non-remote areas. However, the proportion of Aboriginal and Torres Strait Islander people in remote areas who said that they, their family or friends had witnessed violence is three times as high as for Aboriginal and Torres Strait Islander people in non-remote areas. In remote and very remote areas, more than three-quarters of homicide victims in 2005–06 were Aboriginal or Torres Strait Islander.[24]

1.15 Social isolation in an urban setting also affects immigrant and refugee women in particular:

> For many immigrant and refugee women, insufficient knowledge of English creates a specific disadvantage in comparison to men in their families. English is often used as a tool of power and control, engendering the total dependence of refugee women on their husbands.[25]

1.16 Not only are there compounding factors causing family violence, there are also compounding consequences, such as: financial difficulty flowing from economic dependence on a violent partner;[26] homelessness, where women are seeking to escape violence at home;[27] and health issues associated with treating the effects of violence on the victim.[28]

Cost of family violence

1.17 In producing *Time for Action*, an estimate of the cost of family violence in Australia was updated. A 2004 study by Access Economics had estimated the total

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22 Ibid, 29. See also: Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), [4.2].

23 The National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), 30–35.

24 Ibid, 32.

25 Ibid, 33. The Family Law Council also drew attention to the vulnerability of women and children in some communities, contributing factors to which include 'cultural or religious practices that subordinate women and cultural expectations that loyalty to family and community take precedence over personal safety': Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), [4.4].

26 The National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), 44.

27 Ibid, 45

28 Ibid, 42.

annual cost of violence against women by their partners as $8.1 billion.[29] This study was repeated by KPMG in January 2009 for the National Council with a forward projection of costs to 2021–22. The study concluded that an estimated 750,000 Australian women 'will experience and report violence in 2021–22, costing the Australian economy an estimated $15.6 billion'.[30]

Concurrent inquiries and actions

1.18 The ALRC and NSWLRC (the Commissions) are not alone in looking at the problem of family violence and seeking appropriate policy responses. Several other inquiries, state and federal, are being conducted at the same time as this Inquiry. A number have also been conducted before. The concurrent and previous work is referred to throughout this Consultation Paper. In particular, the ALRC has been directed not to duplicate:

a) the other actions being progressed as part of the Immediate Government Actions announced by the Prime Minister on receiving the National Council's report in April 2009;

b) the evaluation of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* reforms being undertaken by the Australian Institute of Family Studies; and

c) the work being undertaken through SCAG on the harmonisation of uniform evidence laws, in particular the development of model sexual assault communications immunity provisions and vulnerable witness protections.

1.19 In addition to these specific areas of concurrent work, there are two further contributions of significance to this Inquiry. First, the Attorney-General commissioned a review by Professor Richard Chisholm, former Justice of the Family Court of Australia, of the practices, procedures and laws that apply in the federal family law courts in the context of family violence (the Chisholm Review).[31] The review was completed at the end of November 2009, and released on 28 January 2010.[32] Secondly, the Family Law Council provided an advice to the Attorney-General on the impact of family violence on children and on parenting, which was also released at the same time as the Chisholm Review.[33]

1.20 Each of these is summarised, in turn, below. Their relationship to particular aspects under consideration in this Inquiry is considered at relevant points throughout this Consultation Paper.

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29 Ibid, 42.

30 Ibid, 43; KPMG, *The Cost of Violence against Women and their Children* Department of Families, Housing, Community Services and Indigenous Affairs on behalf of the National Council to Reduce Violence Against Women and their Children (2009).

31 Attorney-General's Department, 'Family Courts Violence Review' (Press Release, 28 January 2010).

32 Ibid.

33 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).

Immediate Government Actions

1.21 In response to *Time for Action* the Australian Government announced a package of immediate actions,[34] including investments in a new national domestic violence and sexual assault telephone and online crisis service; in primary prevention activities towards building respectful relationships; and to support research on perpetrator treatment.

1.22 The Government also committed to working with the states and territories through SCAG to: establish a national scheme for the registration of domestic and family violence orders; improve the uptake of relevant coronial recommendations; and identify the most effective methods to investigate and prosecute sexual assault cases.

1.23 Further immediate actions include the development of a multi-disciplinary training package for lawyers, judicial officers, counsellors and other professionals working in the family law system, to improve consistency in the handling of family violence cases, and the establishment of the Violence Against Women Advisory Group to advise on the National Plan to Reduce Violence against Women.

1.24 The list of actions also included asking the ALRC to work with state and territory law reform commissions to examine the inter-relationship of federal and state and territory laws that relate to the safety of women and their children. In the list of 'priority actions' the Australian Government agreed to:

> Make a reference to the Australian Law Reform Commission to examine the integration of domestic violence, child protection and federal family law.[35]

Australian Institute of Family Studies evaluation

1.25 In 2006, the Australian Institute of Family Studies (AIFS) was commissioned by the Attorney-General's Department (AGD) and the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) to undertake an evaluation of the changes introduced by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) together with increased funding for new and expanded family relationships services. The amendments introduced significant procedural and substantive changes to the legal framework for resolving parenting disputes following parental separation—including a presumption in favour of equal parental responsibility, an increased focus on protecting children from harm resulting from abuse, neglect and exposure to family violence and a more child-focused process for those disputes that do proceed to court.[36]

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34 Australian Government, *The National Plan to Reduce Violence against Women—Immediate Government Actions* (2009).

35 Ibid, 15.

36 For a summary of the 2006 changes, see Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms—Summary Report* (2009), 2. The Chisholm Review also includes a summary of the background of the 2006 reforms: R Chisholm, *Family Courts Violence Review* (2009), 121–124.

1.26 The purpose of the evaluation was to assess the extent to which the reform package has been effective in achieving its policy aims. There are three components of the AIFS research program for the evaluation: the Legislation and Courts Project; the Service Provision Project; and the Families Project. Each of these components involves a series of studies which will combine to develop a composite picture based on multiple perspectives.[37]

1.27 The particular component that has the closest relationship to the Terms of Reference in this Inquiry is the Legislation and Courts Project, which includes a number of studies that draw data from a variety of sources using a mixture of methodologies. The main components of the project are:

1. a qualitative study based on interviews and group discussions with professionals in the family law system;
2. an analysis of family law cases; and
3. a repeat and extension of the national Family Lawyers Survey, first conducted in 2006 as part of the collection of 'baseline' data prior to the introduction of the reforms.[38]

1.28 The report, *Evaluation of the 2006 Family Law Reforms*, was released at the same time as the Chisholm Review, on 28 January 2010.[39] It involved the collection of data from 28,000 people involved in the family law system—including parents, grandparents, family relationship services staff and clients, lawyers, court professionals and judicial officers—and the analysis of administrative data and court files.

1.29 Of particular relevance in the context of this Inquiry are the findings in relation to family violence and safety concerns:

> Around two-thirds of separated mothers and just over half of separated fathers indicated that their child's other parent had emotionally abused them before or during the separation. One in four mothers and around one in six fathers said that the other parent had hurt them physically prior to separation and, among those who report such experiences, most indicated their children had seen or heard some of the abuse or violence. When family court files ... were examined, over half of the files contained an allegation of family violence on the written file.
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> Around one in five parents reported that they held safety concerns associated with ongoing contact with their child's other parent and over 90% of these parents had been either physically hurt or emotionally abused by the other parent.[40]

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

38 Australian Institute of Family Studies, *About the Legislation and Courts Project* (2009) <www.aifs.gov.au/familylawevaluation/aboutlcp.html> at 22 January 2010.

39 Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009); Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms—Summary Report* (2009); R McClelland (Attorney-General), 'Release of Family Law Reviews' (Press Release, 28 January 2010).

40 Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms—Summary Report* (2009), [3.1.1]. The family courts comprise the Family Court of Australia, the Federal Magistrates Court and the Family Court of Western Australia.

1.30 Notwithstanding the high incidence of family violence identified, the evaluation also found that:

> a majority of separated mothers (62%) and fathers (64%) had friendly and cooperative relationships with each other about 15 months after separation. About a fifth had a distant relationship and a little under a fifth had a highly conflicted or fearful relationship.[41]

1.31 Even when there was violence, therefore, a large number of parents separating after July 2006 were able to reach agreement about their parenting arrangements themselves.

1.32 The study also reported a 'cultural shift' from a primary reliance on legal services to one where 'a greater proportion of post-separation disputes over children are being seen and responded to primarily in relationship terms'.[42] However, ensuring that families are able to reach appropriate services in a timely way was also crucial to the success of this shift:

> Pathways through the system need to be more defined and more widely understood. There is still evidence that some families with family violence and/or child abuse issues are on a roundabout between relationship services, lawyers, courts and state-based child protection and family violence systems. While complex issues may take longer to resolve, resolutions that are delayed by unclear pathways or lack of adequate coordination between services, lawyers and courts have adverse implications for the wellbeing of children and other family members.[43]

1.33 Screening properly to identify family violence and child abuse was another significant theme. The evaluation provided 'clear evidence' that the family law system had improved in relation to the identification of concerns about family violence and child abuse, although there were still significant problems:

> Relevant issues include a lack of understanding of family violence and child abuse in various parts of the system, and perceptions of there being pressure to reach agreements notwithstanding the presence of such concerns. Problems also stem from the intersection of the state and federal systems, and with lawyers (and family relationship sector professionals) finding child protection systems difficult to engage with when there are concerns about risks to children. These issues pre-date the reforms and are longstanding. Further, some professionals believed that some new aspects of the legislative framework have discouraged concerns about family violence and child abuse from being raised. These include an obligation of courts to make costs orders against a party found to have 'knowingly made a false allegation or statement in proceedings' [*Family Law Act* s 117AB] and the requirement for courts to consider the extent to which one parent has facilitated the child having a relationship with the other parent (s 60CC(3)(c)).
>
> While there was widespread concern that family violence and child abuse and neglect are being inadequately responded to, some legal professionals and fathers also

41 Ibid, [3.1.3].
42 Ibid, [3.2.2].
43 Ibid, [4], 21.

> claimed that allegations about family violence and child abuse were being used to impede fathers' claims for a shared parenting role after separation.[44]

1.34 While 'systematic attempts to screen such families in the family relationship service sector and in some parts of the legal sector' have improved the identification of such issues, the expectation that most families will attempt family dispute resolution (FDR) has meant that 'FDR is occurring in some cases where there are very significant concerns about violence and safety'.[45]

> [There is a] need for professionals across the system to have greater levels of access to finely tuned assessment and screening mechanisms applied by highly trained and experienced professionals. Protocols for working constructively and effectively with state-based systems and services (such as child protection systems) also need further work. At the same time, the progress that continues to be made on improved screening practices will go only part of the way to assisting victims of violence and abuse.[46]

1.35 Another area of concern identified in the evaluation was the misunderstanding that shared parental responsibility allows for 'equal' shared care time:

> This confusion has resulted in disillusionment among some fathers who find that the law does not provide for 50–50 'custody'. This sometimes can make it challenging to achieve child-focused arrangements in cases in which an equal or shared care-time arrangement is not practical or not appropriate. Legal sector professionals in particular indicated that in their view the legislative changes had promoted a focus on parents' rights rather than children's needs, obscuring to some extent the primacy of the best interests principle (s 60CA). Further, they indicated that, in their view, the legislative framework did not adequately facilitate making arrangements that were developmentally appropriate for children.[47]

1.36 The overall conclusion of the evaluation was that the 2006 reforms to the family law system have had 'a positive impact in some areas and have a less positive impact in others'. More parents are sorting out their parenting arrangements without an automatic recourse to the court, notwithstanding a high incidence of family violence and child abuse. However, whether FDR is appropriate in such cases, and, if so, when, is a matter requiring further consideration:

> This is an area where collaboration between relationship service professionals, family law system professionals and courts needs to be facilitated so that shared understandings about what types of matters are not suitable for FDR can be developed and so that other options can be better facilitated.[48]

Standing Committee of Attorneys-General

1.37 SCAG, through its Evidence Working Group, is developing amendments to the model Uniform Evidence Act:

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44 Ibid, [3.9], 15.
45 Ibid, 23.
46 Ibid, 24.
47 Ibid.
48 Ibid, 26.

- to provide an immunity in relation to sexual assault communications (as distinct from a privilege); and

- to deal with the protection of vulnerable witnesses.

1.38 Under the second heading, the Working Group is including not just children, but also people with disabilities, and traumatised people—such as victims of sexual assault. The aim of this aspect of the project is to develop a harmonised approach.

1.39 SCAG is also conducting an audit of best practice in the investigation and prosecution of sexual assault.

The Chisholm Review

1.40 Professor Chisholm was required to 'assess the appropriateness of the legislation, practices and procedures' that apply in cases where family violence is an issue and to recommend improvements. In acknowledging the challenges for the family law system in such cases—involving 'more than half the parenting cases that come to the courts'—Chisholm reiterated in his opening remarks that '[v]iolence is bad for everyone, and particularly dangerous for children, whether or not it is specifically directed at them':

> These cases present the courts with truly daunting tasks: to provide a setting in which the parties feel safe and confident that they will be treated with respect; to deal with the cases with necessary efficiency but most importantly with justice and fairness; and to ensure as far as possible that arrangements made for children, whether as a result of the parties' consent or by the court's adjudication, are suitable for their needs, which will include being safe and having both parents contribute to their developmental needs.[49]

1.41 Chisholm identified a theme that recurred throughout his review: 'that family violence must be disclosed, understood, and acted upon'.[50] In terms of the family law system, this means that each component of it 'needs to encourage and facilitate the disclosure of family violence, ensure that it is understood, and act effectively upon that understanding'.[51]

1.42 With respect to the procedures of the family law courts, Chisholm pointed to the importance of expertise in relation to children's cases and a goal of achieving the same approach in both the Federal Magistrates Court and the Family Court. In order to ensure disclosure of family violence, Chisholm targeted the document that is used to alert the court of allegations of violence or abuse, and concluded that 'this system is

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49 R Chisholm, *Family Courts Violence Review* (2009), 4.
50 Ibid, 5.
51 Ibid.

not working'.[52] He suggested, instead, moving to a system of risk identification and assessment that applies to all parenting cases.[53]

1.43 Chisholm identified three particular provisions of the *Family Law Act 1975* (Cth) to be amended:

> In essence, the recommendations are that the 'friendly parent' provision [s 60CC(3)(c)] should be amended so it recognises that parents sometimes need to take action to protect children from risk; that the specific and separate costs provision (s 117AB) dealing with knowingly false allegations and statements should be replaced by a simple reference to the giving of knowingly false evidence in the provision that deals with costs (s 177); and that the information that advisers are required to provide should reflect not only the importance of parental involvement but also the importance of safety for children.[54]

1.44 Key recommendations also focused on the provisions dealing with parental responsibility and the guidelines included in the legislation—primary and additional considerations—for determining what is in the child's best interests.[55] As noted by Chisholm, this is 'a large and controversial topic'.[56] The package of reforms introduced by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth), emphasised two main concerns as the primary considerations:

> (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.[57]

1.45 Although these two matters were principal motivating concerns behind the 2006 amendments, 'the "twin pillars" formula is not an ideal guide to children's best interests'.[58] Chisholm preferred instead guidelines that did not include 'the artificial distinction ... between "primary" and "additional" considerations'.[59]

1.46 In addition, a central issue in the lead-up to the 2006 reforms was whether there should be a presumption in favour of 'equal time' in relation to parental responsibility.[60] The formula, that when making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child's parents to have 'equal shared parental responsibility',[61] has created

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52 Ibid, 6. The document is the 'Form 4': *Family Law Rules 2004* (Cth) r 2.04, sch 2.
53 R Chisholm, *Family Courts Violence Review* (2009), 70–80.
54 Ibid, 7. The 'friendly parent' provision is considered in pt 3.2; the obligations on advisers in pt 3.3; and costs orders in pt 3.4.
55 Ibid, pt 3.5. Section 60CC sets out the matters that must be considered in determining what is in a child's best interests.
56 Ibid, 120.
57 *Family Law Act 1975* (Cth) s 60CC(2).
58 R Chisholm, *Family Courts Violence Review* (2009), 127.
59 Ibid, 8; Rec 3.4.
60 Ibid, 121–124.
61 *Family Law Act 1975* (Cth) s 61DA(1).

considerable controversy, particularly a confusion between 'equal responsibility' and 'equal time'. Such misunderstandings were also evident in the AIFS evaluation, described above. Chisholm preferred instead a presumption simply of each parent having 'parental responsibility'.[62]

1.47 Other recommendations in the Chisholm Review include the provision of additional funding to support the work of contact centres, family dispute resolution agencies, legal aid, and family consultants; and better education in relation to issues of family violence and recognition of the importance of experience and knowledge of family violence in making appointments to significant positions in the family law system.[63]

Family Law Council

1.48 In *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues*, the Family Law Council makes a number of recommendations about family violence 'if and when it becomes visible in the Family Law system in Australia'.[64] The Council recommended a number of strategies to improve the understanding and identification of family violence, including that:

- the definition of 'family violence' in the *Family Law Act* be widened to include a range of threatening behaviour;[65]
- a common knowledge base be established to assist all those in the family law system to better understand the patterns and effects of family violence;[66]
- the *Best Practice Guidelines for Lawyers Doing Family Law Work* be revised to incorporate detailed information on family violence; [67]and
- the forms for notifying family law courts about family violence be improved.[68]

1.49 The Family Law Council was concerned to address 'certain widespread misunderstandings' about the *Family Law Act* through education, in particular:

- Recurrent gossip that notification of family violence may lead to a judicial perception that the notifier is an 'unfriendly parent'

62 R Chisholm, *Family Courts Violence Review* (2009), Rec 3.3.
63 Ibid, recommendations in pt 4.
64 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), 7.
65 Ibid, Rec 1.
66 Ibid, Rec 2.
67 Ibid, Rec 3.
68 Ibid, Rec 10.

- Widespread perception that each parent now has a 'starting right' to equal time (50/50) with children
- Common belief that a parent will receive *both* substantial time with a child, and equal shared parental responsibility, (similar to historic 'guardianship'), *despite* a history of poor communication and hostility between parents; and *despite* the long term health and emotional consequences for children as casualties on such parental battlefields.[69]

1.50 Such misunderstandings were also identified in both the Chisholm Review and the AIFS evaluations, considered above.

1.51 Co-ordination and collaboration between various participants in the system was also seen as being of critical importance, for example:

> between the state and territory child protection agencies, and the federal *Family Law Act*, including: the transportability of state family violence injunctive orders; the establishment of a national register of family violence orders; and the establishment of a network data base which records family violence orders, and a residual family court power to require state Child Protection Agencies to become parties to Family Law Court proceedings about children.[70]

1.52 A specific aspect of communication was also whether FDR practitioners should have responsibility for providing to federal family law courts any information about family violence or other related issues disclosed during an intervention.[71]

1.53 A recommendation of structural significance is the possibility of a referral of powers to federal family courts so that in determining a parenting application federal family courts have concurrent jurisdiction with that of state courts to deal with all matters relating to children including, where relevant, family violence, child protection and parenting orders.[72] The context for a consideration of referral of powers, and the constitutional division of family law matters between the states and territories and the federal sphere are considered in Chapter 2.

Scope of the Inquiry

Terms of Reference

1.54 The Terms of Reference are reproduced at the beginning of this Consultation Paper. There are two terms of reference, the first focusing on 'interaction in practice' of various laws, the second on 'inconsistency' in interpretation and application of sexual assault laws.

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69 Ibid, 8; Rec 13.
70 Ibid, 7; Rec 12.
71 Ibid, Rec 8.
72 Ibid, Rec 7.

First Term of Reference

> the interaction in practice of State and Territory family/domestic violence and child protection laws with the Family Law Act and relevant Commonwealth, State and Territory criminal laws

1.55 The Commissions have interpreted this as requiring a consideration of the interaction of:

- state and territory family violence laws with the *Family Law Act*;
- state and territory child protection laws with the *Family Law Act*;
- state and territory family violence laws with relevant Commonwealth, state and territory criminal laws;
- state and territory child protection laws with relevant Commonwealth, state and territory criminal laws.

1.56 There are further areas of interaction that the Commissions consider lie within the first Term of Reference, in particular, the interaction of state and territory family violence laws and child protection laws.

Second Term of Reference

> the impact of inconsistent interpretation or application of laws in cases of sexual assault occurring in a family/domestic violence context, including rules of evidence, on victims of such violence

1.57 The second Term of Reference requires the Commissions to focus on two key facets of sexual assault legal responses: (1) inconsistency in the interpretation or application of laws; and (2) a specific focus on sexual assaults perpetrated by a person with whom the complainant is in a domestic or family relationship.

Inconsistency of laws

1.58 Inconsistency in the application and interpretation of sexual assault laws can be considered on multiple levels:

- inconsistency of approach between jurisdictions (for example, there are different: offences, definitions of consent, ways in which sexual experience evidence is restricted, judicial directions to the jury, and so on);

- inconsistency between the legal response to victims of sexual assault perpetrated in a family violence context compared to victims of sexual assault perpetrated in other contexts (for example, by a stranger or an acquaintance);

- inconsistency between the legal response to victims of sexual assault perpetrated in a family violence context where those victims come from different backgrounds and have different needs (for example, are Indigenous victims of sexual assault treated in a different way by the legal system compared to other victims of sexual assault within this category?); and

- inconsistency more generally—are individual cases of sexual assault, regardless of who has perpetrated the sexual assault, likely to encounter a different response or different result depending upon the police, prosecutors or judicial officers with whom they come in contact.

1.59 In this Inquiry the Commissions are adopting a broad approach to considering the issue of inconsistency.

1.60 While the primary focus of the Inquiry will be on the interpretation and application of laws in the criminal justice system, it is important that this is not seen as the only legal response to sexual assault. Sexual assault occurring in a family violence context may give rise to multiple legal issues (often concurrently)—for example, issues of family law, civil protection orders, child protection, crimes or victims' compensation, as well as personal injury law.[73] This multiplicity of legal responses and avenues also directly relates to the first Term of Reference, which is concerned with the interaction between the areas of law that respond to family violence.

1.61 In terms of the response of the criminal justice system, the use of the term 'laws' is also to be understood broadly to include not only the laws prescribing certain offences, but the rules of evidence, criminal procedures, and the application of the common law. It also necessarily includes the policies, procedures as well as training and education that apply to the key legal players who implement and interpret those 'laws'—police, prosecutors and judicial officers. This wider interpretation of law is also important in meeting the continuing criticism about the gap between the law as written and its practice.

Family violence context

1.62 The Commissions have been asked to focus on a particular category of sexual assault: sexual assault committed in a family violence context. This reflects the fact

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73 The importance of considering the way other legal categories respond to sexual assault is highlighted in R Graycar, 'Frozen Chooks Revisited: The Challenge of Changing Law/s' in R Hunter and M Keyes (eds), *Changing Law: Rights, Regulation and Reconciliation* (2005) 49, 59.

that most sexual assaults are perpetrated by someone known to the victim. Very few sexual assaults are perpetrated by strangers.

1.63 The *Personal Violence Survey* conducted by the Australian Bureau of Statistics (ABS) in 2005 found that of those women who had been sexually assaulted in the 12 months prior to the survey, 22 per cent had been assaulted by a stranger in the most recent incident, 21 per cent by a former partner,[74] 39 per cent by a family member or friend, and 32 per cent by another known person.[75] Thus in 60 per cent of cases, women were sexually assaulted by a former partner, family member or friend.[76] The 2004 ABS report on sexual assault noted that 'all available data sources indicate that over half of perpetrators ... are known to their victims'.[77]

1.64 The focus on sexual assault in a family violence context provides an important opportunity to focus on the category of sexual assault that comprises the majority of sexual assaults experienced by women and children. It also provides an opportunity to focus more intently not only on the largest category of sexual assaults, but the one that is more likely to remain unreported; and when it is reported is more likely to fall out of the legal system and less likely to result in conviction (a process known as 'attrition').[78] In this way, intimate and familial sexual assaults remain the most hidden from view general—and from the purview of the legal system in particular—despite forming the largest category of sexual assaults.

1.65 The Commissions recognise that there are continuing issues with sexual assault laws and procedures for *all* victims of sexual assault, not only those who are the focus of this Inquiry. In this regard the Commissions see sexual assault within a family violence context as an important case study that will have significance for all victims of sexual violence and anticipate that any recommendations that are made to assist victims of sexual assault in a family context would have benefits for all victims of sexual assault engaging with the legal system.[79]

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74 Note that the ABS defined a partner as current and former marital or de facto partners: Australian Bureau of Statistics, *Personal Safety Survey*, 4906.0 (2005), 60.

75 Ibid, 11. Other known person includes an 'acquaintance, neighbour, counsellor or psychologist or psychiatrist, ex-boyfriend or girlfriend, doctor, teacher, minister, priest or clergy and prison officer': Australian Bureau of Statistics, *Personal Safety Survey*, 4906.0 (2005), 33.

76 Note that the ABS included former boyfriends/girlfriends within the definition of 'other known person' (although current boyfriend/girlfriend or date was a category on its own reflecting, in some instances, 'different levels of commitment and involvement' when compared to a marital or de facto partner), thus the percentage of offenders with a close intimate or familial relationship with the victim would be larger if former boyfriend/girlfriends was included within the definition of 'partner'. For the detailed explanation of the various relationship categories relied on by the ABS see Australian Bureau of Statistics, *Personal Safety Survey*, 4906.0 (2005), 60.

77 Australian Bureau of Statistics, *Sexual Assault in Australia: A Statistical Overview* (2004), 26.

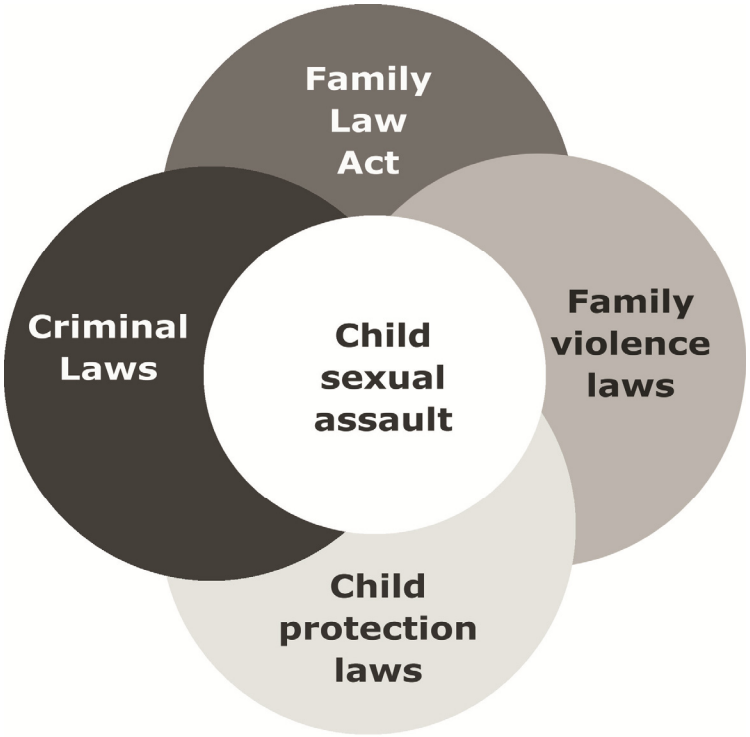
78 Data on reporting and attrition are detailed Ch 17.

79 The wider implications of the Commissions' work in this regard also responds to the strategy 4.1.2 in 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).

The intersecting nature of the Terms of Reference

1.66 There are areas of intersection between the two Terms of Reference, as sexual assault can also constitute family violence. However, given the particular emphasis in *Time for Action* on sexual assault and the specific strategy of giving the ALRC terms of reference in relation to it, a separate term of reference was warranted.

1.67 At the intersection of all the areas under consideration, however, sits the issue of sexual assault of children, potentially bringing together all the areas of law under consideration in this Inquiry—child protection, criminal law, the *Family Law Act*, and family violence laws.



Matters outside this Inquiry

1.68 While the scope of the problem of family violence is extensive, the brief in this Inquiry is necessarily constrained both by the Terms of Reference and by the role and function of a law reform commission. Under the Terms of Reference the Commissions are required to consider 'what, if any, improvements could be made to relevant legal frameworks to protect the safety of women and their children'. The range of legal frameworks is also not 'at large', but limited, in the first Term of Reference, to specified areas of interaction; and, in the second, to the impact of inconsistent interpretation and application of law in relation to sexual assault.

1.69 The Commissions recognise that the Inquiry concerns only a narrow slice of the vast range of issues raised by the prevalence of family violence—when women and children encounter the legal system in its various manifestations. A comment made by the Family Law Council in its advice to the Commonwealth Attorney-General, referred to above, is equally apt as a comment with respect to the problems of family violence in a much wider sense. The Council, noting that it was only focusing on family violence 'when it becomes visible in the Family Law system in Australia', stated that:

> This visible pattern is only the tip of the iceberg of family violence, alcoholism, drug addiction and mental illness which is apparently entrenched in Australia.[80]

1.70 Certainly the Commissions in their consultations to date have noted the widespread concern about the link between alcohol and family violence, and recognise that any serious attempt to develop preventative measures in the area of family violence must tackle the problem of alcohol abuse in Australian society. This issue is beyond the scope of the Terms of Reference and, accordingly, will not be pursued in this Inquiry.

1.71 The Commissions are also acutely aware that there is a limited range of legal responses to the persistent, indeed, endemic, problem of family violence. In particular, punishment through imprisonment can be a blunt instrument which can occasion further violent behaviour. However, for the reasons canvassed by the ALRC in its 2006 report on sentencing of federal offenders,[81] there is no realistic alternative but to mark society's condemnation of serious criminal behaviour—such as serious family violence—through imprisonment, in appropriate circumstances, and in such circumstances, the Commissions will not resile from proposing suitably severe punishment. Nevertheless, the Commissions acknowledge that much can be achieved through an enhanced recognition and understanding of family violence and that an integrated response to family violence—not limited to severe penal measures—is desirable. In the chapters that follow, the Commissions make proposals and pose questions that seek to elicit feedback on potential law reform measures which take family violence seriously, yet also seek to respond to it creatively and in a multi-pronged fashion—to the extent possible within the scope of the Terms of Reference.

1.72 The Commissions note that *Time for Action* identified many other strategies in areas beyond legal frameworks, to achieve outcomes such as relationships that are respectful, and services that meet the needs of women and children.[82]

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

81 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006).

82 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), Outcomes 2–3.

1.73 The Commissions note that family violence is also relevant—or potentially relevant—to other legislative schemes in the Commonwealth arena, including, for example, those regulating workplace relations, immigration, social security and child support. The relationship between child support issues and the impact on parenting time in the context of previous family violence is illustrated, for example in the following case study provided in a consultation with the Australian Domestic and Family Violence Clearinghouse:

> A couple have been separated for a couple of years. There is a court contact arrangement for the two kids (aged 7 and 8) for five nights to dad and 9 to mum in a fortnight, with school holiday arrangements to bring the total to an amount which reduces the husband's child support payment to $26 month. The mother is trying to live on Newstart, with this little bit extra, and some work but needs to pass the work/study test, given the ages of the children. The children are quite distressed by the previous abuse they have witnessed and with having to spend so much time moving from house to house. They call their various houses 'mum's house' and 'dad's house' as they don't feel either is *their* home.
>
> During the last school holidays, contact was given to the father over the post-Christmas period (till mid January). The mother was not working/studying at that time. The father returned to work after the New Year and placed the children in childcare until their return to their mother, even though she offered to care for them while he was at work. They had not previously been apart from her for such an extended time and she knew they would both miss her and she, them.
>
> The father is trying to have his child support payments further reduced. Before the separation the mother was the primary carer as the father travelled a lot for work.
>
> The property settlement left the mother with under $100,000. She has a modest home in a low socio-economic suburb with a large (over $200,000) mortgage. She is worried that she will be required to work in a job that does not allow her to be with her children after school, school holidays or if they are sick, as she has little employment bargaining power and has had many solicitors appointments, court appearances etc which means she has had to work only as a casual (cleaner, lawn mowing etc).[83]

1.74 A consideration of family violence and the child support legislation is outside the Commissions' current Terms of Reference. Given the importance of this issue the Commissions consider that the Australian Government should initiate an inquiry into how family violence is treated in this and other federal legislative schemes not falling within the present Terms of Reference.

Definitions and terminology

1.75 This chapter sets out some of the terminology that will be used in this Consultation Paper in referring to specific concepts, orders and legislation in the family violence sphere. In particular parts of the paper there may be other terms that are used principally in their specific contexts and they will be defined in those places.

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83 Australian Domestic & Family Violence Clearinghouse, *Consultation*, Sydney, 27 January 2010.

Culturally and linguistically diverse

1.76 The phrase 'culturally and linguistically diverse'—and the abbreviation 'CALD'—are commonly used in referring to people of diverse backgrounds. The Commissions recognise that the discussion in this Consultation Paper may apply to people who are 'culturally *or* linguistically diverse' as well as those who are 'culturally *and* linguistically diverse'. The phrase is used for convenience to embrace both kinds of diversity.

Family

1.77 The definition of 'family' or 'domestic' relationship varies across the Australian jurisdictions and legislation. In this Consultation Paper the particular definitions of 'family' are considered in the context of the specific legislation under consideration. For example, for the purposes of the analysis of sexual assault in a family violence context—under the second Term of Reference—emphasis is placed on the following relationships:

- current/former intimate partners (defined as spouses, de facto, and boyfriend/girlfriend);[84]
- relatives (defined broadly to include, grandparents, parents, step-parents, siblings, step-siblings, uncles/aunts, nephews/nieces, cousins and relatives considered part of the extended family and kinship system of an Indigenous person).[85]

Family violence

1.78 The terminology that should be adopted to describe violence within families and intimate relationships has been, and continues to be, the subject of controversy and debate.[86] Invariably there will be difficulties in attaching any one label to describe a complex phenomenon varying in degrees of severity and reflecting the diverse experiences of persons from diverse cultural, socio-economic, geographical groups, and those in same-sex relationships or in family structures that do not emulate the nuclear family structure.

1.79 Professors Belinda Fehlberg and Juliet Behrens note that:

> The label attached to such violence has been a key issue in feminist struggles to bring it out of the shadow of the private sphere, where historically it remained as a vestige

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84 The Terms of Reference require the Commissions to consider violence against 'women and their children'. The Commissions acknowledge that this may include same-sex relationships where women are the target of family violence.

85 This largely complies with the definition of 'relative' in *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 6.

86 See, eg, Domestic Violence and Incest Resource Centre, *What's In a Name? Definitions and Domestic Violence—Domestic Violence? Family Violence? Violence Against Women?*, Discussion Paper No 1 (1998).

> of the era when husbands had the right to use physical force to discipline not only their children but also their wives. According to feminist arguments, the lack of visibility of such violence in public discourse, in policy and in the legal system served to reinforce the gendered imbalances in power that its physical enactment in private relationships perpetuated. Consequently both gender and power have been central to evolving feminist definitions of domestic violence.[87]

1.80 State, territory and Commonwealth legislation that refers to violence within families and intimate relationships uses various descriptions—'family violence', 'domestic violence' and 'domestic abuse'. The term 'domestic' has been criticised on the basis that it 'qualifies and arguably reduces the term "violence"'.[88] The Macquarie Dictionary notes the colloquial use of the term 'domestic' as 'an argument with one's spouse or another member of the household'.[89] Thus, from a cultural perspective, the term 'domestic' can trivialise the impact of the violence on the victim. However the phrase 'family violence' has also been criticised:

> The problem with the term 'family violence' is not even in its gendered neutrality, but the picture that it paints that violence in the family is something in which all members are complicit, and which is just to do with difficulties in relationships between family members and problems in handling conflict in non 'violent' ways. … The term is even less acceptable than the more commonly used 'domestic violence'. 'Domestic' with all its implications of 'just a domestic', at least cannot be taken to qualify the violence by reference to the ungendered perpetrator, as 'family' can.[90]

1.81 Reports and writing in this area have adopted varying terminology. Some have referred to both 'family and domestic violence', or vice versa;[91] others to 'family violence';[92] and some to 'domestic violence'.[93] Fehlberg and Behrens adopt the terminology of 'violence and abuse in families'.[94] In each case, the differing terminology—in the Australian context—attempts to refer to the same type of conduct, although the boundaries of such conduct have expanded over the years.

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87 B Fehlberg and J Behrens, *Australian Family Law—The Contemporary Context* (2008), 177.

88 Ibid, 178.

89 Anecdotally, the Commissions have heard that the term is used in the context of police being called out to a 'domestic'.

90 B Fehlberg and J Behrens, *Australian Family Law—The Contemporary Context* (2008), 178 J Behrens, 'Ending the Silence, But … Family Violence under the Family Law Reform Act 1995' (1996) 10 *Australian Journal of Family Law* 35, 38.

91 See, eg, 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); Australian Bureau of Statistics, *Conceptual Framework for Family and Domestic Violence* (2009); Government of Western Australia, *Family and Domestic Violence Action Plan (2007–2008)*.

92 See, eg, Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006); Queensland Centre for Domestic and Family Violence Research, *Indigenous Family Violence Prevention Forum 2009—Report* (2009).

93 See, eg, Australian Government Solicitor, *The Giving of Evidence by Victims of Sexual Assault* (2008); M Pyke, *South Australian Domestic Violence Laws: Discussion and Options for Reform* (2007); Australian Law Reform Commission, *Domestic Violence*, ALRC 30 (1986).

94 B Fehlberg and J Behrens, *Australian Family Law—The Contemporary Context* (2008), 178.

1.82 In this Inquiry, and for the purposes of this Consultation Paper, the Commissions will refer to 'family violence', rather than 'domestic violence' or 'domestic abuse', unless specifically quoting from sources including legislation which use alternative terminology. The Commissions adopt this terminology to reflect the language used in the respective Terms of Reference, and for the sake of convenience, acknowledging that there is a robust debate about the appropriateness of such terminology.

Family violence legislation

1.83 Each of the states and territories has legislation which provides for the making of court orders to protect victims from future incidents of family violence.[95] In some cases the legislation deals exclusively with the obtaining of protection orders in the family violence context; in other cases the legislation that deals with these protection orders also deals with the obtaining of protection orders in circumstances outside the family violence context. For ease of reference, in this Consultation Paper the Commissions refer generically to both sets of legislation as family violence legislation.

1.84 At the time of writing this Consultation Paper, the family violence legislation current in South Australia is the *Domestic Violence Act 1994* (SA). This legislation, however, will be repealed once the *Intervention Orders (Prevention of Abuse) Act 2009* (SA)—which was assented to on 10 December 2009—comes into effect. Parliamentary debates indicate that this may be sometime later in 2010.[96] When the Commissions refer to the South Australian family violence legislation, it is to the Act which is yet to come into effect—unless the text indicates otherwise.[97]

Indigenous peoples/Indigenous women

1.85 In this Consultation Paper the Commissions use the term 'Indigenous peoples' to refer to Aboriginal and Torres Strait Island peoples, consistently with the terminology adopted by the Aboriginal and Torres Strait Islander Social Justice Commissioner in the *Social Justice Report 2009*:

> Aborigines and Torres Strait Islanders are referred to as 'peoples'. This recognises that Aborigines and Torres Strait Islanders have a collective, rather than purely individual, dimension to their livelihoods. ... The use of the term 'Indigenous' has evolved through international law.[98]

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95 *Crimes (Domestic and Personal Violence) Act 2007* (NSW); *Family Violence Protection Act 2008* (Vic); *Domestic and Family Violence Protection Act 1989* (Qld); *Restraining Orders Act 1997* (WA); *Intervention Orders (Prevention of Abuse) Act 2009* (SA); *Family Violence Act 2004* (Tas); *Domestic Violence and Protection Orders Act 2008* (ACT); *Domestic and Family Violence Act 2007* (NT).

96 South Australia, *Parliamentary Debates*, House of Assembly, 27 October 2009, 4460 (V Chapman—Shadow Attorney-General).

97 For example, when reference is made to supporting documents–including application forms for protection orders—the documents under the old legislation are referred to, as they are the forms available online at the time of writing.

98 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report* (2009), vi.

1.86 'Indigenous women' and 'Indigenous children' also reflect this terminology.

Intimate partner

1.87 As noted above, 'intimate partners' are defined as spouses, de facto partners or boyfriend/girlfriend.

Protection orders

1.88 Protection orders under family violence legislation are variously described as: apprehended violence orders, family violence intervention orders, violence restraining orders, family violence orders, domestic violence orders, and domestic violence restraining orders. For the purposes of this Consultation Paper the Commissions use the generic term of 'protection order', unless we are specifically quoting from legislation or case law which uses the specific terminology adopted by a particular state or territory.

Recurring themes

1.89 Legislation reflects its history and inherently expresses assumptions and viewpoints. It has been said that 'ideological positions represent the "covert values and assumptions that guide the implementation of legislation and social policy" but they are rarely made explicit'.[99] The inclusion of objects clauses or principles is one way of making express some of the underlying philosophy of legislation.

1.90 In this Inquiry a number of different legislative schemes form the legal framework in which issues of family violence arise. Their 'covert values' and particular history provide an explanation of their function and purpose. At the commencement of each of the following three parts of this Consultation Paper, the particular conceptual framework of the material considered in that part is given to facilitate an understanding of the dynamics at play in the area under review. The following list highlights the kind of tensions and principal conceptual dynamics in the material under review, to set the scene for a deeper exploration in the later parts of this Consultation Paper.

Criminal v civil

1.91 As a broad generalisation, the criminal law may be described as 'incident-based', where the civil law may be described as 'relationship-based'. In its focus on incidents the criminal law also requires evidence to a particular standard of proof. The civil law not only includes a different (lesser) standard of proof, but also includes considerable discretion in many of its areas of operation. Further, while a particular emphasis of the *Family Law Act* is the regulation of future relationships, the criminal

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99 A Freiberg, R Fox and M Hogan, *Sentencing Young Offenders—Sentencing Research Paper No 11* (1988) Australian Law Reform Commission, [171], citing S Reid and M Reitsma-Street, *Assumptions and Implications of New Canadian Legislation for Young Offenders* (1984), 6.

law focuses on punishment for past incidents—although with a view to the possibility of further offending.

Public law v private law

1.92 Public law concerns the state as a principal actor; private law concerns litigation between individual litigants. Child protection proceedings fall into the former category, while family law proceedings are an example of the latter.

Public v private realms

1.93 Professor Stephen Parker remarked that:

> The idea that we should distinguish between public and private spheres of life has been a central one in liberal political philosophy since the seventeenth century, although the roots of the idea can be traced back to Aristotle. In classical liberalism, the notion of a private sphere was a crucial part of the belief in limited government. There were certain parts of civil society in which the state had no business. And at the epicentre of the private sphere was the family; more specifically, the patriarchal family.[100]

1.94 The idea that the family is a 'private' space is a continuing theme in law—and especially family law.[101] Intertwined in the idea of the private space are ideas of rights. Contemporary discussion about the family reflects both the importance of the family as a 'fundamental unit' in society,[102] but also the increasing recognition of the public impact of, and responsibility for, family violence. The public costs of family violence are referred to above. Moreover, international conventions—considered further in Chapter 2—play an increasing role in terms of the characterisation of matters as 'public' or 'private', particularly in the area of violence against women:

> Violence against women is an important issue of concern to women in many countries. Women have worked to ensure that State governments accept responsibility to prevent and deal with such violence as a serious infringement of women's rights, and to move the issue of violence from the area of private action to that of public responsibility.[103]

Seamlessness

1.95 The idea of 'seamlessness' is expressed in a number of ways in various reviews and discussions about responding to family violence. At times it is expressed as an aspiration of having one court deal with the wide range of matters that can arise in

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100 S Parker, 'Rights and Utility in Anglo-Australian Family Law' (1992) 55 *Modern Law Review* 311, 325–326.

101 See eg, T Altobelli, *Family Law in Australia–Principles and Practice* (2003), 50; M Thornton, 'The Cartography of Public and Private' in M Thornton (ed) *Public and Private—Feminist Legal Debates* (1995) 2; and R Graycar and J Morgan, *The Hidden Gender of Law* (2nd ed, 2002), ch 2 and references cited throughout.

102 See Ch 2.

103 E Evatt, 'Eliminating Discrimination Against Women: The Impact of the UN Convention' (1991) 18 *Melbourne University Law Review* 435, 437.

relation to a family and where women and children are affected by family violence and child abuse. For example, in 2002 the Family Law Council proposed that

> In child protection matters, duplication of effort between state and federal systems should be avoided, and a decision should be taken as early as possible whether a matter should proceed under the *Family Law Act* or under child welfare law with the consequence that there should be only one court dealing with the matter. This is to be known as the 'One Court principle'.[104]

1.96 At other times the idea of seamlessness may be seen, for example, in terms of:

- recommendations for consistency of definitions;[105]
- pleas for greater sharing of information and facilitation of pathways between the various services, agencies and courts that are involved in family violence matters;[106]
- training programs, knowledge bases and professional development for all those in the various systems that deal with issues of family violence and child abuse;[107]
- coordination or integration of responses to family violence matters.[108]

1.97 From the point of view of the women and children engaging with the legal frameworks in which issues of family violence and child abuse arise, the Commissions consider that the key issue for this Inquiry is to focus upon the experience of those participants—to see the system through the eyes of the women and children. Seamlessness in practice may involve a combination of each and every one of the elements identified so far, and to be considered throughout this Inquiry.

Structure of the Consultation Paper

Coverage

1.98 While the coverage of this Consultation Paper reflects the Terms of Reference, some areas are covered more fully than others at this stage. The Commissions have been directed not to duplicate significant other work—in particular the AIFS evaluation and the Chisholm review. Although the Terms of Reference were issued in

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104 Family Law Council, *Family Law and Child Protection—Final Report* (2002), Rec 13. Another example is the recommendation for a referral of power to federal family courts in relation to all matters in relation to children: Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), Rec 7.

105 For example, 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), Recs 1, 5.

106 For example, Ibid, Recs 4, 12.

107 For example, Ibid, Recs 2, 3.

108 See Ch 19 for a discussion of integrated responses generally.

July 2009, the AIFS evaluation, the Chisholm Review and the Family Law Council's advice were not available until 28 January 2010.

1.99 The Commissions have prioritised the coverage of certain material in this Consultation Paper, hence some subject areas receive more expansive discussion than others. Depending on the response in submissions and further consultations following the publication of this Consultation Paper, the emphasis in the final report may vary.

Outline

1.100 This Inquiry focuses on areas of intersection and interaction between a wide number of laws, operating in different ways and in different spheres. There are state and territory, as well as federal, laws. There are criminal laws as well as civil laws. Some concern private law matters—between individuals; some concern public law matters—between individuals and the state. The Consultation Paper is arranged in five Parts: an introductory section, followed by parts dividing up the subject areas of the Terms of Reference as providing the lens through which the interaction issues are considered.

1.101 Although these laws often operate effectively in 'silos', the people affected are the same people, potentially being bounced around and falling between these various laws.[109] While dividing the Consultation Paper into parts may echo the sense of the law operating in silos, the arrangement of material into parts is a pragmatic one to make the consideration of the wide ranging area of the Inquiry more manageable through this dissection of issues.

1.102 The Commissions are of the view, however, that it is essential for a proper understanding of the nature of family violence from the perspective of the families—and particularly the women and children in the family context—to see the problems from the perspective of those engaging with the legal framework, rather than through the laws themselves. In order to highlight the issues in the Terms of Reference from the perspective of the women and children engaging with the legal system, a number of case studies, hypotheticals and illustrations will be used, integrated throughout the chapters.

Arrangement of chapters

1.103 Part A comprises two chapters: this introductory chapter and a chapter focused on the constitutional and international settings for the Inquiry.

1.104 Parts B and C deal principally with the matters set out in the first Term of Reference. Part B looks at the various interaction issues from the perspective of family violence laws; Part C looks at the intersections and interactions from the perspective of child protection.

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109 Or on a 'roundabout' as described in the AIFS evaluation: Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms—Summary Report* (2009), [4], 21.

1.105 Part D focuses on the second Term of Reference and considers sexual assault in a family violence context.

1.106 Part E focuses on existing and potential responses to the range of interaction and impact issues considered throughout the Consultation Paper.

Processes of reform

Consultation and collaboration processes

1.107 Commitment to widespread consultation is a hallmark of best practice law reform.[110] Moreover, under the provisions of the *Australian Law Reform Commission Act 1996* (Cth), the ALRC 'may inform itself in any way it thinks fit' for the purposes of reviewing or considering anything that is the subject of an inquiry.[111] Similarly the NSWLRC may 'hold and conduct such inquiries as it thinks fit'.[112]

1.108 For this Inquiry, the ALRC is directed to work closely with a number of bodies and to consult particular groups, complementing the multi-faceted consultation strategy adopted for this Inquiry—using a broad mix of face-to-face consultations and roundtable discussions; online communication tools and the release of this Consultation Paper together with a companion Consultation Paper Summary.

1.109 The Terms of Reference require the ALRC to:

> b) work jointly with the New South Wales Law Reform Commission with a view to developing agreed recommendations and consult with other State and Territory law reform bodies as appropriate;
>
> c) work closely with the Australian Government Attorney-General's Department to ensure the solutions identified are practically achievable and consistent with other reforms and initiatives being considered in relation to the development of a National Plan to Reduce Violence against Women and their Children or the National Framework for Protecting Australia's Children, which has been approved by the Council of Australian Governments; and
>
> d) consult with relevant courts, the Australian Government Department of Families, Housing, Community Services and Indigenous Affairs, relevant State and Territory agencies, State and Territory Legal Aid Commissions, the Family Law Council, the Australian Domestic Violence Clearinghouse and similar bodies in each State and Territory.

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110 B Opeskin, 'Measuring Success' in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2005), 202.

111 *Australian Law Reform Commission Act 1996* (Cth) s 38.

112 *New South Wales Law Reform Commission Act 1966* (NSW) s 10(1)(c).

Working with the NSWLRC and the Attorney-General's Department

1.110 This Consultation Paper is released as a joint document between the ALRC and the NSWLRC, reflecting the co-operative work in the Inquiry. The use of the term 'the Commissions' as appropriate throughout, reflects this joint endeavour.

1.111 To ensure that the solutions developed in the Inquiry are 'practically achievable and consistent with other reforms and initiatives being considered', the ALRC provides regular briefings to key staff in the Australian Government Attorney-General's Department.

Consultation with designated bodies and groups

1.112 The consultation strategy for this Inquiry includes all of the bodies identified expressly in the Terms of Reference as well as other key stakeholder groups. The e-newsletter provides a monthly update on past and projected consultations. To date, consultations include—in addition to those named in the Terms of Reference—police, offices of public prosecutions, lawyers, legal services, judicial officers, the Family Law Council, AIFS, the Australian Centre for the Study of Sexual Assault, specialist family violence courts, academics and the Australian Family and Domestic Violence Clearinghouse.

1.113 A two-pronged strategy of seeking additional comments has been adopted. First, using internet communication tools both to provide information and obtain comment—an e-newsletter and an online forum; and, secondly, through this Consultation Paper with its companion Summary.

E-newsletter

1.114 In this Inquiry the ALRC has adopted a new and additional consultation strategy, by way of monthly Family Violence Inquiry e-newsletters. This provides a way to keep stakeholders informed about the inquiry progress on a regular basis, with a calendar of stakeholder consultations or other key events in the upcoming month, as well as a summary of consultations and other work in the past month. Each e-newsletter also highlights an 'issue in focus' and seeks views, experience or recommendations in relation to the particular topic. Links are provided to give immediate feedback on the issue in focus through the online comment form, as well as to information about how to make formal submissions. In addition, there are links to the other inquiries of immediate relevance to this Inquiry, namely the Chisholm Review and the AIFS evaluation.

1.115 The comments received in response to the issues in focus have provided—and continue to provide—an important additional means of input into the Inquiry. E-newsletters will continue to be published monthly for the remainder of the Inquiry.

Online forum

1.116 The second use of internet communication tools is the Family Violence Online Forum conducted from November 2009 to January 2010 amongst women's legal services, assisted by a grant from the Government 2.0 Taskforce. The Taskforce was formed in 2008 against a backdrop of increased interest by governments worldwide in the potential of online engagement. The ALRC received funding from the Taskforce to run an online stakeholder consultation pilot, with the technical and strategic support of social business and development consultancy, Headshift.

1.117 The Family Violence Online Forum was conducted amongst a closed group from the women's legal services community across Australia to facilitate frank and open discussion in a secure online environment about issues relevant to the concerns and experiences of that stakeholder group.

Consultation Paper and Summary

1.118 In the past, the ALRC's standard practice has been to produce an issues paper and a discussion paper, prior to producing a final report. In this Inquiry, in response to the very wide-ranging and challenging Terms of Reference, and a tight time frame—twelve months and two weeks—the Commissions have had to adopt different practices in relation to consultation documents to provide appropriate opportunities for community engagement without overloading stakeholders.

1.119 First, only one consultation document—this Consultation Paper—is being published, complemented by the monthly e-newsletters. Secondly, the propositions put forward are presented differently. ALRC practice has been to include questions in an Issues Paper, and Proposals in a Discussion Paper. In this Consultation Paper the Commissions have adopted a combined format for propositions, posing questions—particularly in highly contested areas—as well as options and proposals for reform.

1.120 Moreover, because there is only one consultation document, the Commissions have produced a Consultation Paper that is somewhat longer and more fully developed than previous practice, to enable the community to have access to the detailed evidence and arguments underpinning the questions and proposals. However, a Summary is being released simultaneously in order to facilitate contributions by stakeholders in the restricted time frame for this Inquiry. All the questions and proposals for reform are included in both documents, in the same order, and numbered in the same way, for ease of reference. The Summary includes a brief discussion of the background to each question and proposal. Full background information, such as discussion of various models and legislation by jurisdiction, is included in this Consultation Paper.

1.121 In most ALRC inquiries, proposals and recommendations for reform are addressed to those appropriate persons or agencies in the federal sphere best placed to implement them. This reflects the ALRC's functions under the *Australian Law Reform Commission Act 1996* s 21(1):

The Commission has the following functions in relation to matters referred to it by the Attorney-General:

(a) to review Commonwealth laws relevant to those matters for the purposes of systematically developing and reforming the law, particularly by:

  (i) bringing the law into line with current conditions and ensuring that it meets current needs; and

  (ii) removing defects in the law; and

  (iii) simplifying the law; and

  (iv) adopting new or more effective methods for administering the law and dispensing justice; and

  (v) providing improved access to justice;

(b) to consider proposals for making or consolidating Commonwealth laws about those matters;

(c) to consider proposals for the repeal of obsolete or unnecessary laws about those matters;

(d) to consider proposals for uniformity between State and Territory laws about those matters;

(e) to consider proposals for complementary Commonwealth, State and Territory laws about those matters.

1.122 The NSWLRC's functions are similarly set out in its constituting Act, the *New South Wales Law Reform Commission Act 1966*, s 10(1), which provides that:

(1) The Commission, in accordance with any reference to it made by the Minister:

(a) shall consider the law, enacted or promulgated by the Legislature of New South Wales or by any person under the authority of that Legislature, with a view to, or for the purpose of:

  (i) eliminating defects and anachronisms in the law,

  (ii) repealing obsolete or unnecessary enactments,

  (iii) consolidating, codifying or revising the law,

  (iv) simplifying or modernising the law by bringing it into accord with current conditions,

  (v) adopting new or more effective methods for the administration of the law and the dispensation of justice,

  (vi) systematically developing and reforming the law,

(b) shall consider proposals relating to matters in respect of which it is competent for the Legislature of New South Wales or any person under the authority of that Legislature to enact or promulgate laws, and

(c) may for the purposes of this section hold and conduct such inquiries as it thinks fit.

1.123 This Inquiry engages with Commonwealth laws, as well as state and territory laws on many levels—and in both Terms of Reference. As noted in the constituting provisions above, the ALRC—as a Commonwealth body—is principally concerned with Commonwealth laws or matters of uniformity and complementarity of Commonwealth laws with state and territory laws; and the NSWLRC—as a state body—is principally concerned with NSW laws.

1.124 In this Inquiry, however, both bodies, acting together, have been asked to go further in their respective functions. Given the importance of the Australian Government's commitment to reducing violence against women and children, the nature of the Terms of Reference, and the compelling and widespread nature of the issues being considered, the nature of the proposals and recommendations are likely to be different from those in previous inquiries of both Commissions.

1.125 In framing proposals, and eventually recommendations in this way, the Commissions recognise that implementation of many recommendations will be primarily the responsibility of the states and territories. The Commissions will recommend, in due course, that reform in this area be led by the Commonwealth Attorney-General and NSW Attorney General cooperatively and through the Standing Committee of Attorneys-General.

Advisory groups

1.126 A key aspect of ALRC procedures is to establish an expert Advisory Committee or 'reference group' to assist with the development of its inquiries. Because of the complex nature of this Inquiry the Commissions are taking the approach of using roundtables of invited experts and advisers to inform the consultative processes at key points during the Inquiry. In particular, Magistrate Anne Goldsbrough has been appointed as a part-time Commissioner for the Inquiry and George Zdenkowski is acting as special adviser.

1.127 Advisory groups of experts have particular value in helping the Commissions to identify the key issues and determine priorities, providing quality assurance in the research, writing and consultation processes. The advisory groups will also assist with the development of recommendations for reform as the Inquiry progresses. Ultimate responsibility for the Report and recommendations, however, remains with the Commissions.

Written submissions

1.128 With the release of this Consultation Paper, the Commissions invite individuals and organisations to make submissions in response to the specific proposals, or to any of the background material and analysis provided, to help advance the reform process in this Inquiry.

1.129 There is no specified format for submissions and they may be marked confidential if preferred. The Commissions will gratefully accept anything from

handwritten notes to detailed commentary and scholarly analyses on relevant laws and practices. Although not essential, the Commissions prefer electronic communications and submissions may be made simply by contributing comments online at the ALRC's website—even simple dot-points are welcome. In this Inquiry the Commissions are also providing an online space for public comment and discussion on the Consultation Paper summary document and the specific questions and proposals included.

1.130 The Commissions appreciate that the tight deadline for making submissions places considerable pressure upon those who wish to participate in the Inquiry. The Commissions acknowledge the considerable amount of work undertaken by those who have contributed to the consultative processes to date. Given the deadline for delivering the final report to the respective Attorneys-General, and the need to consider fully the submissions received in response to this Consultation Paper, all submissions must be submitted on time—by Friday 4 June 2010.

1.131 It is the invaluable work of participants that enriches the whole consultative process of the Commissions' inquiries. The quality of the outcomes is assisted greatly by the understanding of contributors in needing to meet the deadline imposed by the reporting process itself. This Inquiry is no exception.

In order to ensure consideration for use in the final report, submissions addressing the questions and proposals in this Consultation Paper must reach the ALRC by **Friday 4 June 2010**.

2. Constitutional and International Settings

Contents

Introduction

2.1 Family violence as a legal issue sits within a complex framework of laws, state and federal. As the Family Law Council has remarked:

> The volatile nature of family law, the involvement of such a large number of jurisdictions and infrastructures and the plethora of laws relating to children's welfare all combine to provide a dynamic and constantly changing legislative climate. These factors in turn impact upon practices and arguably also on outcomes.[1]

2.2 It is that complex framework that generates the interaction and impact issues that are the key focus of this Inquiry.[2] This chapter sets out the broad constitutional landscape of family law and the international instruments that provide a backdrop for Australian law today. A further part of the legal framework in which family violence issues may arise is the range of courts—both state and federal—and this chapter will also provide a brief description of the nature of these jurisdictions.

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1 Family Law Council, *The Best Interests of the Child? The Interaction of Public and Private Law in Australia—Discussion Paper* (2000), [1.10].

2 The ambit of the Terms of Reference is discussed in Ch 1.

Constitutional framework

2.3 Australia has a federal system of government in which legislative power is divided between the Commonwealth and the states and territories. In the area of family law, neither the Commonwealth nor the states and territories have exclusive legislative competence.[3] It has been remarked that '[i]f family law is viewed as an integral and homogeneous subject area on which it is appropriate to legislate, containing within it subject matters requiring a uniform approach, the conferral of legislative power has been incomplete'.[4]

Commonwealth powers

2.4 The *Australian Constitution* gives the Commonwealth government the power to make laws with respect to: (1) 'marriage';[5] and (2) 'divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants'.[6] It also has the power to legislate with respect to 'matters incidental to the execution of any power vested by this Constitution in the Parliament'.[7]

2.5 The power of the states to legislate in relation to family law is not limited in the same way, but where a state law is inconsistent with a Commonwealth law, the Commonwealth law prevails.[8]

2.6 Federal Magistrate Geoff Monahan and Associate Professor Lisa Young comment, with respect to this division between the Commonwealth and the states, that 'as a general principle, private rights were regarded as more appropriately a matter for the states than for the Commonwealth'. However, questions of status—marriage and divorce—needed uniformity across Australia and hence were more appropriate for allocation to federal power:[9]

> what was chiefly in the minds of the framers of the Constitution was the need to ensure the recognition of such a basic institution as marriage in the different parts of the new Commonwealth and beyond its borders, throughout what was then known as the British Empire. Legislation for marriage necessarily also implied legislation for its

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3 Family Law Council, *The Best Interests of the Child? The Interaction of Public and Private Law in Australia—Discussion Paper* (2000) provides a useful discussion of the constitutional context of family law in Australia: ch 2.

4 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [3.3].

5 *Australian Constitution* s 51(xxi).

6 Ibid s 51(xxii).

7 Ibid s 51(xxxix).

8 Section 109 of the *Australian Constitution* provides that: 'when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'. This provision may operate in two ways: it may directly invalidate state law where it is impossible to obey both the state law and the federal law; or it may indirectly invalidate state law where the Australian Parliament's legislative intent is to 'cover the field' in relation to a particular matter.

9 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [3.6].

> dissolution, since the recognition of a person's status as a divorced person was a necessary precondition to the capacity to remarry.[10]

2.7 The Commonwealth Parliament did not race into the field. The first Commonwealth legislation was the *Matrimonial Causes Act 1959* (Cth), followed two years later by the *Marriage Act 1961* (Cth). These laws superseded the laws of the states and provided a uniform Commonwealth law on marriage and divorce.

2.8 The *Family Law Act 1975* (Cth) and the establishment of the Family Court of Australia ushered in the current framework of federal family law. The new regime reflected the intention 'to exercise as plenary a power as the Constitution permitted the Commonwealth to take', and was subject to a series of constitutional challenges.[11]

2.9 The federal framework was later expanded by the referral of legislative power from the states to the Commonwealth.[12] Section 51(xxxvii) of the Constitution gives the Commonwealth Parliament power to make laws with respect to:

> matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.

2.10 Dr Anthony Dickey has noted that the referral of powers has been 'the practical way in which problems resulting from the division of State and Commonwealth powers have most often been overcome'.[13]

2.11 A major addition to federal power was the referral to the Commonwealth of the power to make laws with respect to the children of unmarried parents—'ex-nuptial children'.[14] Between 1986 and 1990, all states (with the exception of Western Australia) referred state powers with respect to 'guardianship, custody, maintenance and access' in relation to ex-nuptial children to the Commonwealth.[15] The states did

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10 Ibid, [3.7]. Dickey notes that it would appear that members of the Constitutional Convention of 1897–1898 were averse to repeating the United States experience where the law of divorce varies with the law of the different states: A Dickey, *Family Law* (5th ed, 2007), 13–14. Sir Garfield Barwick suggested another reason—Queen Victoria, who proved reluctant to assent to colonial Bills which liberalised divorce, her approval being necessary for such Bills: G Barwick, 'Some Aspects of the New Matrimonial Causes Act' (1961) 3 *Sydney Law Review* 409, 410.

11 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [3.30] ff discusses the various constitutional challenges.

12 A referral of power to the Commonwealth is not required from the ACT, the Northern Territory and Norfolk Island because s 122 of the *Australian Constitution* assigns to the Commonwealth plenary power to 'make laws for the government' of the territories.

13 A Dickey, *Family Law* (5th ed, 2007), 40.

14 There was an attempt in 1983 to extend the categories of children covered by the *Family Law Act* but this was held to be constitutionally invalid, necessitating the referral of power: Ibid, 32. In *Re Cormick* (1984) 156 CLR 170 it was held that the marriage power could not extend to a child who is neither a natural child of both the husband and wife, nor a child adopted by them.

15 See *Commonwealth Powers (Family Law—Children) Act 1986* (NSW); *Commonwealth Powers (Family Law—Children) Act 1986* (Vic); *Commonwealth Powers (Family Law—Children) Act 1990* (Qld); *Commonwealth Powers (Family Law) Act 1986* (SA); *Commonwealth Powers (Family Law) Act 1987* (Tas).

not, however, refer to the Commonwealth their power to legislate with respect to child protection and adoption.[16]

2.12 The effect of the referral is described by Dickey:

> As a result of this referral of powers, the Parliament now has virtually unlimited legislative power in respect of children in these jurisdictions. The sole matters that are excluded by the States in their referral of powers concern children who come within the scope of State child welfare legislation, and adoption. Only with respect to these matters are the limits of the Commonwealth's power to legislate in respect of children likely to be of continuing importance in these States.[17]

2.13 As a consequence, in 1996, the *Family Law Act* was amended to include a 'welfare power' in relation to children.[18] A further referral of power led to the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth).

2.14 Western Australia took a different approach from the other states by availing itself of the opportunity provided in the *Family Law Act* for the creation of a state family court exercising federal and state jurisdiction.[19] The reasons for doing so were explained in the Second Reading Speech to the *Family Court Act 1975* (WA):

> (1) to provide a single court of unified jurisdiction, administering matters of family law, both federal and state;
>
> (2) to enable the state to continue to exercise jurisdiction in family law matters which would otherwise have been removed into the Family Court of Australia, with the opportunity of retaining complementary action with other responsibilities in the areas of welfare and counselling services;
>
> (3) in the public interest to keep the administration of justice as close as possible to the people it is designed to serve;
>
> (4) to obviate the creation of a further Commonwealth court in the state.[20]

2.15 When the states referred power in relation to parenting disputes involving parents who are not married to each other, Western Australia again enacted similar laws at a state level, in the *Family Court Act 1997* (WA). That Act reaffirmed the separate state Family Court in Western Australia and its expanded jurisdiction on the basis that

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16 *Commonwealth Powers (Family Law—Children) Act 1986* (NSW) s 3(2); *Commonwealth Powers (Family Law—Children) Act 1986* (Vic) s 3(2); *Commonwealth Powers (Family Law—Children) Act 1990* (Qld) s (3)(2); *Commonwealth Powers (Family Law) Act 1986* (SA) s 3(2); *Commonwealth Powers (Family Law) Act 1987* (Tas) s 3(2).

17 A Dickey, *Family Law* (5th ed, 2007), 34.

18 *Family Law Reform Act 1995* (Cth), introducing a new pt VII. The relationship between the *Family Law Act* and the child welfare legislation of the states and territories is considered in Ch 14.

19 *Family Court Act 1975* (WA), replaced by *Family Court Act 1997* (WA): see ss 35–36.

20 Western Australia, *Parliamentary Debates*, Legislative Assembly, 21 October 1975, 3606 (D O'Neill—Minister for Works).

> the Western Australian Family Court allows us in Western Australia—the tyranny of distance is always a problem with legislation—to be responsive to local demands and needs for the benefit of people using the Family Court.[21]

2.16 The court also has power to exercise jurisdiction under the *Children and Community Services Act 2004* (WA) and so, unlike the federal family courts, it may issue care or protection orders in relation to children.

2.17 The effect of the establishment and expansion of the Family Court of Western Australia has been described as follows:

> As it happens, however, Western Australia has followed the federal law closely and its Family Court has administered the [*Family Law Act*] in conformity with guidelines set out by the Full Court of the Federal Court and by the High Court. There has been full interchange of judges between that court and the Family Court and, to all intents and purposes, the existence of a separate Family Court has not affected the administration of the law under the federal Act.[22]

2.18 Given that Western Australia has kept family law matters within the state, it provides, in some respects, a 'control jurisdiction' for a consideration of some of the issues generated by the fragmentation between the state and federal spheres in the other states and territories. As remarked by the Family Law Council,

> Western Australia is uniquely placed, as the only State Family Court in Australia with a single court for family law matters, to be the first State in Australia to develop and implement a unified Family Law/Child Protection Court to manage all cases involving the welfare of children with the same judicial officers able to determine both public [child protection] and private [parental responsibility and the care arrangements for children] family law matters.[23]

Cross-vesting

> One of the most creative and effective schemes for addressing some of the unsatisfactory issues arising out of the constitutional limitations of power between the Commonwealth and the states was the cross-vesting scheme.[24]

2.19 The essence and objects of the scheme, introduced in 1987, were explained by the then Attorney-General in his Second Reading Speech:

> The essence of the cross-vesting scheme, as provided for in the Bill and proposed in complementary state legislation, is that State and Territory Supreme Courts will be vested with all the civil jurisdiction—except certain industrial and trade practices jurisdiction—of the Federal Courts, at present the Federal Court of Australia and the Family Court of Australia, and the federal courts will be vested with the full jurisdiction of the State and Territory Supreme Courts.

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21 Western Australia, *Parliamentary Debates*, Legislative Assembly, 25 November 1997, 8534 (J van de Klashorst—Parliamentary Secretary).

22 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [3.86].

23 Family Law Council, *The Best Interests of the Child? The Interaction of Public and Private Law in Australia—Discussion Paper* (2000), 1.

24 T Altobelli, *Family Law in Australia–Principles and Practice* (2003), 56.

> The reasons for the proposed scheme are that litigants have occasionally experienced inconvenience and have been put to unnecessary expense as a result of, firstly, uncertainties as to the jurisdictional limits of federal, state and territory courts, particularly in the areas of trade practices and family law; and, secondly, the lack of power in these courts to ensure that proceedings which are instituted in different courts, but which ought to be tried together, are tried in the one court. Jurisdictional difficulties do the law and the community no good. They result in litigants with a genuine dispute requiring judicial determination being faced with the anguish, delay and additional expense which flow from the sterile and pointless need to search for a court or courts, with jurisdiction to resolve the dispute. The seriousness of these jurisdictional difficulties to the community is all the more pressing because they occur in areas such as family law and trade practices which touch the everyday activities of so many people and corporations in Australia.[25]

2.20 The scheme was 'revolutionary (yet ultimately flawed)',[26] and did not withstand constitutional challenge. The essence of the scheme was uniform cross-vesting legislation enacted by the Commonwealth together with all the states and territories.[27] The purpose of the uniform scheme—'as ingenious as it was simple'[28]—is evident in the preamble to the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth):

> WHEREAS inconvenience and expense have occasionally been caused to litigants by jurisdictional limitations in federal, State and Territory courts, and whereas it is desirable—
>
> (a) to establish a system of cross-vesting of jurisdiction between those courts, without detracting from the existing jurisdiction of any court;
>
> (b) to structure the system in such a way as to ensure as far as practicable that proceedings concerning matters which, apart from this Act and any law of a State relating to cross-vesting of jurisdiction, would be entirely or substantially within the jurisdiction (other than any accrued jurisdiction) of the Federal Court or the Family Court or the jurisdiction of a Supreme Court of a State or Territory are instituted and determined in that court, whilst providing for the determination by one court of federal and State matters in appropriate cases; and
>
> (c) if a proceeding is instituted in a court that is not the appropriate court, to provide a system under which the proceeding will be transferred to the appropriate court.

2.21 The Explanatory Memorandum accompanying the federal Bill articulated the hope 'that no action will fail in a court through lack of jurisdiction, and that as far as possible no court will have to determine the boundaries between federal, state and territory jurisdiction'.[29] State and territory Supreme Courts were vested with federal

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25 Commonwealth, *Parliamentary Debates*, House of Representatives, 22 October 1986, 2555 (L Bowen—Attorney-General), 2555–2556.

26 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [3.87].

27 For a consideration of the scheme see, eg, K Mason and J Crawford, 'The Cross-Vesting Scheme' (1988) 62 *Australian Law Journal* 328; C Baker, 'Cross-Vesting of Jurisdiction between State and Federal Courts' (1987) 14(2) *University of Queensland Law Journal* 118; R Chisholm, 'Cross-vesting and Family Law: A Review of Recent Developments' (1991) 7 *Australian Family Lawyer* 15.

28 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [3.96].

29 Explanatory Memorandum, Jurisdiction of Courts (Cross-Vesting) Bill 1987 (Cth).

jurisdiction; federal courts were vested with the full jurisdiction of state and territory Supreme Courts; and from 1988–1999, the scheme 'overcame constitutional deadlocks that used to bedevil the Family Court's jurisdiction'.[30]

2.22 However, in *Re Wakim; Ex parte McNally*, the High Court held that Ch III of the *Australian Constitution* exhaustively defined the 'matters' that may be the subject of the judicial power of the Commonwealth—and this did not include exercising the jurisdiction of the states.[31] That part of the scheme that enabled federal courts to hear state matters—such as the Family Court determining a claim under state based de facto relationships legislation or family provision legislation—was unconstitutional.

2.23 *Re Wakim* struck down the cross-vesting scheme in one direction, but not the other. While it held invalid the purported vesting in federal courts of state judicial power, cross-vesting remains valid from the Commonwealth to the states. In addition, a vesting of jurisdiction between the Commonwealth and the territories is still permissible.[32] Young and Monahan describe the impact of the failure of the cross-vesting scheme:

> In addition to its impact on corporate law … the partial demise of the cross-vesting scheme had an immediate effect on Australian family law. While the former was swiftly remedied by a reference of powers by the states to the Commonwealth, the latter has proved more difficult to solve. Many family law matters now needed to be resolved in both a federal and state court. Of immediate relevance was the reality that cross-vesting had allowed de facto families to seek orders in the Family Court to resolve both parenting disputes (federal jurisdiction) and property disputes (state jurisdiction). This problem was, of course, resolved by a state reference of powers over de facto relationships that resulted in amendments to the [*Family Law Act*] (by the Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (Cth) … Nevertheless, many other procedural benefits that cross-vesting provided to family law litigants have now been lost.[33]

The web of courts in family violence matters

2.24 Family violence issues may arise in a number of judicial settings:[34]

- magistrates courts;
- Supreme Courts;
- children's courts; and
- family courts—including the Family Court of Australia, the Federal Magistrates Court and the Family Court of Western Australia.

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30 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [3.96].
31 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.
32 *Australian Constitution* s 122.
33 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [3.100].
34 The particular name of the court in each jurisdiction may vary.

Magistrates courts

2.25 Many family violence matters are likely to arise first in a local court of a state or territory, before a magistrate. Such matters may include proceedings for protection orders and summary criminal offences—such as common assault, property damage, stalking, and breach of a protection order. Committal proceedings for serious criminal offences—for example, sexual assault—may also be heard in such courts.[35] Magistrates courts also exercise some limited jurisdiction in matters under the *Family Law Act*.[36]

District (County) and Supreme Courts

2.26 State and territory District (County) and Supreme Courts exercise jurisdiction in relation to state and territory law, in particular as to more serious criminal offences. Appeals regarding protection orders may go to the District (County) Court.[37]

2.27 Although s 39 of the *Family Law Act* originally vested the Supreme Courts of the states and territories with jurisdiction in relation to matrimonial causes, this vesting arrangement was terminated by Proclamation in 1976, except in relation to the Northern Territory. However, the Supreme Courts may exercise the jurisdiction of the Family Court of Australia by virtue of the cross-vesting of jurisdiction legislation discussed above.[38]

Children's courts

2.28 In all states and territories there are specialised children's courts that have jurisdiction related to the care and protection of children and young people, and also criminal cases concerning children and young people.[39]

2.29 The proceedings are conducted with as little formality and legal technicality as the case permits. Proceedings in the care and protection jurisdiction are not conducted in a strictly adversarial manner. Children's courts take all measures practicable to ensure that a child or young person has every opportunity to be heard and participate in proceedings, and that the proceedings, decisions or rulings are understood by the child or young person.

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35 Various lower courts generally have their own legislation, eg *Local Court Act 2007* (NSW); *Magistrates Court Act 1989* (Vic).

36 *Family Law Act 1975* (Cth) ss 69J(1), 67ZC. See A Dickey, *Family Law* (5th ed, 2007), 110–111.

37 For example, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 84.

38 The Supreme Court of the Northern Territory still exercises original jurisdiction under the *Family Law Act*, together with the Family Court of Australia: see A Dickey, *Family Law* (5th ed, 2007), 108.

39 For example, the NSW Children's Court has jurisdiction to hearing protection order matters where the defendant is less than 18 years of age: *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 91(1)(b). South Australia and the Northern Territory have a Youth Court and a Family Matters Court with jurisdiction over child welfare.

2.30 In Tasmania, the ACT and the Northern Territory, the Children's Court is presided over by a magistrate. In New South Wales, Victoria, Queensland, Western and South Australia, the head of the court is a specialist judge from the District Court.[40] Most states have specialist children's courts operating in the capital cities. Outside these areas, the local magistrate can convene a children's court when necessary.[41]

Family courts

2.31 The Family Court of Australia, the Federal Magistrates Court and the Family Court of Western Australia all exercise jurisdiction under the *Family Law Act* to hear family law matters. The Family Court of Australia was established by the *Family Law Act* as a superior court of record. Appeals from a judge of the Family Court go to the Full Court of the Family Court with a further appeal to the High Court of Australia where the court grants special leave.

2.32 The Federal Magistrates Court was established under the *Federal Magistrates Act 1999* (Cth) and commenced operation on 23 June 2000. As set out in s 3, it is intended that the court: operate as informally as possible; use streamlined procedures; and encourage the use of dispute resolution procedures.[42] The Federal Magistrates Court exercises limited jurisdiction under the *Family Law Act* including in relation to matrimonial causes, and matters arising under Part VII (Children).

2.33 A very high proportion of the work in the court concerns family law—in 2007–08, it was 91.7% of the work.[43] The majority of family law matters overall are heard in the Federal Magistrates Court. For example, in the period 2007–08, over 79% of first instance family law applications were filed in the Federal Magistrates Court.[44] Appeals in family law matters go to the Family Court.

2.34 The Family Law Council described the differences in the work of the two courts as follows:

> In the family law context, the Family Court of Australia deals with the most intractable disputes and in particular with those parenting applications where there are extremely serious allegations of child abuse or physical abuse which often involve allegations of substance abuse and mental health issues. However, issues of child abuse, substance abuse, mental health and family violence are also highly prevalent issues in parenting applications dealt with by the Federal Magistrates Court.[45]

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40 C Cunneen, 'Young People and Juvenile Justice' in G Monahan and L Young (eds), *Children and the Law in Australia* (2008) 187, [9.11]—note that since this publication, the Chief Children's magistrate in NSW is a District Court Judge, as reflected in the text above.

41 Ibid, [9.11].

42 *Federal Magistrates Act 1999* (Cth) s 3(2).

43 Federal Magistrates Court of Australia, *Annual Report 2007–08* (2008), 24.

44 Ibid, 28.

45 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), 49; drawing upon L Moloney and others, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-reform Exploratory Study* (2007) Australian Institute of Family Studies.

2.35 As discussed above, the Family Court of Western Australia is a state family court, exercising both federal and state jurisdiction. It is invested with jurisdiction in relation to most original proceedings arising under the *Family Law Act*, including matrimonial causes, and to hear appeals under the Act from the Magistrates Court of Western Australia, other than appeals against decisions made by a family law magistrate.

Problems of fragmentation

2.36 Federal Magistrate Tom Altobelli has described the 'chaos and complexity of jurisdiction' in family law matters as mainly attributable to Australia's federal system of government and the distribution of powers under the *Australian Constitution*.

> Under the Constitution, neither the Commonwealth nor the states have exclusive legislative competence in the area of family law. This has meant that a complex and fragmented system for determining family law issues has developed and been exacerbated by attempts to interpret constitutional powers in various ways.[46]

2.37 The boundaries between the various parts of the system are not always clear and jurisdictional intersections and overlaps are 'an inevitable, but unintended, consequence'.[47] The fragmentation of the system has a particular impact in relation to child protection issues:

> In essence, at least two court systems are potentially involved in any child protection dispute: the State and Territory children's courts, and the federal Family Court. With the introduction of the Federal Magistrates Service, this fragmentation now extends to three courts. Further, if a dispute extends across State and Territory borders, more than one children's court may be involved. Family violence issues are also often relevant when child protection issues are raised, but the State and Territory courts that deal with violence issues are usually the generalist magistrates' courts. This can add a further layer of complexity.[48]

2.38 Which laws apply across the state/federal divide is principally a function of whether the family is 'intact' or not. The rationale for this has been questioned:

> Why the separation of the parents should make such a difference in Australia has much more to do with the peculiarities of state and federal jurisdiction and funding arrangements than any rational approach to child protection practice. The current arrangements have the potential to put some children at grave risk of harm, and also make it much more difficult to deal speedily with unfounded allegations of child abuse.[49]

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46 T Altobelli, *Family Law in Australia–Principles and Practice* (2003), 46.

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

48 Ibid, [2.4].

49 Family Law Council, *Family Law and Child Protection—Final Report* (2002), [2.15].

2.39 Family violence issues also have to encounter the 'bifurcated institutional framework'[50] generated by the federal/state divide:

> Fragmentation of the law on jurisdictional lines results in the possibility of differences of approach to similar problems. It may result in an unevenness in the development of facilities created for dealing with similar problems. It may lead to manoeuvring and the use of subterfuge as parties attempt to get themselves within a particular jurisdiction not otherwise open to them.
>
> These effects may seem pretty unsatisfactory to anyone who is concerned that the best legal solutions and facilities should be available for dealing with problems which so closely affect the happiness of so many families and, particularly, the children.[51]

2.40 There is a danger, moreover, that issues concerning violence may fall into the cracks between the systems:

> To the extent that State and Territory child protection authorities do not investigate such matters because there are proceedings under the *Family Law Act*, there is a Catch 22. The family law system is to some extent predicated on an assumption that State or Territory child protection authorities will investigate all serious cases of intrafamilial child abuse and make the results of those investigations available to the Court. State and Territory child protection authorities may in some cases decline to allocate significant resources to the case because it is already proceeding in the family law system. There is certainly a perception that State and Territory child protection authorities are reluctant to get involved when a matter is in the family law system already.[52]

2.41 As noted by the Family Law Council in December 2009, the division of powers means that 'neither the Commonwealth nor the States' jurisdiction provides a family unit with the complete suite of judicial solutions to address all of the legal issues that may impact on a family in respect of their children'.[53]

Interactions and overlaps

Children

2.42 Protection issues concerning children are mainly the domain of the state and territory children's courts. They may also arise when the Family Court makes parenting orders.

> For example, a parent in a Family Court proceeding may allege that the other parent has been violent towards the child. Conversely, in exercising their power to make protection orders, State and Territory children's courts sometimes make orders on issues that could also be the subject of parenting orders made by the Family Court.

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50 Ibid, [2.2].
51 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [3.77].
52 Family Law Council, *Family Law and Child Protection—Final Report* (2002), [3.18].
53 L Moloney and others, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-reform Exploratory Study* (2007) Australian Institute of Family Studies, [7.3.2].

> For example, in making a protective order, a children's court may make orders regarding access and custody.[54]

2.43 State and territory child welfare laws take precedence over Family Court orders.[55] In contrast, in the area of family violence, contact and residence orders made under the *Family Law Act* can be used to defeat state and territory family violence protection orders.[56]

2.44 The constitutional position is that the *Family Law Act* governs the resolution of private disputes about the parenting of all children in Australia, while state and territory 'child protection laws'—that is, laws that aim to protect children from abuse and neglect[57]—govern the resolution of public disputes between state or territory governments and individuals about the care and protection of their children.

2.45 The nature of the different proceedings was described by the Family Law Council:

> [T]he applicant in family proceedings in State and Territory children's courts is always the State and Territory child protection authority. Hence, children's court disputes are public law disputes with the State acting as applicant. This is in contrast to disputes under the Commonwealth [*Family Law Act*] where both the applicant and respondent are usually a parent or family member, and the dispute is thus a private one. There can, however, be a private element to child protection disputes and a public element to Family Court disputes. For example, in a matter before the Family Court an allegation of abuse may be made requiring child protection authorities to become involved. At the State and Territory level, once the public law threshold for intervention has been met, a children's court may make custody and access orders in favour of individuals in the context of exercising their protective jurisdiction (although the ambit of this power depends on the order made), thus creating a private law dimension in such disputes.[58]

2.46 The Council also observed that despite the differences between the jurisdictions and the 'distinct divide between private and public law', the orders available under the state and territory family violence and child protection legislation 'cover much of the same ground' as the *Family Law Act*.[59]

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54 Family Law Council, *The Best Interests of the Child? The Interaction of Public and Private Law in Australia—Discussion Paper* (2000), [3.8].

55 *Family Law Act 1975* (Cth) s 69ZK. See the discussion of s 69K in Ch 14 and in Family Law Council, *The Best Interests of the Child? The Interaction of Public and Private Law in Australia—Discussion Paper* (2000), [2.21]–[2.22].

56 Family Law Council, *The Best Interests of the Child? The Interaction of Public and Private Law in Australia—Discussion Paper* (2000), [3.9].

57 *Children and Young Persons (Care and Protection) Act 1998* (NSW); *Children, Youth and Families Act 2005* (Vic); *Child Protection Act 1999* (Qld); *Children's Protection Act 1993* (SA); *Children, Young Persons and their Families Act 1997* (Tas); *Children and Young People Act 2008* (ACT); *Care and Protection of Children Act 2007* (NT).

58 Family Law Council, *The Best Interests of the Child? The Interaction of Public and Private Law in Australia—Discussion Paper* (2000), [2.6].

59 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), [7.3.4].

Family violence

2.47 The primary mechanism exercised at state and territory level in relation to family violence is that of protection orders—and these may interact with the *Family Law Act*:

> There is often interplay between State Protection orders which provide for the protection of a parent and their children by prohibiting the alleged perpetrator (the other parent) from coming within a defined distance of the parent and child, and federal family court orders that provide for the child to spend time with that parent.[60]

2.48 Division 11 of the *Family Law Act* was introduced with the objective of resolving inconsistencies between *Family Law Act* contact orders and state and territory family violence orders, however 'the possibility of inconsistent orders still exists where one court orders contact while another court prohibits it':[61]

> While the [*Family Law Act*] permits contact orders to be inconsistent with State and Territory family violence orders, providing ss 68K and 68R are complied with, s 68T of the [*Family Law Act*] states that in the course of making or varying a family violence order, a State and Territory court may make, revive, vary, discharge or suspend a [*Family Law Act*] contact order.
>
> While the [*Family Law Act*] contains quite detailed procedures for the Court to follow when the possibility of inconsistent orders arises, the written law is not necessarily the same as the law in practice.[62]

2.49 As noted by the Family Law Council, the levels of complexity increase the more 'blended' the family is:

> The interplay between State child protection orders and orders by federal family courts is heightened where there are differing arrangements between parents of children in a family or differing orders in respect of siblings within a family unit. This is not uncommon in blended families for a parent to have had children with different partners. Often the arrangements in respect of each of the children may vary. For example, one child may be the subject of a State child protection order (public law) and the arrangements in respect of the other child(ren) are determined under private law (federal family courts). There is also the concern in respect of those children who are the subject of temporary child protection orders in the State courts but the orders are not pursued by the child welfare authority in the State or Territory courts on the basis that the 'relative' is to apply to the federal family courts for parenting orders.[63]

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60 Ibid, 54.

61 Family Law Council, *The Best Interests of the Child? The Interaction of Public and Private Law in Australia—Discussion Paper* (2000), [3.2].

62 Ibid, [3.5].

63 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), 54–55.

2.50 This is the kind of 'interaction in practice' issue that sits within the Terms of Reference for this Inquiry. Put at its simplest:

> more than one court may be involved in a particular family breakdown. Disputes cannot be neatly divided into private and public areas of law and parties will often have to institute or be engaged in proceedings in various legal forums to have all of their issues determined. ... The overlapping jurisdictions cause significant angst for the parties involved and considerable difficulties for the courts.[64]

International instruments

2.51 Under its constituting legislation, the ALRC is directed to have regard to 'all of Australia's international obligations that are relevant to the matter'.[65] A number of international conventions are relevant to the legal framework in relation to violence against women and children in a family violence context. In particular, these reflect the acknowledgment that violence against women and children is a violation of human rights.

2.52 Such international instruments do not become part of Australian law until incorporated into domestic law by statute.[66] But, as noted by the High Court in *Minister for Immigration and Ethnic Affairs v Teoh*, a convention can still assist with the interpretation of domestic law:

> The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law. But the courts should act in this fashion with due circumspection when the Parliament itself has not seen fit to incorporate the provisions of a convention into our domestic law.[67]

Universal Declaration of Human Rights

2.53 The Universal Declaration of Human Rights (UDHR) was adopted and proclaimed by the General Assembly of the United Nations on 10 December 1948, in the wake of the Second World War, and as the first international expression of rights to which all human beings are entitled.[68] Comprising 30 articles, it provides the backdrop for a number of later instruments which embody and expand upon its provisions.

International Covenant on Civil and Political Rights

2.54 The *International Covenant on Civil and Political Rights* (ICCPR), described as 'one of the most important human rights conventions of the United Nations era',[69] was adopted by the United Nations General Assembly on 16 December 1966 and ratified

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64 Ibid, [7.3.5].
65 *Australian Law Reform Commission Act 1996* (Cth) s 24(2).
66 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–8; 315.
67 Ibid, 288.
68 *Universal Declaration of Human Rights*, 10 December 1948, (entered into force generally on 10 December 1948).
69 B Opeskin and D Rothwell (eds), *International Law and Australian Federalism* (1997), 16.

by the Australian Government in 1980. In making any proposals or recommendations the ALRC is directed to ensure that they are consistent, 'as far as practicable', with the ICCPR.[70]

2.55 A number of articles of the ICCPR are of particular relevance in the context of a consideration of family violence. Article 23 provides that '[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State';[71] and art 17 includes protection for the family in stipulating that:

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.[72]

2.56 With respect to children, art 24 provides that:

> Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2.57 Another key right is the right to a 'fair and public hearing' in art 14 with minimum procedural guarantees in the case of criminal charges.[73]

2.58 In the context of family violence, there are evident tensions in the way that these articles—and the expectations they engender—might operate. The person accused of committing family violence is entitled to a fair hearing (art 14); the family itself, as a fundamental unit of society, is entitled to protection (art 23); and the child is entitled to the expectation of protection by his or her family and the state (art 24). When, for example, a child is the subject of abuse by a family member, each of these articles, and their inherent expectations, may be in conflict. Similarly, where a woman is the subject of family violence, the protection of the family requires being open to public scrutiny—notwithstanding the right to privacy and the protection of the home (art 17).

Convention on the Elimination of Discrimination Against Women

2.59 The *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW)[74] specifically targets discrimination against women. CEDAW came into force for Australia on 27 August 1983.[75]

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70 *Australian Law Reform Commission Act 1996* (Cth) s 24(1)(b).

71 Reflecting art 16 of the *Universal Declaration of Human Rights*, 10 December 1948, (entered into force generally on 10 December 1948).

72 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976), art 17(1). This article reflects art 12 of the UDHR.

73 Ibid, art 14. This article reflects art 10 of the UDHR.

74 *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, [1983] ATS 9, (entered into force generally on 3 September 1981).

75 Ibid; and see, eg, E Evatt, 'Eliminating Discrimination Against Women: The Impact of the UN Convention' (1991) 18 *Melbourne University Law Review* 435. In March 2009 Australia became a party

2.60 CEDAW defines discrimination as any distinction, exclusion or restriction which prevents the equal exercise or enjoyment by women of human rights and fundamental freedoms 'in the political, economic, social, cultural, civil or any other field'.[76] It supplements the anti-discrimination provisions in the ICCPR, amongst others.[77] It has been called 'an international bill of rights for women'[78] and described as representing 'a commitment by the international community to equality in the enjoyment of human rights'.[79]

2.61 In 1993 the ALRC was given Terms of Reference on equality before the law as part of the Australian Government's 'New National Agenda for Women' requiring the ALRC to consider whether laws should be changed or new laws made to remove any unjustifiable discrimination with a view to ensuring women's full equality before the law. Two reports resulted.[80] The ALRC noted in particular that:

> As a party to [CEDAW], Australia has undertaken to pursue 'by all appropriate means and without delay a policy of eliminating discrimination against women'.[81]

2.62 The ALRC also noted that as a party to the ICCPR, considered below, 'Australia must guarantee the equal protection of human rights to men and women without discrimination and equality before the law'.[82]

2.63 The ALRC concluded that a significant aspect of gender inequality—and therefore of discrimination in contravention of CEDAW—was 'women's experience and fear of violence'.[83] This was not a new discovery. As noted by Young and Monahan, while academic commentators had been writing about the dynamic of violence in gender inequality 'for some years',[84]

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to the CEDAW Optional Protocol, which allows individuals to bring a complaint directly to the UN CEDAW Committee, after all remedies domestically have been exhausted.

76 *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, [1983] ATS 9, (entered into force generally on 3 September 1981), Arts 1–3.

77 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976), art 2.1. See also E Evatt, 'Eliminating Discrimination Against Women: The Impact of the UN Convention' (1991) 18 *Melbourne University Law Review* 435.

78 E Evatt, 'Eliminating Discrimination Against Women: The Impact of the UN Convention' (1991) 18 *Melbourne University Law Review* 435, 435.

79 Ibid, 437.

80 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, ALRC 69 (1994); Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 2)*, ALRC 69 (1994).

81 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, ALRC 69 (1994), [1.2].

82 Ibid.

83 Ibid, [2.30].

84 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [16.2], drawing attention to R Graycar and J Morgan, *The Hidden Gender of Law* (2nd ed, 2002), ch 10 and the literature cited by them there.

> The ALRC's distinctive contribution was to raise the general public and government awareness of the issue and to act as a mouthpiece for the views of women across Australia.[85]

2.64 A further aspect of inequality highlighted by the ALRC was the impact that violence has on women's access to the legal system:

> Violence directly impedes women in enforcing their legal rights through its destructive impact on their personal confidence and because they may fear retaliation.[86]

2.65 Although CEDAW does not expressly mention violence as a form of discrimination, parties are asked to report on the protection of women against the incidence of all kinds of violence, 'including sexual violence, abuses in the family, sexual harassment at the work place, etc'.[87] So, for example, where art 16 calls for the elimination of discrimination in marriage and the family, family violence 'is clearly a form of discrimination which denies women equality'.[88]

Declaration on the Elimination of Violence against Women

2.66 The Declaration on the Elimination of Violence against Women was adopted by the General Assembly of the United Nations on 20 December 1993, to complement and strengthen CEDAW. The commencing articles of the declaration define violence against women:

> Article 1
>
> For the purposes of this Declaration, the term 'violence against women' means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.
>
> Article 2
>
> Violence against women shall be understood to encompass, but not be limited to, the following:
>
> (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
>
> (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

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85 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [16.2].

86 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, ALRC 69 (1994), [9.6].

87 E Evatt, 'Eliminating Discrimination Against Women: The Impact of the UN Convention' (1991) 18 *Melbourne University Law Review* 435, 438, n 21 citing Rec 12, 8th session 1989.

88 Ibid, 441.

> (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

2.67 In 1999, the General Assembly designated 25 November as the International Day for the Elimination of Violence against Women.

Convention on the Rights of the Child

2.68 The United Nations *Convention on the Rights of the Child* (CROC)[89] has been described as 'the most comprehensive statement of children's rights ever drawn up at the international level'.[90] Following ratification by Australia on 17 December 1990, CROC has proved of significance in 'shaping the first wave of reforms to Pt VII of the *Family Law Act* effected under the *Family Law Reform Act 1995* (Cth)'.[91]

2.69 CROC sets out the full range of human rights—civil, cultural, economic, political and social rights—pertaining to children under 18 years of age.[92] CROC spells out that children everywhere have the right:

- to survival;
- to develop to the fullest;
- to protection from harmful influences, abuse and exploitation; and
- to participate fully in family, cultural and social life.

2.70 The four core principles of the Convention are non-discrimination; devotion to the best interests of the child; the right to life, survival and development; and respect for the views of the child. In a joint 1997 report, the ALRC and the Human Rights and Equal Opportunity Commission stated that:

> CROC recognises that children, as members of the human family, have certain inalienable, fundamental human rights. It emphatically endorses the proposition that the family is the fundamental environment for the growth and well-being of children and states that, for the well-being of society, the family should be afforded protection and assistance so as to fully assume its responsibilities. At the same time, it recognises that children need special safeguards and care where the family does not or cannot assume these roles.[93]

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89 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990).

90 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [7.3].

91 Ibid, [7.5].

92 UNICEF, *Convention on the Rights of the Child—Introduction* <www.unicef.org/crc/index_30160.html> at 18 January 2010.

93 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [3.15].

2.71 A number of CROC provisions are particularly relevant to this Inquiry. First, 'the best interests of the child' is a central principle:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[94]

2.72 Secondly, the maintenance of contact between a child and his or her parents is affirmed, subject to the 'best interests' principle:

> States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.[95]

2.73 Of particular note is the rider in the above provision—that separation of a child from a parent may be in the child's best interests where the child is subject to abuse or neglect by a parent. However, notwithstanding this qualification, it is also stated that:

> States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.[96]

2.74 The risk of violence and abuse to a child is given specific attention, States Parties being required to

> take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.[97]

2.75 CROC also includes articles concerning protection from sexual exploitation and sexual abuse;[98] and promoting physical and psychological recovery from, amongst other things, any form of neglect, exploitation or abuse.[99]

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94 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990), art 3(1).

95 Ibid, art 9(1).

96 Ibid, art 9(3).

97 Ibid, art 19(1). 'Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement': art 19(2).

98 Ibid, art 34.

99 Ibid, art 39.

2.76 The child's right to be heard in proceedings involving him or her is also addressed:

> States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.[100]

2.77 The right to express his or her own views may be satisfied by being given an opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of applicable national law.[101]

2.78 These articles provide the base guidelines for children's interactions with legal processes. Some aspects of CROC, however, may need further consideration—particularly in relation to the *Family Law Act*—such as art 12 dealing with the child's right to be heard in proceedings affecting it, either directly, or indirectly through a representative or appropriate body.[102]

2.79 In *B and B: Family Law Reform Act 1995*, the Full Court of the Family Court expressed the view that CROC

> must be given special significance because it is an almost universally accepted human rights instrument and thus has much greater significance for the purposes of domestic law than does an ordinary bilateral or multilateral treaty not directed at such ends.[103]

2.80 The relationship between CROC and the *Family Law Act* has been considered by the High Court in the context of mandatory detention of children in immigration detention centres when proceedings for the release of two boys were brought under pt VII of the *Family Law Act*.[104] The High Court held that the welfare power was constrained by the constitutional head of power under which it was enacted and, accordingly, that the Family Court had no jurisdiction either to order the release of the children from detention or to make general orders concerning the welfare of detained children.

Convention on the Civil Aspects of International Child Abduction

2.81 The 1980 *Hague Convention on Civil Aspects of International Child Abduction* (the Abduction Convention), to which Australia became a signatory on 1 January 1988,[105] sought to provide for the return of children under the age of 16 years who

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100 Ibid, art 12(1).
101 Ibid, art 12(2).
102 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [7.5].
103 *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676, [10.19].
104 *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365.
105 *Convention on the Civil Aspects of International Child Abduction*, [1987] ATS 2, (entered into force generally on 1 December 1983).

have been wrongfully removed from, or retained outside, their country of habitual residence.[106]

2.82 The Convention sets up a Central Authority in each country to deal with requests for the return of children taken to or from each country. Signatories commit to the prompt return of children to the country in which they habitually reside so that issues of parental responsibility can be resolved by the courts in that country.

2.83 The Convention was implemented in Australia through the *Family Law (Child Abduction Convention) Regulations 1986* (Cth). The Secretary of the Attorney-General's Department is designated as the Commonwealth Central Authority under the Convention with responsibility for coordinating incoming and outgoing requests to and from overseas Central Authorities and liaising with the relevant state or territory Central Authority in Australia to perform Australia's obligations under the Convention.[107]

2.84 Article 1 sets out the objects of the Abduction Convention:

> a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
>
> b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

2.85 There are a number of exceptions to the requirement to return the child set out in art 13, in particular where:

> a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention;
>
> b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
>
> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

2.86 While these provide some qualification to the 'prompt return' principle, the overall emphasis in the Abduction Convention is not on 'the best interests of the child'—language used, for example, in CROC—but rather on the 'rights of custody and access'—namely, rights of the parents. In a study on Abduction Convention cases in Australia, Deborah Fry remarked of this different emphasis that:

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106 UNICEF, *Convention on the Rights of the Child—Introduction* <www.unicef.org/crc/index_30160.html> at 18 January 2010, arts 3, 4.

107 Attorney-General's Department, *International Child Abduction* <www.ag.gov.au/www/agd/agd.nsf/Page/Families_Children_Internationalchildabduction> at 16 March 2010.

> While the Convention is generally praised for providing hope and redress for many parents in providing the prompt return of abducted children, it is also criticised for failing to adequately balance the needs and interests of particular children against the needs and interests of all children everywhere. The Hague Convention does not rest upon consideration of the principle of the 'best interests of the child' but rather purports to uphold the best interests of children collectively by deterring international abduction. It is Utilitarian at its philosophical base, aimed at enforcing the greatest good for the greatest number.[108]

2.87 The Full Court of the Family Court summarised the effect of the Abduction Convention and Regulations in *In the Marriage of Emmett and Perry*:

> The *Family Law (Child Abduction Convention) Regulations* impose upon the court a primary obligation to promptly return children wrongfully removed or retained. Matters coming before this court are not to be treated as competing claims for interim custody. Proceedings under the regulations are to be heard in a prompt and summary way and it is only in exceptional circumstances that a court would give consideration to refusing the application of the Central Authority for the return of the children. Regulation 16 does vest in the court a discretion to refuse to return children if certain conditions are established. The onus of establishing those preconditions rests upon the party resisting the order for return of the children and that onus must necessarily be a heavy one.[109]

2.88 Abduction Convention matters may sit at the intersection of *Family Law Act*, child protection and family violence laws. For example, where there has been violence to the mother of the child by her partner, and the child has witnessed the violence, how might this be considered in relation to an Abduction Convention application for the recovery of the child? How difficult is it for a mother who seeks to escape violence by leaving her partner to argue that the exposure of the child to the violence on her 'would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation'?[110] This is a matter of particular relevance in this Inquiry and will be considered in Chapter 9.

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108 D Fry, 'Children's Voices in International Hague Convention Child Abduction Cases—An Australian Experience' (Paper presented at 5th World Congress on Family Law and Human Rights, Halifax, Canada, August 2009), 8.

109 *In the Marriage of Emmett and Perry* (1995) 20 Fam LR 380, 383.

110 *Convention on the Civil Aspects of International Child Abduction*, [1987] ATS 2, (entered into force generally on 1 December 1983), art 13(b).

Part B

Family Violence

3. Purposes of Laws Relevant to Family Violence

Introduction

3.1 The Commissions have been asked to consider how family violence laws interact in practice with the criminal laws of the states, territories and the Commonwealth, and with the *Family Law Act (1975)* (Cth). The interactions cross geographical jurisdictions, various areas of substantive law—namely family law, family violence law, criminal law and criminal procedure—and span criminal and civil jurisdictions, and private and public law. This Part of the Consultation Paper will consider this particular aspect of the Commissions' Terms of Reference.

3.2 This chapter discusses the underlying policy justifications for various laws relevant to family violence. These laws include those specifically referred to in the Terms of Reference—namely family violence laws, family law and the criminal law—as well as victims' compensation schemes and migration law. Victims' compensation

schemes are addressed because of their particular interaction with the criminal law, and also because victims' compensation is inextricably connected to an assessment of how legal frameworks can be improved to assist victims of family violence to navigate various jurisdictions. While, as noted in Chapter 1, there are a range of federal laws which intersect with family violence laws and other laws the subject of the Terms of Reference, the *Migration Regulations 1994* (Cth) are addressed because their operation impacts on a group of women who are particularly vulnerable to family violence, due to the threat of deportation, as highlighted by the National Council to Reduce Violence Against Women and their Children.[1]

3.3 An analysis of these policy considerations reveals that, while policy justifications differ, in some cases different statutory regimes share common aims. This discussion is a necessary prelude to the consideration of the desirability of pursuing a common interpretative framework of what constitutes family violence across the different legislative schemes under consideration—an issue which is canvassed in Chapter 4. A key theme explored in this Part of the Consultation Paper is balancing the need for synergies between statutory definitions of family violence and the underlying purposes of various civil and criminal legislative schemes relevant to family violence, with the benefits that could flow from the adoption of a common interpretative framework.

3.4 A discussion of the underlying policy objectives of the various legislative schemes also serves as a general background to the discussion of specific interaction issues between family violence laws and the criminal law, and between family violence laws and the *Family Law Act*, which are considered in the following chapters in this Part.[2] Chapters 5 to 7 discuss interaction issues between family violence laws and criminal procedures and criminal laws, as well as the recognition of family violence in the criminal law. Chapters 8 and 9 discuss interaction issues between family violence laws and the *Family Law Act*, including various orders under the *Family Law Act*, such as parenting orders, property orders and injunctive relief. Chapter 10 discusses potential avenues of reform to improve the interaction of family violence laws and the *Family Law Act*—namely ways to improve evidence and information-sharing. Chapter 11 discusses the issue of whether certain alternative processes—namely family dispute resolution and restorative justice—are appropriate.[3]

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1 The National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), [2.5].

2 International conventions relevant to the legal framework governing family violence are discussed in Ch 2. Elements of those conventions are reflected in certain policy justifications for laws relevant to family violence.

3 Chapters 19 and 20—which discuss integrated responses and specialisation respectively—also discuss options for reform relevant to family violence, as well as child protection and sexual assault.

3.5 The organisation of the chapters in this Part—addressing issues of interaction between specified legislative schemes—has been decided upon for convenience in writing, and to address the specific interactions of legal frameworks referred to in the Terms of Reference. As stated in Chapter 1, the Commissions recognise that, in practice, issues may not present themselves in such a siloed manner. Matters may involve interactions between multiple legal frameworks, and there may be different permutations of interactions between legal frameworks—such as interactions between family violence and child protection laws.

Family violence legislation

3.6 The discussion below addresses the purpose and objects of family violence legislation, as well as the specific purpose of family violence protection orders.

Purpose of family violence legislation

3.7 Family violence legislation was enacted in most states and territories in the 1980s and 1990s as a response to growing recognition that existing legal mechanisms failed to protect victims—predominantly women—from family violence. Feminist critiques in the 1970s and 1980s, for example, highlighted the inability of the criminal justice system to protect women from future violence, as well as systemic institutional failure to tackle family violence.[4]

3.8 Most family violence acts contain objects clauses which set out their purposes—though the degree of articulation and specificity varies.[5] Some family violence acts also contain preambles or articulate specific principles which assist in identifying the policy underpinning the legislative scheme. The objects and principles set out in family violence legislation—and identified in second reading speeches—are addressed in turn below.

3.9 Objects that are expressly stipulated in family violence legislation—in varying language—include:

- ensuring, facilitating or maximising the safety and protection of persons, including children, who fear or experience family violence or are exposed to it;[6]

4 B Fehlberg and J Behrens, *Australian Family Law—The Contemporary Context* (2008), 198 (citations omitted).

5 For example, the Queensland legislation sets out one main purpose, whereas some other jurisdictions specify several purposes. Objects clauses are also discussed in Ch 4 and the Commissions make proposals in this regard.

6 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(1)(a); *Family Violence Protection Act 2008* (Vic) s 1(a); *Domestic and Family Violence Protection Act 1989* (Qld) s 3A(1); *Domestic Violence and Protection Orders Act 2008* (ACT) s 6(b); *Domestic and Family Violence Act 2007* (NT) s 3(1)(a).

- reducing or preventing family violence and the exposure of children to the effects of family violence;[7]

- ensuring that people who use family violence accept responsibility for their conduct,[8] or promoting the accountability of those who use family violence for their actions;[9]

- enacting provisions that are consistent with certain principles underlying the *Declaration on the Elimination of Violence against Women* and with the United Nations *Convention on the Rights of the Child*;[10]

- providing special police powers of arrest, detention and search in connection with issuing, serving and enforcing protection orders;[11] and

- further protecting persons suffering or witnessing family violence in the giving of evidence and the protection of identity.[12]

3.10 The Tasmanian legislation cites in its objects clause 'the safety, psychological well-being and interests of people affected by family violence' as paramount considerations in the administration of the Act.[13]

3.11 The family violence legislation of Western Australia does not have an objects clause setting out the purposes of the Act. It does, however, set out certain matters to be considered by the court in considering whether to make a protection order, from which certain objects can be implied.[14] As stated in the Second Reading Speech:

> The first three [matters in s 12] are the primary considerations: that is, to protect the applicant from personal violence; secondly to prevent behaviour that could reasonably be expected to cause fear that the applicant will suffer personal violence … the third prime consideration is … the welfare of children.[15]

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7 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(1)(b); *Family Violence Protection Act 2008* (Vic) s 1(b); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 5(a); *Domestic Violence and Protection Orders Act 2008* (ACT) s 6(a); *Domestic and Family Violence Act 2007* (NT) s 3(1)(c).

8 *Domestic and Family Violence Act 2007* (NT) s 3(1)(b).

9 *Family Violence Protection Act 2008* (Vic) s 1(c). This purpose concerning accountability is similar to those expressed in the sentencing legislation of NSW and Victoria, which is discussed below. See also *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 10(1)(d) which states that intervention should be designed to encourage defendants to accept responsibility and take steps to avoid committing family violence.

10 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(1)(c), (d). These conventions are described in Ch 2.

11 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 5(b).

12 Ibid s 5(c).

13 *Family Violence Act 2004* (Tas) s 3.

14 *Restraining Orders Act 1997* (WA) s 12. Section 12 was amended in 2004 to insert a further paragraph (ba)—'the need to ensure that children are not exposed to acts of family and domestic violence'.

15 Western Australia, *Parliamentary Debates*, Legislative Assembly, 29 May 1997, 1219 (J McGinty), 3485.

Protection as the primary concern

3.12 Significantly, some legislation and second reading speeches state an intention to prioritise the protection of victims of family violence as the main objective. For example, the Queensland family violence legislation provides that the main purpose of the Act is to provide safety and protection for victims of family violence, and it does not nominate any additional purposes.[16] In the Second Reading Speech of the Northern Territory family violence legislation, the Attorney-General stated that:

> The primary objective of the bill is to ensure the safety of all people, including children, who experience domestic and family violence, and the second objective, to ensure that those who commit violence in their relationships must accept responsibility for their behaviour.[17]

3.13 The Second Reading Speech of the Domestic Violence and Protection Orders Bill 2008 (ACT) also emphasised the object of protection:

> The purpose of this act is to provide enforceable court orders to protect people who experience domestic violence and other people who have good reason to fear violence.
>
> … People who experience violence require and deserve the assistance of our justice system to aid their protection. …
>
> It is well recognised from the significant body of research that has been undertaken in this field that many people who are subjected to this form of violence never report the offence to police. Recognising this, it is essential that the protection afforded to those in need under this act be readily available and accessible.[18]

3.14 Similarly, the Second Reading Speech of the Intervention Orders (Prevention of Abuse) Bill 2009 (SA) stresses the priority of protection:

> In enacting these reforms, Parliament will be sending a clear message that it will not tolerate the use of violence to control or intimidate another person, particularly in a domestic setting; that it recognises and abhors the lasting psychological and emotional damage to children from exposure to such violence; that it expects perpetrators to accept full responsibility for their violent behaviour; *and that the paramount consideration is always the protection and future safety of the victims of abuse and the children who are exposed to it*.[19]

Other objectives revealed in second reading speeches

3.15 A number of other objectives are also revealed in second reading speeches. For example, in the Second Reading Speech of the Northern Territory legislation, the Attorney-General stated that:

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16 *Domestic and Family Violence Protection Act 1989* (Qld) s 3A(1).

17 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 17 October 2007, 4846 (S Stirling—Attorney-General), 4846.

18 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 7 August 2005, 3005 (S Corbell—Attorney-General, Minister for Police and Emergency Services), 3005–3006.

19 South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2009, 3937 (M Atkinson—Attorney-General), 3944 (emphasis added).

> Another central objective of the legislation is to ensure minimal disruption to the lives of families affected by violence. There will be a new presumption when making orders in favour of an applicant with children in their care remaining in the family home.[20]

3.16 In the Second Reading Speech of the Intervention Orders (Prevention of Abuse) Bill 2009 (SA) the Attorney-General stated that the legislation

> will also be offering perpetrators of domestic or personal abuse the means to deal with associated problems of substance abuse, mental health, problem gambling and anger control, in the expectation that they will then be able to reflect upon and appreciate the effects of their abusive behaviour on others, take responsibility for it and learn to treat other people, particularly those close to them, with respect and care.[21]

3.17 In the Second Reading Speech of the Family Violence Protection Bill 2008 (Vic) Ms Marshall stated that:

> This bill seeks to address two main issues: the attitude that family violence is a domestic matter and therefore not a crime worthy of response; and the need to ensure that the justice system itself does not inadvertently compound the devastating effects of family violence.[22]

Overlap with family law policy

3.18 The policy of giving consideration to the best interests of the child is consistent with the approach taken in family law in the context of parenting disputes.[23] Importantly, the policy behind some aspects of family violence legislation is also to give paramount consideration to the best interests of the child. This is specifically referred to in the Second Reading Speech of the Crimes (Domestic and Personal Violence) Bill 2007 (NSW) in a discussion of the provisions requiring the inclusion of children in protection orders.[24] It is also referred to in the Second Reading Speech of the Domestic and Family Violence Bill 2007 (NT) in the context of reforms which aim to ensure that children are protected from family violence and that their long-term development is not damaged by the experience of, or exposure to, family violence. It is stated that such reforms are 'consistent with the principle of the best interests of the child contained in the *Convention on the Rights of the Child*'.[25]

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20 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 17 October 2007, 4846 (S Stirling—Attorney-General), 4848. A similar intention is expressed in South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2009, 3937 (M Atkinson—Attorney-General), 3943. The *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 10(1)(d) also expresses the principle that intervention should be designed to minimise disruption to protected persons and the children living with them.

21 South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2009, 3937 (M Atkinson—Attorney-General), 3944.

22 Victoria, *Parliamentary Debates*, House of Assembly, 21 August 2008, 3190 (K Marshall), 3195.

23 Family law policy is discussed separately below.

24 New South Wales, *Parliamentary Debates*, Legislative Council, 29 November 2007, 4652 (T Kelly—Minister for Lands, Minister for Rural Affairs, Minister for Regional Development, and Vice-President of the Executive Council), 4652.

25 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 17 October 2007, 4846 (S Stirling—Attorney-General), 4846.

3.19 Another—perhaps less obvious—area of overlap between the policy objectives in family violence legislation and family law is revealed in the Second Reading Speech of the Domestic Violence (Family Protection) Bill 1989 (Qld), in which the Minister for Family Services emphasised the importance of the role of family in society, and the institution of marriage:

> No one should doubt that the family is the natural and fundamental unit in our society … The widest possible protection and assistance needs to be given to the family unit and the institution of marriage …
>
> The Queensland Government is committed to doing all in its power to promote the family unit and strengthen and support its role. …
>
> Many victims of domestic violence have indicated that they do not wish to end their marriages. They just want the violence to stop. The proposed legislation may allow this to occur in those cases without the disintegration of the family unit.[26]

Achievement of objects

3.20 Most family violence legislation states the manner in which they intend to achieve their specific objects. These include statements about providing for the following:

- the making of protection orders by the court—or police where they are empowered to do so—to protect people from family violence or further family violence,[27] and to encourage those committing family violence to change their behaviour;[28]
- the registration of orders made in other jurisdictions;[29]
- the enforcement of protection orders;[30]
- an effective and accessible system of family violence protection orders—including those that are issued by police[31]—and access to courts that is as safe, speedy, inexpensive and simple as is consistent with justice;[32]
- the creation of offences for the contravention of family violence orders;[33]

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26 Queensland, *Parliamentary Debates*, Legislative Assembly, 15 March 1989, 3797 (C Sherrin—Minister for Family Services), 3797.

27 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s (2); *Domestic and Family Violence Protection Act 1989* (Qld) s 3(2); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 5(a); *Domestic and Family Violence Act 2007* (NT) s 3(2)(a).

28 *Domestic and Family Violence Act 2007* (NT) s 3(2)(a).

29 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 5(a); *Domestic and Family Violence Act 2007* (NT) s 3(2)(b).

30 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 5(a); *Domestic and Family Violence Act 2007* (NT) s 3(2)(c).

31 *Family Violence Protection Act 2008* (Vic) s 2(a).

32 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(2)(b).

- the issuing of associated orders relating to problem gambling and tenancy agreements;[34]

- special arrangements for witnesses in family violence protection proceedings;[35] and

- limitations on publishing reports about proceedings or orders under family violence legislation.[36]

Guiding principles

3.21 The family violence legislation in NSW and Victoria sets out guiding principles and features about family violence, which provide a contextual framework for the legislative response. The NSW legislation does so in its objects clause; and the Victorian legislation does so in its preamble. The family violence legislation of South Australia also contains principles which must be taken into account in determining both whether it is appropriate to issue a protection order and the terms of such order.[37] In particular, the family violence legislation of those states highlights the following principles and features about family violence:

- it is unacceptable behaviour in all its forms,[38] and in any community or culture;[39]

- it is a fundamental violation of human rights;[40]

- that in responding to it the justice system should treat the views of victims of family violence with respect;[41]

- it is predominantly committed by men against women and children;[42]

- it affects the entire community,[43] and occurs in all sectors of the community;[44]

- it extends beyond physical violence;[45]

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33 *Family Violence Protection Act 2008* (Vic) s 2(b).
34 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 5(a).
35 Ibid s 5(c).
36 Ibid.
37 Ibid s 10.
38 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(3).
39 *Family Violence Protection Act 2008* (Vic) preamble.
40 Ibid.
41 Ibid.
42 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(3).
43 *Family Violence Protection Act 2008* (Vic) preamble.
44 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(3); *Family Violence Protection Act 2008* (Vic) preamble; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 10(1)(a).

- it may involve the overt or subtle exploitation of power imbalances and may consist of patterns of abuse over many years[46] or of isolated incidents;[47]

- it occurs in traditional and non-traditional settings;[48]

- children who are exposed to family violence—as victims or witnesses—are particularly vulnerable, and can suffer detrimental effects to their current and future physical, psychological and emotional well-being;[49] and

- it is best addressed through a coordinated legal and social response of assistance and prevention.[50]

3.22 The family violence legislation of the ACT states that family violence is 'a particular form of interpersonal violence that needs a greater level of protection'.[51]

Purpose of family violence protection orders

3.23 The purpose of family violence protection orders is to protect victims from *future* violence—typically by the imposition of conditions regulating the behaviour and movements of persons who have committed family violence. The focus on restraining future behaviour is similar to the granting of injunctive relief. The emphasis is on the immediate protection of victims, often as a response to a crisis situation. The need to provide immediate protection is facilitated by legislative provisions for emergency orders or interim orders.

3.24 These objectives are evidenced in second reading speeches, as well as in family violence legislation. For example, the Second Reading Speech of the Restraining Orders Bill 1997 (WA) states that protection orders 'play a central role in the legal response to domestic violence by affording what is intended to be ready access to legal protection for victims'.[52]

3.25 The family violence legislation of the ACT provides that in deciding an application for a protection order, the paramount consideration is 'the need to ensure

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45 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(3); *Family Violence Protection Act 2008* (Vic) preamble.

46 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(3); *Family Violence Protection Act 2008* (Vic) preamble; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 10(1)(b).

47 *Family Violence Protection Act 2008* (Vic) preamble; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 10.

48 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(3).

49 Ibid s 9(3); *Family Violence Protection Act 2008* (Vic) preamble. See also *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 10(c) which states that it is of primary importance to prevent family violence and to prevent children from being exposed to it.

50 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(3).

51 *Domestic Violence and Protection Orders Act 2008* (ACT) s 6(a).

52 Western Australia, *Parliamentary Debates*, Legislative Council, 12 March 1997, 156 (P Foss—Attorney-General), 157.

that the aggrieved person, and any child at risk of exposure to domestic violence, is protected from domestic violence.'[53]

3.26 The ACT legislation, however, also provides that if a protection order is to be made it is one that must be the

> least restrictive of the personal rights and liberties of the respondent as possible that still achieves the objects of the Act and gives effect to [the paramount consideration to ensure protection].[54]

3.27 In the Second Reading Speech of the South Australian legislation, the Attorney-General emphasised the policy underlying new police powers to issue interim protection orders:

> This new police power, combined with improved powers to hold a defendant pending preparation and service of process and while making arrangements for the security of the victim, is designed to give victims and their children immediate protection from abuse without first needing to go to court first, in circumstances where the alleged perpetrator can be served on the spot and is therefore instantly bound by the order.[55]

Family law

3.28 The *Family Law Act* sets out the rights, duties, powers and liabilities between spouses and children, and provides for enforcement of those rights and liabilities and the dissolution of marriage.[56] The discussion below canvasses the historical policy behind the original *Family Law Act*, as well as the policy underlying the Act as amended since inception.

Historical policy underlying the *Family Law Act*

3.29 There are a number of policy strands underpinning the *Family Law Act.* These include a philosophy of no fault; the best interests of the child; preserving the institution of marriage; promoting reconciliation; and protecting the notion of the family.

3.30 ***No fault philosophy***. One of the main ideological foundations for the introduction of the *Family Law Act* was the removal of the previous requirement of fault for divorce and a move towards a 'no-fault' system for the dissolution of marriage.[57] As consultation conducted by the Senate Standing Committee on Constitutional and Legal Affairs in the early 1970s revealed, the community considered that the previous provisions were costly and protracted, and also involved indignity and humiliation to the parties because of the court's inquiry into the

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53 *Domestic Violence and Protection Orders Act 2008* (ACT) s 7(1)(a).
54 Ibid s 7(2).
55 South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2009, 3937 (M Atkinson—Attorney-General), 3940. Police powers to issue protection orders are discussed in Ch 6.
56 A Dickey, *Family Law* (5th ed, 2007), 43.
57 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), 29.

breakdown of marriage.[58] Consequently, all inquiries as to fault were removed from the legislation.

3.31 The original *Family Law Act* did not expressly mention family violence, or the need to protect women and children from harm. In the Second Reading Speech of the Family Law Bill 1973 (Cth), the then Attorney-General, Lionel Murphy, said:

> I have given a great deal of thought to whether there should be another ground to meet the cases such as where the husband repeatedly comes home drunk and beats up his wife and terrifies the children, if not beating them as well. The marriage may become intolerable for the wife, and yet she cannot physically separate from her husband because there is nowhere she can go ... however [an intolerable conduct] ground would of necessity contain an element of fault, and there would have to be an inquiry to satisfy the court that the respondent's conduct was intolerable. This is what we are trying to avoid.[59]

3.32 In addition, it appears that the government considered that there would be no need for an 'intolerable conduct' ground to address family violence because 'the petitioner will be able to obtain the relief she wants in other ways' through an application for an injunction.[60] The conduct that could potentially form the basis for an injunction was said to include molesting or 'using insulting, indecent or humiliating language' to or in front of the victim.[61]

3.33 Whilst the removal of fault considerations related to the grounds for dissolution of marriage, this ideology influenced other provisions of the Act, the reasoning of the Family Court of Australia in its early days, and its reluctance to entertain an evaluation of conduct during marriage. The Family Court, at its outset, was therefore not conceptually set up as a court that would deal with issues of family violence.

3.34 ***Interests of the children***. From the beginning, the importance of the interests of children has been evident in the *Family Law Act*.[62] In the Second Reading Speech of the Family Law Bill the then Attorney-General stated that:

> In custody matters the court is required by the Bill—as it is by the present Act—to regard the interests of the children as the paramount consideration.[63]

3.35 The original *Family Law Act* contained a provision that in custodial proceedings, the court was to regard the welfare of the child as the paramount

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58 Commonwealth, *Parliamentary Debates*, Senate, 3 April 1974, 640 (L Murphy—Attorney-General), 641.

59 Commonwealth, *Parliamentary Debates*, Senate, 13 December 1973, 2827 (L Murphy—Attorney-General), 2829. See also Commonwealth, *Parliamentary Debates*, Senate, 3 April 1974, 640 (L Murphy—Attorney-General), 641.

60 Commonwealth, *Parliamentary Debates*, Senate, 13 December 1973, 2827 (L Murphy—Attorney-General), 2829.

61 Commonwealth, *Parliamentary Debates*, Senate, 3 April 1974, 640 (L Murphy—Attorney-General), 641.

62 Ibid, 642.

63 Ibid.

consideration.[64] As outlined below, this policy has since evolved to one that advocates a consideration of the 'best interests' of children.

3.36 In addition, one of the principles that the Family Court has had to take into account since the inception of the Act is 'the need to protect the rights of children and to promote their welfare'.[65]

3.37 ***Preserving the institution of marriage***. Another principle that courts exercising family law jurisdiction have been required to consider in decision-making since the inception of the Act is 'the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life'.[66]

3.38 As stated by Dr Anthony Dickey:

> The *Family Law Act* has a variety of functions, many of which are designed to support marriage and family life rather than put an end to them.[67]

3.39 After a consideration of Canadian and United Kingdom divorce legislation, the then Attorney-General Murphy stated in the Second Reading Speech of the Family Law Bill that:

> whilst none of these laws was an entirely suitable precedent to be followed here, I am in agreement with the two criteria adopted by the English Law Commission for a good divorce law: that it should buttress, rather than undermine, the stability of marriage and, when a marriage has irretrievably broken down, it should enable the empty legal shell to be destroyed with the maximum fairness and the minimum bitterness, distress and humiliation.[68]

3.40 The policy of preserving the marital relationship presents some conceptual difficulties when the court is dealing with an issue such as family violence.[69]

3.41 ***Reconciliation***. Closely connected to the goal of preserving the marital relationship is the aim of encouraging parties to reconcile. In the Second Reading Speech of the Family Law Bill, then Attorney–General Murphy stated that 'the Bill recognises the desirability of reconciliation being kept in mind at all stages until the marriage is dissolved'[70] but decided against a compulsory reconciliation conference because it would be 'unacceptable to the Australian people'.[71] Since the

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64 *Family Law Act 1975* (Cth) as made in 1975 s 64(1)(a).
65 Ibid s 43(1)(c).
66 Ibid s 43(1)(a).
67 A Dickey, *Family Law* (5th ed, 2007), 43.
68 Commonwealth, *Parliamentary Debates*, Senate, 13 December 1973, 2827 (L Murphy—Attorney-General), 2828.
69 R Hunter, 'Narratives of Domestic Violence' (2006) 28 *Sydney Law Review* 733, 760.
70 Commonwealth, *Parliamentary Debates*, Senate, 13 December 1973, 2827 (L Murphy—Attorney-General), 2829.
71 Ibid.

commencement of the *Family Law Act,* courts exercising family law jurisdiction have been directed to consider 'the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to their children'.[72]

3.42 Murphy said that the *Family Law Act* would adopt ways for 'helping persons for whom reconciliation is not possible to resolve their differences with the minimum bitterness and hostility'.[73]

3.43 ***Protection of the notion of family***. One of the fundamental rights codified in the *International Covenant on Civil and Political Rights* is that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State'.[74] It was noted in the Second Reading Speech of the Family Law Bill that this statement underlies the provisions of the *Family Law Act*.[75] Section 43 of the Act provides that one of the overarching principles to be applied by the courts in their deliberations is

> the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children.[76]

3.44 While the term 'family' is seldom used explicitly in Australian law, it is apparent that the notion of the nuclear family—comprising a mother, father and their children—still underlies the *Family Law Act*.[77] This focus on the nuclear family may be, in part, due to the heads of Commonwealth legislative power under the *Constitution* in relation to marriage; divorce and matrimonial causes; and in relation thereto, parental rights, custody and guardianship of infants.[78] However, a growing number of families do not fit that pattern—including within the context of Indigenous families and same-sex couples.

3.45 ***The public/private divide***. The *Family Law Act* has some ideological foundations in the well established principle of non-intervention in the private sphere of family life. In the Second Reading of the Family Law Bill the then Attorney-General Murphy stated:

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72 *Family Law Act 1975* (Cth) s 43(1)(d).
73 Commonwealth, *Parliamentary Debates*, Senate, 3 April 1974, 640 (L Murphy—Attorney-General), 759.
74 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976), art 23.
75 Commonwealth, *Parliamentary Debates*, Senate, 3 April 1974, 640 (L Murphy—Attorney-General), 641.
76 *Family Law Act 1975* (Cth) s 43(1)(b).
77 B Fehlberg and J Behrens, *Australian Family Law—The Contemporary Context* (2008), 145.
78 *Australian Constitution* s 51(xxi), (xxii). The constitutional framework is discussed in Ch 2.

> It does not seem right to me that divorce itself should be an occasion for judicial intrusion. It may be different in custody, maintenance and property disputes, but even in those the parties should be encouraged to resolve their differences themselves.[79]

3.46 The principle of non-intrusion into family life has its origins as far back as ancient Greek philosophy and the liberal philosophers developed the concept of a 'private sphere' in the seventeenth century.[80] Family law disputes are 'private' in the sense that they are disputes between two parties, and the state generally has no role in these disputes—apart from enacting the legislation that establishes the framework pursuant to which the disputes are to be resolved.[81]

Policy behind the *Family Law Act* as amended since inception

3.47 Despite a changing social context, many of the historical policies underpinning the *Family Law Act* still influence how it is applied. The principles in s 43 of the Act—noted above—still apply. In addition, a new principle was introduced by the *Family Law Reform Act 1995* (Cth) requiring consideration of the need to ensure safety from family violence,[82] reflecting the influence of the *Convention on the Elimination of All Forms of Discrimination Against Women* and the *Declaration on the Elimination of Violence against Women*.[83]

3.48 The *Family Law Act* does not have an objects clause specifying its overarching objects. Instead, provisions set out specific objects and principles in relation to: obligations to inform people about family services based outside the courts and about the court's processes and services;[84] the court's powers in relation to family services both in and outside of court;[85] children;[86] family violence;[87] orders and injunctions;[88] and superannuation interests.[89]

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79 Commonwealth of Australia, *Parliamentary Debates*, Senate, 1 August 1974, 758 (L Murphy—Attorney General), 760.

80 B Fehlberg and J Behrens, *Australian Family Law—The Contemporary Context* (2008), 157, (citations omitted). See also Ibid, 159 for a synthesis of feminist critiques of the public/private dichotomy.

81 D Higgins and R Kaspiew, '"Mind the Gap…": Protecting Children in Family Law Cases' (2008) 22 *Australian Journal of Family Law* 235, 244. See also *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976), art 17, set out in Ch 2.

82 *Family Law Act 1975* (Cth) s 43(1)(ca).

83 These instruments are discussed in Ch 2.

84 *Family Law Act 1975* (Cth) s 12A.

85 Ibid s 13A.

86 Ibid s 60B.

87 Ibid s 68N.

88 Ibid s 90AA.

89 Ibid s 90MA. The *Family Law Act* does not codify the objects and principles behind the provisions relating to property and spousal maintenance.

3.49 Of particular importance is the objects and principles provision in relation to children.[90] The paramount principle in children's matters is that of the best interests of the child.[91] In order to ensure this, the following objects were introduced in 2006:

(a) ensuring that children have the benefit of both parents having a meaningful involvement in their lives; and

(b) protecting children from physical or psychological harm or being subjected to, or exposed to abuse, neglect or family violence.[92]

3.50 Importantly, the objects provision stresses 'meaningful' relationships, suggesting that the quality of time parents spend with their children is a significant factor.[93]

3.51 The primary considerations listed in pt VII reflect these objects.[94] In determining what is in a child's best interests the court must have regard to the following primary considerations:

(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 or from being subjected to, or exposed to, abuse, neglect or family violence.[95]

3.52 These objects reflect the increased emphasis since 1996 on protecting families from violence and the move towards shared parenting in 2006. The shared parenting amendments were introduced[96] following the 2003 *Every Picture Tells A Story* Inquiry and the Report from the House of Representatives Standing Committee on Legal and Constitutional Affairs.[97]

3.53 The 2006 reforms sought to reflect the changing patterns of parenting, the transition of traditional roles and the fragmentation of family structures.[98] The

90 Ibid s 60B.
91 Ibid s 60CA.
92 Ibid s 60B.
93 B Fehlberg and J Behrens, *Australian Family Law—The Contemporary Context* (2008), 242.
94 *Family Law Act 1975* (Cth), s 60CC.
95 Ibid s 60CC(2)(a), (b).
96 Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth).
97 House of Representatives Standing Committee on Family and Community Affairs—Parliament of Australia, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (2003); House of Representatives Standing Committee on Legal and Constitutional Affairs—Parliament of Australia, *Report on the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005* (2005).
98 House of Representatives Standing Committee on Family and Community Affairs—Parliament of Australia, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (2003), 12–13.

amendments were supported by research from psychologists indicating that some children could benefit from a meaningful relationship with both parents.

3.54 There has been considerable controversy and debate over the issue of shared parenting. As noted in Chapter 1, in 2009, the Australian Institute of Family Studies completed an evaluation of the reforms introduced by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).[99]

3.55 Another significant change to principles introduced by the 2006 reforms was recognition of the importance of cultural heritage,[100] and addressing what this means for Indigenous children. For example, s 60B(3) of the *Family Law Act* provides that the right of an 'Aboriginal or Torres Strait Islander' child to enjoy culture includes the right to maintain connection with that culture and to have the support and opportunity to explore and develop a positive appreciation of that culture.

Criminal law

3.56 Central to the concept of criminality are the notion of individual culpability and the criminal intention for one's action.[101] Criminal law is 'public' in the sense that the state has a clear role to play in the investigation and prosecution of offences. It has been said that the criminal law is designed to maintain the social order and to stipulate the fundamental requirements for a person's treatment of others.[102] However, it is difficult to identify a single underlying philosophy of the criminal law. As some criminal law academics have contended:

> What we choose to call criminal law in fact comprises a number of different practices with a variety of rationales rather than a single principled response to diverse social behaviour. We have criminal *laws* rather than criminal *law*.[103]

3.57 Professor Andrew Ashworth has described the construction of the criminal law as 'unprincipled and chaotic'.[104] He states that criminal law is

> not the product of any principled inquiry or consistent application of certain criteria, but largely dependent on the fortunes of successive governments, on campaigns in the mass media, on the activities of various pressure groups, and so forth.[105]

3.58 Nonetheless, the following discussion describes some functions of the criminal law, particularly in the context of sentencing. Chapter 5, which contains an

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99 Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009).
100 *Family Law Act 1975* (Cth) s 60B(2)(e).
101 Australian Law Reform Commission, *Principled Regulation—Federal Civil and Administrative Penalties in Australia*, ALRC 95 (2002), [2.9].
102 S Talarico, 'What Do We Expect of Criminal Justice? Critical Questions of Sanction Policy, Sentencing Purpose and the Politics of Reform' (1979) 4 *Criminal Justice Review* 55, 55.
103 D Brown and others, *Brown, Farrier, Neal and Weisbrot's Criminal Laws—Material and Commentary on Criminal Law and Process in New South Wales* (4th ed, 2006), 3.
104 A Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225, 225.
105 Ibid, 226.

introductory discussion of the interaction of family violence legislation and the criminal law, also discusses the policy basis of a specific aspect of criminal procedure, namely bail.

3.59 Judicial pronouncements and legislative provisions have emphasised the protective role of the criminal law, particularly in seeking to protect innocent members of the community who are unable to protect themselves.[106] The South Australian sentencing legislation, for example, states that primary objectives of the criminal law include to protect the safety of the community[107] and, in particular, children from sexual predators by ensuring that in any sentence for an offence involving sexual exploitation of a child, paramount consideration is given to the need for deterrence.[108]

3.60 Punishment for past criminal conduct is an essential component of any criminal justice system. There is a significant amount of academic literature on the underlying justification for punishment, largely dominated by two theories. The utilitarian theory of punishment justifies punishment on the basis that its benefits outweigh its detrimental effects. Proponents of this theory consider that punishment has the potential to reduce crime.[109] On the other hand, the retributive theory of punishment justifies punishment as an appropriate moral response to the voluntary commission of an offence, regardless of its effects.[110]

3.61 To the extent that the criminal justice system integrates and considers restoration and rehabilitation—either at the sentencing stage or as a diversionary practice—the orientation is forward-looking, with an emphasis on prevention of further offending via treatment and healing.

3.62 Understanding the various purposes of sentencing is integral to a consideration of the policy basis of criminal laws.[111] When a person is sentenced for a family violence offence or for a breach of a protection order that sentence will be imposed in furtherance of specific objects.

3.63 Many state and territory sentencing acts expressly set out the purposes of sentencing.[112] The commonly cited purposes of sentencing are retribution, deterrence, rehabilitation, incapacitation, denunciation, and in more recent times, restoration. In

106 See, eg, *R v Collins; Ex parte Attorney-General (Qld)* [2009] QCA 350, [35].
107 *Criminal Law (Sentencing) Act 1988* (SA) s 10(1b).
108 Ibid s 10(4).
109 C Ten, *Crime, Guilt, and Punishment: A Philosophical Introduction* (1987), 7.
110 Ibid, 46–47.
111 The ALRC considered the purposes of sentencing in Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), ch 4. This section draws from that report.
112 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act 1991* (Vic) s 5; *Penalties and Sentences Act 1992* (Qld) s 9; *Sentencing Act 1997* (Tas) s 3; *Crimes (Sentencing) Act 2005* (ACT) s 7; *Sentencing Act 1995* (NT) s 5.

The sentencing acts of NSW and the ACT also specify that a purpose of sentencing is to make the offender accountable for his or her actions.[113]

3.64 The main purposes of sentencing are considered below. The purposes of sentencing may sometimes conflict but some purposes, such as retribution and deterrence, can be pursued simultaneously.

Retribution

3.65 Retribution—often referred to as 'punishment' in legislation and case law—is derived from the retributive theory of punishment. It is the oldest theory of punishment based on concepts of vengeance and responsibility.[114] It is advocated in the 'eye for eye' principle in the Book of Leviticus in the Old Testament.[115]

3.66 Proponents of the retribution theory disagree about why offenders deserve to be punished. Some argue that it is to eliminate the unfair advantage the offender gained over other law abiding citizens by committing the offence; while others say that it is to satisfy a debt to society.[116] Those who advocate for 'just deserts' consider that offenders deserve to be punished but that the punishment should be proportionate to the gravity of the offence.[117]

3.67 A number of state and territory sentencing acts set out retribution as a sentencing purpose in varying language:

- to ensure that the offender is adequately punished for the offence;[118]
- to punish the offender to an extent or in a way that is just in all the circumstances;[119] or
- to ensure that the offender is adequately punished for the offence in a way that is just and appropriate.[120]

Deterrence

3.68 Deterrence is derived from the utilitarian theory of punishment.[121] There is widespread support for the proposition that the mere existence of a criminal justice

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113 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(e); *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(e).
114 S Talarico, 'What Do We Expect of Criminal Justice? Critical Questions of Sanction Policy, Sentencing Purpose and the Politics of Reform' (1979) 4 *Criminal Justice Review* 55, 55–56.
115 See Leviticus, 25: 17–22.
116 N Walker, *Why Punish?* (1991), 73–75.
117 A von Hirsch, *Doing Justice: The Choice of Punishments—Report of the Committee for the Study of Incarceration* (1976).
118 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(a).
119 *Penalties and Sentences Act 1992* (Qld) s 9(1)(a); *Sentencing Act 1995* (NT) s 5(1)(a). See also *Sentencing Act 1991* (Vic) s 5(1)(a) which is expressed in similar terms.
120 *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(a).
121 C Ten, *Crime, Guilt, and Punishment: A Philosophical Introduction* (1987), 7–8.

system has the effect of deterring persons from committing criminal offences.[122] This systemic effect is commonly referred to as 'absolute deterrence'. Other forms of deterrence arise specifically in the context of sentencing, and describe the deterrent effect of the sentence both on the future behaviour of other people and of the offender. These types of deterrence are known respectively as general deterrence and specific deterrence.

General deterrence

3.69 General deterrence assumes that offenders are rational and will therefore refrain from engaging in criminal conduct if the consequences of their actions are perceived to be sufficiently harsh. The assumption that offenders are rational—when some do not in fact undertake a rational analysis of their actions prior to committing an offence—is one basis upon which the effectiveness of general deterrence has been challenged.

3.70 In its 1988 report *Sentencing*, the ALRC objected to general deterrence on the basis that it was unfair to punish one person by reference to the hypothetical crime of another.[123] However, in its report *Same Time Same Crime: Sentencing of Federal Offenders*, the ALRC agreed that general deterrence is an established and legitimate purpose of sentencing, having regard to judicial pronouncements on the importance of general deterrence, and the purposes of sentencing articulated in other jurisdictions.[124]

3.71 A number of state and territory sentencing acts set out general deterrence as a purpose of sentencing. This is usually done in language to the effect that a purpose of sentencing is to prevent crime by deterring or discouraging other persons from committing the same or similar offences.[125] The South Australian sentencing legislation specifies the deterrent effect any sentence under consideration may have on other persons as a matter that a court is to have regard in determining sentence, to the extent that it is relevant and known to the court.[126]

3.72 The importance placed upon general deterrence in sentencing for family violence offences will depend on the circumstances of particular cases. For example, in *R v Collins: Ex parte Attorney-General*, the Crown appealed against the inadequacy of sentence imposed on a 17 year old father for causing grievous bodily harm to his three

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122 See, eg, P Robinson and J Darley, 'Does Criminal Law Deter? A Behavioural Science Investigation' (2004) 24 *Oxford Journal of Legal Studies* 173, 173; N Demleitner and others, *Sentencing Law and Policy: Cases, Statutes and Guidelines* (2003), 10; P Robinson and J Darley, 'The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best' (2003) 91 *Georgetown Law Journal* 949, 951; N Walker, *Why Punish?* (1991), 15.

123 Australian Law Reform Commission, *Sentencing*, ALRC 44 (1988), [37].

124 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), [4.29].

125 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(b); *Sentencing Act 1991* (Vic) s 5(1)(b); *Penalties and Sentences Act 1992* (Qld) s 9(1)(c); *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(b); *Sentencing Act 1995* (NT) s 5(1)(c). See also *Sentencing Act 1997* (Tas) s 3(e)(i).

126 *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(j).

and half month old son.[127] In dismissing the appeal, the court made the following observations about general deterrence:

> So far as general deterrence is concerned, this crime was not one of calculation but a spur of the moment explosion of anger and frustration. It is important here to keep steadily in mind that the respondent was little more than a child himself at the time of the offence. How the respondent came to find himself at the age of 17 years in the position of father to a three and half month old baby without the assistance of adult supervision and care was not satisfactorily explained. ... The social structure which should have been in place to prevent the appalling situation in which the care of the child was left to the respondent and the child's 16 year old mother were, lamentably, absent. …
>
> In relation to general deterrence, I consider that the suggestion that juvenile fathers, similarly situated to the respondent, will be deterred by reflecting upon a custodial element in the sentence imposed on the respondent when they are minded to act violently towards an infant in their care out of tiredness, frustration and personal inadequacy is not so compelling as to persuade me that this consideration affords a 'reason of substance' to conclude that this Court should impose a sentence which includes a period of custody.[128]

3.73 Officers of the ALRC observed that in a case of family violence at Burwood Local Court, Sydney, general deterrence was said not to be a factor in sentencing because the family violence was said to be at the 'lower end' of the scale of seriousness and it was unlikely that the offender would re-offend.[129]

Specific deterrence

3.74 Specific deterrence seeks to prevent offenders from engaging in further criminal conduct by demonstrating to them the adverse consequences of their offending. Specific deterrence may be afforded greater emphasis when sentencing a repeat offender because there is an assumption that the previous sentence was ineffective in its deterrent effect.[130] Specific deterrence may not be as significant in circumstances where an offender is considered unlikely to reoffend, such as where an offender has demonstrated significant remorse.[131]

3.75 A number of state and territory sentencing acts set out specific deterrence as a sentencing purpose, usually in language to the effect that a purpose of sentencing is to prevent crime by deterring or discouraging the offender from committing the same or similar offence.[132] The South Australian sentencing legislation specifies the deterrent

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127 *R v Collins; Ex parte Attorney-General (Qld)* [2009] QCA 350.

128 Ibid, [34], [36].

129 *Court Observation: Burwood Local Court: Apprehended Violence Order/All Charges and Summons/Defended Hearings List*, 18 December 2009.

130 M Bagaric, 'Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals?' (2000) 24 *Criminal Law Journal* 21, 32.

131 Ibid, 33.

132 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(b); *Sentencing Act 1991* (Vic) s 5(1)(b); *Penalties and Sentences Act 1992* (Qld) s 9(1)(c); *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(b); *Sentencing Act 1995* (NT) s 5(1)(c). See also *Sentencing Act 1997* (Tas) s 3(e)(i).

effect any sentence under consideration may have on the defendant as a matter that the court must have regard to in determining sentence, to the extent that it is relevant and known.[133]

Rehabilitation

3.76 Rehabilitation is derived from the utilitarian theory of punishment.[134] Susette Talarico comments:

> While retribution, deterrence and incapacitation are based on assumptions of free will, rationality and simple confinement, rehabilitation looks to the offender in a rather innovative and distinctly contemporary perspective. Assuming that criminal behaviour can be explained and predicted, rehabilitation focuses on a treatment approach to crime control.[135]

3.77 Rehabilitation looks to identify and address the underlying causes of criminal conduct, by changing an offender's personality, attitudes, habits, beliefs, outlooks or skills to stop them from re-offending.[136]

3.78 A number of state and territory sentencing acts set out rehabilitation as a purpose of sentencing in the following terms:

- to promote the rehabilitation of the offender;[137] or
- to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated.[138]

3.79 The Tasmanian sentencing legislation states that a purpose of the Act—as opposed to a purpose of sentencing—is to help prevent crime and promote respect for the law by allowing courts to impose sentences aimed at the rehabilitation of offenders.[139] The South Australian sentencing legislation specifies the rehabilitation of the offender as a matter that the court must have regard to in determining sentence, to the extent that it is relevant and known to the court.[140]

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133 *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(j).
134 C Ten, *Crime, Guilt, and Punishment: A Philosophical Introduction* (1987), 7–8.
135 S Talarico, 'What Do We Expect of Criminal Justice? Critical Questions of Sanction Policy, Sentencing Purpose and the Politics of Reform' (1979) 4 *Criminal Justice Review* 55, 57–58 (citations omitted).
136 See, eg, Victorian Sentencing Committee, *Sentencing* (1988), 79.
137 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(d); *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(d).
138 *Sentencing Act 1991* (Vic) s 5(1)(c). See also *Penalties and Sentences Act 1992* (Qld) s 9(1)(b); *Sentencing Act 1995* (NT)s 5(1)(b) which are expressed in similar terms.
139 *Sentencing Act 1997* (Tas) s 3(e)(ii).
140 *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(m).

3.80 In sentencing for family violence offenders, courts have remarked on the offenders' prospects of rehabilitation,[141] and have suspended sentences on the basis that offenders will—among other things—undergo treatment.[142]

Incapacitation

3.81 Incapacitation aims to restrain an offender in order to render him or her incapable of re-offending.[143] Imprisonment is one form of incapacitation. Other sentencing options that curtail an offender's liberty—such as the use of electronic surveillance to track an offender's movements—are also forms of incapacitation.

3.82 Collective incapacitation is the strategy of seeking to reduce crime by incapacitating more offenders, or incapacitating them for longer periods of time.[144] Selective incapacitation is the strategy of trying to identify, and then incapacitate, certain offenders who are likely to re-offend.[145] This strategy relies on predictions of future criminality—which have been criticised by some as inherently unreliable[146] and often erroneous.[147]

3.83 Provisions in sentencing legislation of a number of states and territories provides for the selective incapacitation of certain offenders.[148] In addition, a number of state and territory sentencing acts state that a purpose of sentencing is to protect the community from the offender.[149] The Western Australian sentencing legislation provides that a court must not impose a sentence of imprisonment unless it decides—among other things—that it is required to protect the community.[150]

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141 For example, in *R v Rindjarra* [2008] NTCCA 9, [79], the trial judge commented that the offender's prospects were poor.

142 For example, in *R v Taylor (No 2)* [2008] ACTSC 97, [28] the offender's 12 month sentence of imprisonment for breach of a protection order was suspended on condition that he present himself for assessment for and, if found suitable, complete, the ACT Corrective Service Family Violence Program as well as any program deemed to be necessary for his rehabilitation by ACT Corrective Services.

143 M Bagaric, 'Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals?' (2000) 24 *Criminal Law Journal* 21, 24; A von Hirsch, 'The Problem of False Positives' in A von Hirsch and A Ashworth (ed) *Principled Sentencing: Readings on Theory and Policy* (1998) 88; S Talarico, 'What Do We Expect of Criminal Justice? Critical Questions of Sanction Policy, Sentencing Purpose and the Politics of Reform' (1979) 4 *Criminal Justice Review* 55, 56.

144 D Weatherburn, *Law and Order in Australia: Rhetoric and Reality* (2004), 124–125.

145 Ibid, 125.

146 N Demleitner and others, *Sentencing Law and Policy: Cases, Statutes and Guidelines* (2003), 11; American Law Institute, *Model Penal Code: Sentencing Report* (2003), 32.

147 A von Hirsch, 'The Problem of False Positives' in A von Hirsch and A Ashworth (ed) *Principled Sentencing: Readings on Theory and Policy* (1998) 88, 99.

148 See, eg, *Sentencing Act 1991* (Vic) ss 18A, 18B (indefinite sentence for offender convicted of serious offences where there is a high probability that offender is a serious dangerous to the community); *Penalties and Sentences Act 1992* (Qld) s 163(indefinite sentence for violent offender who poses a serious danger to the community); *Sentencing Act 1995* (WA) s 98 (indefinite sentences where a superior court is satisfied on balance of probabilities that offender, if released, would be a danger to society).

149 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(c); *Sentencing Act 1991* (Vic) s 5(1)(e); *Penalties and Sentences Act 1992* (Qld) s 9(1)(e); *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(c); *Sentencing Act 1995* (NT) s 5(1)(e).

150 *Sentencing Act 1995* (WA) s 6(4).

Denunciation

3.84 Denunciation is premised on the theory that a sentence can serve the purpose of communicating to the offender and the community the message that the law should not be flouted.[151] In this regard, denunciation performs an educative role. Further, a sentence that denounces the conduct of an offender represents a symbolic, collective statement of society's censure of the criminal conduct.[152] The public opinion to be taken into account is 'informed public opinion' as opposed to actual public opinion.[153] In *Inkson v the Queen*, Underwood J stated that:

> The community delegates to the Court the task of identifying, assessing and weighing the outrage and revulsion that an informed and responsible public would have to criminal conduct.[154]

3.85 A consideration of informed public opinion cannot lead to the imposition of a sentence that is contrary to law.[155]

3.86 A number of state and territory sentencing acts set out denunciation as a purpose of sentencing in the following terms:

- to denounce the conduct of the offender;[156]
- to manifest the denunciation by the court of the type of conduct in which the offender engaged;[157] and
- to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved.[158]

3.87 In sentencing offenders for family violence offences, courts have specifically referred to the need for denunciation.[159]

Restoration

3.88 While there is no universally accepted definition of restorative justice, it is essentially an approach to crime that is principally concerned with repairing the harm

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151 N Walker, *Why Punish?* (1991), 26. See also *Ryan v The Queen* (2001) 206 CLR 267, [118].
152 N Walker, *Why Punish?* (1991), 31.
153 *Inkson v The Queen* (1996) 6 Tas R 1, 2.
154 Ibid, 16.
155 *R v Nemer* (2003) 87 SASR 168, 171.
156 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(f); *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(f). See also *Sentencing Act 1997* (Tas) s 3(e)(iii) which provides that a purpose of the Act is to help prevent crime and respect for the law by allowing court to impose sentences that denounce the conduct of offenders.
157 *Sentencing Act 1991* (Vic) s 5(1)(d).
158 *Penalties and Sentences Act 1992* (Qld) s 9(1)(d). See also *Sentencing Act 1995* (NT) s 5(1)(d).
159 For example, see *R v Gazdovic* [2002] VSC 485, [28], [30] in relation to the sentencing for incitement to murder the offender's wife and sister and incitement to intentionally cause serious injury to the offender's brother-in-law.

caused by criminal conduct and addressing the underlying causes of criminality. In this regard, restoration integrates elements of rehabilitation.

3.89 Restorative justice initiatives in Australia are diverse and employed at different stages of the criminal justice process, including sentencing. Examples of such initiatives are victim-offender mediation, conferencing and circle sentencing. Restorative justice is discussed more fully in Chapter 11.

3.90 The sentencing legislation of some states and territories refers either to restorative aims or restorative initiatives. For example, the sentencing legislation of NSW and the ACT states that a purpose of sentencing is 'to recognise the harm done to the victim of the crime and the community'.[160] The South Australian sentencing legislation mandates sentencing conferencing prior to the sentencing of Indigenous offenders. Victims of crime may choose to be present at such conferences.[161]

Victims' compensation

3.91 The avenues of redress for compensation for victims of crime are not exclusively based on legislation.[162] Victims of crime—including victims of family violence—may be financially compensated in three ways: through an award of compensation in the civil courts, typically through a claim that a tort has been committed; through an order that an offender pay restitution or reparation to the victim, as part of the offender's sentence; and through a claim to a statutory compensation scheme in which awards are assessed and paid by the government.

3.92 Compensating victims of crime has been part of a wider social and legislative trend towards greater recognition of the importance of the interests of the victims of crime in the criminal process. The general philosophy underlying victims' compensation is expressed in the preamble to the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted by the United Nations General Assembly in 1985, as a recognition that victims of crime and

> frequently their families, witnesses and others who aid them, are unjustly subjected to loss, damage or injury and that they may, in addition, suffer hardship when assisting in the prosecution of offenders.[163]

3.93 The Declaration includes basic principles of restitution—that is, that offenders should pay for the costs of their crimes—and state compensation—that is, where such costs are not recoverable from offenders or elsewhere, states should endeavour to

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160 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g); *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(g). See also *Sentencing Act 1997* (Tas) s 3(h) which provides that a purpose of the Act is to recognise the interests of victims of offences.

161 *Criminal Law (Sentencing) Act 1988* (SA) s 9C.

162 Victims' compensation is discussed more fully in Ch 19.

163 *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN GAOR, 40th sess, 96th plen mtg, UN Doc A/RES/40/34 (1985).

provide financial compensation to such victims and their families.[164] The principle of restitution underlies the power to sentence an offender by ordering restitution or reparation, as well as damages for tort, while the development of statutory compensation schemes has been driven by the principle of compensation. Although the different avenues for compensation share the general philosophy of recognition of the injustice that a victim should bear the losses of a crime, there are some distinctions between the purposes of those forms of compensation. These purposes are addressed below.

Victims' compensation schemes

3.94 All Australian states and territories have legislation establishing statutory victims' compensation schemes. In some jurisdictions, such as Queensland and South Australia, these schemes are established in broader legislation that also encompasses other measures to support victims, such as the inclusion of fundamental principles of justice underlying the treatment of victims or the establishment of a levy upon offenders for the purposes of compensating victims.[165] In other jurisdictions, such as Victoria, the legislation is concerned primarily with the establishment of a compensation scheme.[166]

3.95 The legislation of NSW, Victoria, Queensland, South Australia and the Northern Territory include provisions setting out statutory purposes and objects. Apart from the aim of establishing a compensation scheme (and other mechanisms under the legislation),[167] these objects clauses include the following purposes and objects (variously expressed):

- to provide assistance (or support and rehabilitation) to victims of crime;[168]
- to assist victims of crime to recover from the crime (and, in South Australia, 'to advance their welfare in other ways');[169] and
- to give statutory recognition to victims of crime and the harm that they suffer from criminal offending.[170]

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164 Ibid cls 8–9, 12.

165 *Victims of Crime Assistance Act 2009* (Qld); *Victims of Crime Act 2001* (SA).

166 *Victims of Crime Assistance Act 1996* (Vic).

167 The objects clauses, for example, commonly provide that it is an object or purpose of the Act to establish a victims' compensation scheme and other associated schemes under the legislation. For example, in Queensland and South Australia, another 'object' is to set out principles of justice underlying the treatment of victims. These instrumental objects are not included in this summary.

168 *Victims of Crime Assistance Act 1996* (Vic) s 1(1). See also *Victims Support and Rehabilitation Act 1996* (NSW) s 3(a); *Victims of Crime Assistance Act 2006* (NT) s 3(a).

169 *Victims of Crime Assistance Act 1996* (Vic) s 1(2)(a). See also *Victims of Crime Assistance Act 2009* (Qld) s 3(2)(a); *Victims of Crime Act 2001* (SA) s 3(c).

170 *Victims of Crime Act 2001* (SA) s 3(c). See also *Victims of Crime Assistance Act 1996* (Vic) s 1(2)(b); *Victims of Crime Assistance Act 2009* (Qld) s 3(2)(b), (c).

3.96 The objects clauses also make clear that the awards under the compensation scheme are not intended to reflect the level of compensation to which victims of acts of violence may be entitled at common law or otherwise.[171] In addition to these common provisions, the Victorian and Queensland acts include the further objective of adding to, or complementing, other victims' services and, in Victoria, the objective of 'allow[ing] victims of crime to have recourse to financial assistance under this Act where compensation for the injury cannot be obtained from the offender or other sources'.[172]

3.97 As well as these statutory objectives, victims' compensation schemes are seen as enhancing the efficacy of criminal justice systems by encouraging victims of crime to come forward and prosecute perpetrators.[173] Like restitution orders, victims' compensation schemes provide a more informal and efficient forum than civil litigation.[174] They are also more effective in that victims have access to a pool of dedicated funds, whereas restitution from an offender depends upon the offender's capacity to pay.

Restitution orders

3.98 In all Australian jurisdictions except Western Australia, there is power to order an offender to pay compensation for loss, injury or damage as a consequence of an offence, as a sentencing option.[175] In Western Australia, the power to order compensation is restricted to property damage or property offences.[176]

3.99 The 'fundamental purpose' of such powers is to give victims 'easy access to civil justice'.[177] As Bell J has explained:

> When an offender has been dealt with by the courts, the judge can be in a good position to consider the issue of compensating the victim. The factual circumstances relevant to compensation may have been fully or at least sufficiently established by the evidence led or the admissions made by the offender. It can be clear that the offender's crime has caused loss or damage to the victim. Once the court receives evidence of the extent and value of such loss or damage, it can then expeditiously determine whether and what compensation to order. This saves the victim the time, expense, inconvenience and possible additional trauma of having to institute a civil

171 *Victims of Crime Assistance Act 2009* (Qld) s 3(3). See also *Victims of Crime Assistance Act 2009* (Qld) s 1(3); *Victims of Crime Act 2001* (SA) s 3(d) ('limited' compensation).

172 *Victims of Crime Assistance Act 1996* (Vic) s 1(2)(c), (4); *Victims of Crime Assistance Act 2009* (Qld) s 3(2)(d).

173 L Finestone, 'Crimes Compensation: A National Perspective' in M Heenan (ed) *Legalising Justice for All Women: National Conference on Sexual Assault and the Law* (1996) 198, 199.

174 Ibid, 198–199.

175 *Victims Support and Rehabilitation Act 1996* (NSW) ss 71, 77B; *Sentencing Act 1991* (Vic) s 85B; *Penalties and Sentences Act 1992* (Qld) s 35; *Criminal Law (Sentencing) Act 1988* (SA) s 53; *Sentencing Act 1997* (Tas) s 58; *Crimes (Sentencing) Act 2005* (ACT) s 18, ch 7; *Sentencing Act 1995* (NT) s 88.

176 See s 116 of the *Sentencing Act 1995* (WA), which defines 'victim' as a person who or which has suffered loss of or damage to his, her or its property as a direct or indirect result of the offence.

177 *RK v Mirik* [2009] VSC 14, [11].

> proceeding. Not doing so may deprive the victim of ready access to just compensation, leaving them with an understandable sense of grievance.[178]

3.100 The making of restitution orders shares some philosophical underpinnings with the sentencing aim of restoration.

Compensation for tort claims

3.101 Victims of family violence, including sexual assault, may be able to seek damages from an offender if a tort has been committed. Such claims are largely governed by the common law and are pursued in the civil courts.

3.102 The basic function of an award of damages in tort is:

> to compensate the plaintiff for loss suffered as a result of the tort; the plaintiff is entitled to *restitutio in integrum*, that is, to be put in the position they would have been in had the tort not been committed.[179]

3.103 Along with this general purpose of restitution, individual torts may serve different purposes. Family violence most commonly gives rise to a claim in assault or battery. A battery is committed when a person directly and intentionally causes contact with the body of the victim without the latter's consent.[180] An assault is committed when a person directly and intentionally threatens the victim in such a way that the victim reasonably apprehends imminent contact with his or her body by the person, or something within the person's control.[181] Assault and battery are also criminal offences.[182] The fundamental principle underlying these torts is that every person's body is inviolable—that is, these torts protect the physical integrity of a person.[183]

3.104 Negligence, on the other hand, is directed to ensuring that persons do not behave carelessly or negligently, in such a way as to harm others. Negligence may arise in the context of family violence where, for example, a third party such as a parent fails to take reasonable care to ensure a child is not subject to violence.

3.105 Compensation claims by way of tort are not easy methods of redress for victims of family violence, for a number of reasons.[184] This has been partly addressed through the power to order restitution and the development of statutory victims' compensation schemes.

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178 Ibid.

179 F Trindade and P Cane, *The Law of Torts in Australia* (3rd ed, 1999), 511.

180 Ibid, 27.

181 Ibid, 42.

182 In some jurisdictions, a summary conviction for an offence acts as a bar to any subsequent civil proceedings for the offence, and civil proceedings taken against a person for an offence act as a bar to subsequent criminal proceedings for the same offence: see, eg, *Crimes Act 1900* (NSW) s 556.

183 *Collins v Wilcock* [1984] 1 WLR 1172, 1177. See also *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218, 253.

184 This is discussed in Ch 19. See also C Forster, 'Good Law or Bad Lore? The Efficacy of Criminal Injuries Compensation Schemes for Victims of Sexual Abuse: A New Model of Sexual Assault Provisions' (2004) 32 *University of Western Australia Law Review* 264, 271.

Migration legislation

3.106 The object of the *Migration Act 1958* (Cth) is expressed broadly as being to 'regulate in the national interest, the coming into, and presence in Australia, of non-citizens'.[185] The Commissions, however, are only focussed on the objectives of particular provisions in the *Migration Regulations 1994* (Cth) which relate to family violence.

3.107 These provisions permit certain persons applying for permanent residence in Australia to proceed with their application after the breakdown of their married or de facto relationship if they or a member of their family have experienced family violence at the hands of their partner.[186]

3.108 The family violence provisions were

> introduced in response to community concerns that some partners might feel compelled to remain in abusive relationships rather than end the relationship and be forced to leave Australia.[187]

3.109 The Queensland Centre for Domestic and Family Violence Research reports that the vast majority of persons intended to be protected by these provisions are women,[188] and that the provisions were intended to respond to

> the incidence of abuse occurring in relationships where one partner was being sponsored for residence in Australia. Anecdotal and statistical evidence at the time revealed significant levels of verbal, emotional, social, racial, physical, sexual and financial abuse in spousal relationships occurring in this context.[189]

3.110 The National Council to Reduce Violence Against Women and their Children stated that:

> Women who are sponsored by Australian citizens and residents are particularly vulnerable to abuse due to the threat of deportation. In the late 1980s and early 1990s, domestic violence practitioners became concerned about the number of repeat or serial sponsors who abused the women and then triggered their deportation. Predominantly, the concern related to the abuse of Filipino women by serial sponsors,

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185 *Migration Act 1958* (Cth) s 4(1).

186 *Migration Regulations 1994* (Cth) Div 1.5; Australian Government Department of Immigration and Citizenship, *Media Fact Sheet 38—Family Violence Provisions* (2009) <www.immi.gov.au/media/fact-sheets/38domestic.htm> at 19 January 2010.

187 Australian Government Department of Immigration and Citizenship, *Media Fact Sheet 38—Family Violence Provisions* (2009) <www.immi.gov.au/media/fact-sheets/38domestic.htm> at 19 January 2010.

188 It is reported that the Department of Immigration's policy is that if the applicant is a male it is considered reasonable to refer a non-judicially determined claim of family violence unless there is 'strong evidence' that the claim is genuine: Immigration Advice and Rights Centre Inc, *IARC Client Information Sheet 14A—The Family Violence Provisions* (2009) <www.iarc.asn.au/publications/pdfs/familyViolence.pdf> at 12 April 2010.

189 Queensland Centre for Domestic and Family Violence Research, *The Domestic Violence Provisions in Migration Law* (2002) CDFVR Online <www.noviolence.com.au/migrationarticle.html> at 19 January 2010.

> although more recently concerns have increased about women sponsored from other countries such as Russia, Thailand, Indonesia and Fiji.[190]

3.111 Under the *Migration Regulations*, a person whose relationship ends after the person has applied for permanent residence will still be able to be considered for permanent residence if he or she can provide evidence of family violence that is acceptable under the Regulations. The Regulations provide for both judicially and non-judicially determined claims of family violence.

190 The National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), [2.5] (citations omitted).

4. Family Violence: A Common Interpretative Framework?

Contents

Introduction

4.1 This chapter explores various conceptualisations of family violence. Understanding what constitutes family violence—or domestic violence or domestic abuse as it is referred to in some jurisdictions—is integral to a consideration of interaction issues.[1] Definitions of family violence vary widely across family violence legislation,[2] the *Family Law Act 1975* (Cth), the criminal law, and other types of legislation such as victims' compensation legislation and migration regulations. In addition, disciplines other than law—for example, the social sciences, health and welfare service providers—may conceptualise family violence differently.

4.2 This chapter considers whether it is appropriate or desirable to aim for a common interpretative framework for what constitutes family violence across the different legislative schemes under consideration.[3] This issue is considered in light of

1 An explanation of the Commissions' use of the term 'family violence' is set out in Ch 1.
2 An explanation of the Commissions' use of the term 'family violence legislation' is set out in Ch 1.
3 Definitions form one limb of such a framework, complemented, for example, by guiding principles and statutory objects.

the underlying policy justifications for each of the legislative schemes, which are discussed in the preceding chapter. An analysis of these policy considerations reveals that while policy justifications differ, in some cases different statutory regimes share common aims. A key theme is therefore balancing the need for synergies between statutory definitions and statutory purposes, with the benefits that could flow from the adoption of a common interpretative framework.

4.3 The appropriateness or desirability of a commonly shared understanding of family violence across various legislative schemes is also discussed in the context of the relationship between the definitions of family violence in family violence legislation, the criminal law, and the *Family Law Act*.

4.4 This chapter also raises the appropriateness or desirability of addressing key differences in family violence legislation—for example, by model provisions which contain best practice approaches—even where no issues arise from the interaction of family violence laws with other relevant legal frameworks. This discussion acknowledges that achieving consistency with respect to family violence legislation across the states and territories is not feasible, questionable as a goal in itself and, in any event, outside the Terms of Reference for this Inquiry. This Inquiry does, however, present the Commissions with a unique opportunity to comment on ways in which legal frameworks could be improved to respond to family violence. Exploring the desirability of model provisions in particular areas of family violence legislation can be seen as falling within that aspect of the Terms of Reference. In particular, the Commissions propose the adoption of similar guiding principles in each family violence Act, which should contain express reference to a human rights framework.

Definition of family violence or acts constituting family violence

Introduction

4.5 There is no common understanding or single definition of family violence. As noted in Chapter 2, the United Nations *Declaration on the Elimination of Violence against Women* defines violence against women as 'any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life'.[4]

4.6 As the Australian Bureau of Statistics has noted, definitions of what constitutes family violence are inherently likely to differ between the legal sector, researchers and service providers. These definitions do not necessarily align with community understandings, or victim and offender perspectives, of what constitutes family

4 *Declaration on the Elimination of Violence against Women* 20 December 1993, UN GAOR, A/RES/48/104, (entered into force generally on 23 February 1994), art 1.

violence.[5] It has been noted that in NSW alone, there are 17 different definitions of family violence across various agencies.[6]

4.7 Partnerships Against Domestic Violence—an Australian intergovernmental taskforce on family violence—adopted the following definition of family violence:

> Domestic violence is an abuse of power perpetrated mainly (but not only) by men against women in a relationship or after separation. It occurs when one partner attempts physically or psychologically to dominate and control the other. Domestic violence takes many forms. The most commonly acknowledged forms are physical and sexual violence, threat and intimidation, emotional and social abuse and economic deprivation. Many forms of domestic violence are against the law.
>
> For many indigenous people the term family violence is preferred as it encompasses all forms of violence in intimate, family and other relationships of mutual obligation and support.[7]

4.8 Conduct constituting violence can encompass varying degrees of severity and take many forms—physical abuse, sexual abuse, damage to property, emotional abuse, social abuse, economic abuse, psychological abuse, and spiritual abuse.

4.9 Whatever form violence takes, a central feature is that it involves a person exercising control and power over the victim by inducing fear, for example by using threatening behaviour.[8] Definitions of family violence usually recognise that violence can constitute more than single 'incidents'. It can involve 'a continuum of controlling behaviour and violence, which can occur over a number of years'.[9]

4.10 While the definition of family violence may not appear to be a practically important issue, it is necessary to understand precisely what constitutes family violence in each of the state and territory jurisdictions in order to consider *whether* family violence laws interact with the *Family Law Act* or with the criminal law in any particular matter and, if they do, the nature of that interaction. The scope of the various definitions of family violence in family violence legislation may, in a particular case, mean that there will be no interaction with the *Family Law Act* or with the criminal law. For example, certain definitions cover conduct that may justify a protection order but the conduct does not amount to a criminal offence. Conversely, some definitions of family violence in family violence legislation are linked expressly to the criminal law, and result in an interaction between family violence and criminal legislative regimes at some level.

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5 Australian Bureau of Statistics, *Conceptual Framework for Family and Domestic Violence* (2009).

6 M Murdoch—Assistant Commissioner NSW Police, *Prevention and Reduction of Family Violence—An Australasian Policing Strategy*, The University of Sydney—Sydney Forensic Medicine & Science Network, 12 September 2009.

7 Partnerships Against Domestic Violence, *What is Domestic Violence?* (2003) cited in B Fehlberg and J Behrens, *Australian Family Law—The Contemporary Context* (2008), 179.

8 See, eg, 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), 13–14.

9 Access Economics, *The Cost of Domestic Violence to the Australian Economy, Part I* (2004), 3.

4.11 Critically assessing definitional issues is relevant to the important question of when it is appropriate for the law to intervene to provide protection or other forms of redress to victims. On the one hand, excessively narrow definitions of family violence might cause gaps in protection to victims. On the other, excessively broad definitions may detract from the significance of family violence or devalue the experience of its victims or—as noted by one stakeholder—promote the abuse of the protection order system.[10]

4.12 The discussion below focuses on the definition of family violence across various legislative schemes. It also addresses definitions across family violence and criminal legislation of *specific* acts or conduct that may constitute family violence, such as stalking or assault.

Family violence legislation

4.13 Table A below provides a snapshot of variations in the definitions of family violence across the states and territories. The following discussion addresses various aspects of the state and territory definitions. Key differences include the extent to which definitions:

- are linked to criminal offences;
- capture non-physical violence;
- turn on the impact on the victim or the intent of the person committing family violence;[11] and
- capture abuse specific to certain groups in the community—such as those from a culturally and linguistically diverse background,[12] the aged, persons with a disability and persons in same-sex relationships.

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

11 The *Intervention Orders (Prevention of Abuse) Act 2009* (SA) focuses on both impact and intent: s 8.

12 An explanation of the Commissions' use of the phrase 'culturally and linguistically diverse' is set out in Ch 1.

Table A

	Assault	Sexual assault	Kidnap/deprive of liberty	Property damage	Harm animal	Economic abuse	Emotional/ psych abuse *
NSW	✓	✓	✓	✓			
Vic	✓	✓	✓	✓	✓	✓	✓
Qld	Wilful injury	Indecent behaviour without consent		✓	Eg of wilful property damage		
WA	✓		✓	✓	Eg of property damage		✓
SA	Physical injury-result or intent	✓ Eg of emotional or psych abuse	Eg of emotional or psych abuse	✓ Result or intent	Eg of emotional or psych abuse	✓	✓
Tas	✓	✓	✓			✓	✓
ACT	✓ plus physical or personal injury	✓	✓	✓	✓(animal violence offence)		
NT	Eg of conduct causing harm	Eg of conduct causing harm		✓	✓	✓	

* Psych = Psychological

In addition to the conduct captured in Table A, some types of threats constitute family violence in all jurisdictions; and specific criminal offences in NSW and the ACT also constitute family violence.

Table A continued.

	Stalk	Intimidate/ coerce	Harass	Expose child to violence	Breach protection order
NSW	✓	✓	✓		✓
Vic		Eg of emotional abuse	Eg of emotional abuse	✓	
Qld		✓	✓		
WA	Pursuing with intent to intimidate	✓			
SA	Captured in examples of emotional or psych*abuse	Captured in examples of emotional/psych abuse plus denial of social/personal autonomy			
Tas	✓	✓			✓
ACT	✓		✓ or offensive conduct		✓
NT	✓	✓	Eg of intimidation		

* Psych = Psychological

Extent of linkage of definitions of family violence to the criminal law

4.14 A key difference between the state and territory definitions of family violence in family violence legislation is the extent to which those definitions are directly linked to specific criminal law offences. When family violence is defined by reference to criminal offences, the behaviour that constitutes family violence can form the basis for a protection order as well as a prosecution for a criminal offence, although the latter will require proof beyond reasonable doubt.[13]

4.15 At one end of the spectrum, NSW family violence legislation does not define family violence. Rather it defines 'domestic violence offence' by referring specifically to 55 'personal violence' offences in the *Crimes Act 1900* (NSW) where those offences are committed by persons in defined domestic relationships against other persons.[14] The offences include, for example, murder, manslaughter, wounding or causing grievous bodily harm with intent, assault, sexual assault, kidnapping, child abduction and destroying or damaging property. The list also includes narrower offences such as discharging a firearm with intent, causing bodily injury by gunpowder, not providing a wife with food, and setting traps.

4.16 Some of the 'personal violence' offences included in the definition of 'domestic violence offence' in the NSW family violence legislation have been repealed.[15] These historical offences are retained because such offences can be recorded on a person's criminal record as 'domestic violence offences'[16] and this has a number of important consequences.[17]

4.17 The NSW family violence legislation also provides that stalking, intimidation with intent to cause fear of physical or mental harm, and attempts to commit any specified offence can amount to 'domestic violence'.[18]

4.18 The ACT family violence legislation sets out a general definition of 'domestic violence' which covers, for example, any conduct that causes physical or personal injury to a relevant person, or is harassing or offensive. The definition also provides that a 'domestic violence offence' is an offence against scheduled legislative provisions.[19] The scheduled offences cover a broad range of conduct. They include

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13 Ch 5 discusses some differences between civil and criminal responses to family violence, and Ch 6 discusses the interaction between protection orders obtained under family violence laws and the criminal law.

14 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 4.

15 Including *Crimes Act 1900* (NSW) ss 61B–E, 665A, 562ZG.

16 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 12.

17 Ibid s 12. The note to s 12 states, for example, that an indication in the charge for an offence that a person has committed a domestic violence offence will be relevant in bail proceedings. Further, the recording on a person's criminal record that an offence is a 'domestic violence offence' is relevant to determining whether a person's behaviour amounts to stalking or intimidation as previous behaviour constituting 'domestic violence' is taken into account.

18 Ibid s 4. 'Intimidation' is separately defined, and captures, for example, harassment or molestation.

19 *Domestic Violence and Protection Orders Act 2008* (ACT) s 13, sch 1.

offences traditionally recognised as including forms of family violence, such as assault and wounding, as well as offences that are less obviously related to family violence—such as causing bushfires, arson, trespass on government premises, and refusing or neglecting to leave government premises when directed.[20]

4.19 Interestingly, the offences constituting family violence are not the same in NSW and the ACT.[21] This raises a more general issue of whether, in some cases, family violence is over-defined or whether gaps in definitional parameters translate to gaps in protection in practice.

4.20 Other state and territory definitions of family violence pick up selected definitions of criminal law offences. For example, the Victorian family violence legislation provides that the definition of 'assault' is the same as the definition of assault in s 31 of the *Crimes Act 1958* (Vic).[22] Similarly, the Western Australian family violence legislation provides that various definitions, including those of 'assault', 'intimidate', 'kidnapping or depriving the person of his or her liberty' and 'pursue' are the same as the equivalent definitions in the *Criminal Code* (WA).[23]

4.21 At the other end of the spectrum, other state and territory definitions largely describe conduct that constitutes family violence without linking that conduct to specific criminal offences or, where that conduct could constitute an offence, without defining the conduct or attempting to align the definitions with those used in the criminal law. While in these cases there may be an overlap between conduct constituting family violence for the purpose of obtaining a protection order and the conduct forming the basis for a criminal prosecution, the scope of the definition for the purposes of the protection order may be somewhat unclear. Specific examples of non-alignment of definitions or terminology across family violence legislation and the criminal law are discussed more fully below.

4.22 In other cases, the conduct described as falling within the definition of family violence may not amount to a criminal offence, for example, emotional abuse, but may provide grounds for the making of a civil protection order.[24] The Victorian legislation, for example, explicitly provides that 'to remove doubt it is declared that behaviour may constitute family violence even if behaviour would not constitute a criminal offence'.[25]

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20 Ibid sch 1.

21 For example, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 4 does not categorise the offences of negligent driving and causing bushfires as family violence offences where those offences are committed by defined persons, whereas the *Domestic Violence and Protection Orders Act 2008* (ACT) does.

22 *Family Violence Protection Act 2008* (Vic) s 4.

23 *Restraining Orders Act 1997* (WA) s 6.

24 As noted below, economic abuse is family violence in some jurisdictions without being a criminal offence, whereas in Tasmania it is a criminal offence.

25 *Family Violence Protection Act 2008* (Vic) s 5(3).

Specific elements of the definition of family violence

4.23 The discussion below gives a snapshot of the various elements that may comprise family violence across the state and territory jurisdictions.[26]

Sexual assault

4.24 Significantly, not every jurisdiction expressly refers to sexual assault in the definition of family violence—nor do the 1999 Model Domestic Violence Laws.[27] The Victorian Law Reform Commission (VLRC) recommended that the definition of family violence should include specific references to sexual forms of family violence.[28] The National Council to Reduce Violence Against Women and their Children also stated that 'it is important that legislation *explicitly* acknowledges sexual offences as constituting domestic and family violence'.[29]

4.25 Where the definition of family violence recognises sexual assault as a form of family violence, the prominence it is given in the definition varies. For example, the general definition of 'domestic violence' in s 13 of the *Domestic Violence and Protection Orders Act 2008* (ACT) does not refer to sexual assault, although various sexual assault offences are included in sch 1, which lists all 'domestic violence offences'. In the Northern Territory, sexual assault is cited in the definition as an example of conduct causing harm, whereas in Victoria and Tasmania it is cited as a category of conduct in its own right.

4.26 Part D of this Consultation Paper deals with sexual assault, and the 'invisibility' of sexual assault in family violence cases is discussed in Chapter 15.

Economic abuse

4.27 Only some jurisdictions include 'economic abuse' in their definition of family violence—namely Victoria, South Australia, Tasmania and the Northern Territory.

4.28 There are some differences in the precise formulations of economic abuse. It may include, for example:

- unreasonable controlling behaviour without consent that denies a person financial autonomy;

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26 A more detailed examination of the types of family violence recognised is set out on a jurisdiction-by-jurisdiction basis in: Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009).

27 Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999), s 3(1). The Model Domestic Violence Laws project is discussed further below.

28 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), [4.39]–[4.43], Rec 15.

29 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), 112.

- withholding financial support reasonably necessary for the maintenance of a partner;
- coercing a partner to relinquish control over assets;
- unreasonably preventing a person from taking part in decisions over household expenditure or the disposition of joint property; and
- preventing the person from seeking or keeping employment.[30]

4.29 There are differences in the extent to which the provisions require a particular intention on the part of the person engaging in economic abuse. Only the Tasmanian provision criminalises economic abuse, requiring that the person committing it has the intention unreasonably to control or intimidate his or her spouse or partner or cause mental harm, apprehension or fear in committing certain acts of economic abuse.[31]

Emotional or psychological abuse

4.30 Only some state legislation expressly refers to emotional or psychological abuse as a form of family violence. There are differences in the way these terms are defined, if they are defined.[32] More significantly, only the Tasmanian legislation makes emotional abuse (and intimidation) a criminal offence.[33] Belinda Fehlberg and Juliet Behrens state that the Tasmanian provisions:

> bring criminal law in line with the civil definition by creating new offences that fill the gap between the legal definitions of criminal conduct constituting offences such as assault and the non-physical, control based types of violence. This creation of special domestic violence offences is unique in Australia and was not, for example, proposed in the Model Domestic Violence Laws, nor by the Victorian Law Reform Commission, which focused instead on the grounds for obtaining a civil protection order.[34]

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30 *Family Violence Protection Act 2008* (Vic) s 6; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8(5); *Family Violence Act 2004* (Tas) ss 7, 8; *Domestic and Family Violence Act 2007* (NT) s 5. See also *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 4 which provides a more limited offence of wilfully and without lawful excuse failing to provide a wife with necessary food, clothing or lodging so that her life is endangered or her health seriously injured.

31 *Family Violence Act 2004* (Tas) s 8. The Commissions are not aware of any prosecution for economic abuse under the Tasmanian provision. This is noted further in Ch 5.

32 *Family Violence Protection Act 2008* (Vic) ss 5, 7; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8(4); *Restraining Orders Act 1997* (WA) s 6; *Family Violence Act 2004* (Tas) s 7.

33 *Family Violence Act 2004* (Tas) s 9.

34 B Fehlberg and J Behrens, *Australian Family Law—The Contemporary Context* (2008), 206. Ch 5 discusses the delineation of civil and criminal redress.

4.31 The 2008 review of the Tasmanian family violence legislation noted that, as at that time, no charge had been brought for emotional abuse and intimidation but that the ground had been used in support of applications for protection orders.[35]

4.32 Both the Victorian and South Australian family violence legislation define emotional or psychological abuse as well and give examples of such abuse. The Victorian family violence legislation defines emotional or psychological abuse as behaviour that 'torments, intimidates, harasses or is offensive'.[36] Examples of such behaviour are racial taunts, threatening to disclose a person's sexual orientation or to commit suicide, preventing a person from keeping family and cultural connections, and threatening to withhold a person's medication.[37] The South Australian family violence legislation defines emotional or psychological harm as including mental illness; nervous shock; and distress, anxiety or fear that is more than trivial.[38] Examples of such conduct include threatening to institutionalise the person and threatening to withdraw care on which the person is dependent.[39]

4.33 In contrast, Western Australian family violence legislation includes 'emotionally abusive conduct' but neither defines nor gives examples of such conduct.[40]

4.34 Emotional abuse or intimidation under the Tasmanian legislation is defined as the pursuit of 'a course of conduct that he or she knows, or ought to know, is likely to have the effect of unreasonably controlling or intimidating, or causing mental harm, apprehension or fear, in his or her spouse'.[41]

4.35 Other legislation refers to conduct that is intimidating,[42] harassing[43] or offensive.[44] Intimidation is defined variously to include conduct that: causes reasonable apprehension or fear;[45] a reasonable apprehension of injury[46] or violence to the person or the person's property;[47] has the effect of unreasonably controlling the person or

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35 Urbis (for the Tasmanian Government Department of Justice), *Review of the Family Violence Act 2004 (Tas)* (2008), 12.
36 *Family Violence Protection Act 2008* (Vic) s 7.
37 Ibid.
38 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8(3).
39 Ibid s 8(4).
40 *Restraining Orders Act 1997* (WA) s 6(1)(d).
41 *Family Violence Act 2004* (Tas) s 9.
42 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 6, 7; *Domestic and Family Violence Protection Act 1989* (Qld) s 11; *Restraining Orders Act 1997* (WA) s 6. *Restraining Orders Act 1997* (WA) s 6 provides that the definition of intimidation is the same as that in the *Criminal Code* (WA) s 338D.
43 *Domestic and Family Violence Protection Act 1989* (Qld) s 11; *Domestic Violence and Protection Orders Act 2008* (ACT) s 13.
44 *Domestic Violence and Protection Orders Act 2008* (ACT) s 13.
45 *Restraining Orders Act 1997* (WA) s 6(4) picks up the definition of 'intimidate' in *Criminal Code* (WA) s 338D.
46 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 7.
47 *Domestic and Family Violence Act 2007* (NT) s 6.

causing mental harm;[48] causes physical harm;[49] prevents the person from doing any act that the person is lawfully entitled to do or compels the person to do an act that the person is legally entitled to abstain from;[50] and conduct that amounts to harassment or molestation.[51] Intimidation is usually included either as a subcategory of emotional abuse or as a ground of family violence in its own right. Similarly, in some cases harassment and offensive behaviour are treated as subcategories of emotional abuse or of intimidation, while in other cases they form an aspect of family violence in their own right.

Kidnapping or deprivation of liberty

4.36 Most jurisdictions expressly include kidnapping or deprivation of liberty as a form of family violence.[52] The South Australian family violence legislation includes it as an example of abuse that results in emotional or psychological damage.[53]

4.37 The family violence legislation of Queensland and the Northern Territory do not include kidnapping or deprivation of liberty in their definitions of family violence. The Australian Government Solicitor (AGS) has expressed the view that kidnapping could constitute intimidation under those legislative schemes.[54]

Damage to property

4.38 All of the states and territories, except Tasmania, specify damage to property as constituting family violence. The 2008 review of the Tasmanian family violence legislation stated:

> Stakeholders did note the absence of property damage within s 7(a) [the definition of family violence]; which was reported to be a common feature of family violence incidents, and at present cannot be pursued under this Act.[55]

4.39 The Queensland family violence legislation provides that the damage to property must be 'wilful'.[56] The Domestic Violence Legislation Working Group remarked that the inclusion of the element of 'wilfulness' in the Queensland provision

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48 Ibid s 6.

49 *Criminal Code Act Compilation 1913* (WA) s 338D picked up by *Restraining Orders Act 1997* (WA) s 6(4).

50 *Criminal Code Act Compilation 1913* (WA) s 338D picked up by *Restraining Orders Act 1997* (WA) s 6(4).

51 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 7.

52 Ibid s 4(a) picking up *Crimes Act 1900* (NSW) s 86 (kidnapping), s 87 (child abduction); *Family Violence Protection Act 2008* (Vic) s 5(2); *Restraining Orders Act 1997* (WA) s 6; *Family Violence Act 2004* (Tas) s 7(a)(iii); *Domestic Violence and Protection Orders Act 2008* (ACT) s 13(1)(c) picking up *Crimes Act 1900* (ACT) s 37 (abduction of young person) and s 38 (kidnapping).

53 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8(4)(b).

54 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), [3.1.5].

55 Urbis (for the Tasmanian Government Department of Justice), *Review of the Family Violence Act 2004 (Tas)* (2008), 11.

56 *Domestic and Family Violence Protection Act 1989* (Qld) s 11(1)(b).

'is more appropriate to criminal behaviour and unnecessarily complicates what is required to be proved'.[57]

Injuring animals

4.40 Most jurisdictions provide that injuring or killing an animal constitutes family violence. In Queensland, Western Australia and the Northern Territory, harm to an animal is included as a type of property damage.[58] The ACT legislation separates damage to property from conduct directed to a pet, and makes the latter family violence where it constitutes a defined animal violence offence.[59] The Victorian legislation, however, includes conduct that threatens or causes the death or injury of an animal irrespective of whether the animal belongs to the relevant family member where such conduct is aimed at dominating or coercing the family member.[60]

4.41 The other jurisdictions are silent on whether harm to animals constitutes family violence. Harm to animals may fall within the broader category of damage to property, but the Tasmanian legislation does not include damage to property in its definition of family violence. Harm to an animal may in some cases be covered by more general provisions such as emotional abuse.[61]

Stalking

4.42 Four jurisdictions expressly include stalking as conduct that constitutes family violence,[62] with three of those jurisdictions linking the conduct to the criminal offence of stalking.[63] The situation in the Northern Territory warrants special mention because of the disjunction between the civil and criminal definitions of stalking. This is discussed below.[64]

4.43 Other jurisdictions do not expressly refer to stalking as conduct that may constitute family violence, but their definitions, to varying degrees, encompass conduct that includes certain stalking behaviour.[65]

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57 Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999), 19.

58 *Domestic and Family Violence Protection Act 1989* (Qld) s 11; *Restraining Orders Act 1997* (WA) s 6; *Domestic and Family Violence Act 2007* (NT) s 5.

59 *Domestic Violence and Protection Orders Act 2008* (ACT) s 13(1)(b), (f); 13(3).

60 *Family Violence Protection Act 2008* (Vic) s 5. This approach is consistent with that proposed by the Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999), s 3(1).

61 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), [3.1.31].

62 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13; *Family Violence Act 2004* (Tas) s 7(a)(iv); *Domestic Violence and Protection Orders Act 2008* (ACT) s 13, sch 1; *Domestic and Family Violence Act 2007* (NT) ss 5, 7.

63 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 4(b), 13; *Family Violence Act 2004* (Tas) s 7(a)(iv), linking to *Criminal Code* (Tas) s 192; *Domestic Violence and Protection Orders Act 2008* (ACT) s 13, sch 1, linking to *Crimes Act 1900* (ACT) s 35.

64 See discussion below under the heading Criminal Law.

65 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), [3.1.24]. For example, *Domestic and Family Violence Protection Act 1989* (Qld) s 11(c) gives examples of stalking behaviour to

Exposing child to violence

4.44 Victoria is the only Australian jurisdiction where causing a child to witness or otherwise be exposed to the effects of family violence itself constitutes family violence.[66] The legislation in Western Australia and the Northern Territory does not treat exposure of a child to family violence as constituting family violence but expressly allows for the making of protection orders to protect children from such exposure.[67] The legislation in NSW provides that a child must be included in a protection order if the child is in a domestic relationship with the person subject to the order.[68]

4.45 Where jurisdictions have definitions that include emotional or psychological abuse, these may encompass the exposure of a child to family violence.[69]

Breach of protection orders

4.46 In NSW, Tasmania and the ACT a breach of a protection order is included in the definition of family violence.[70]

Threats to commit acts of family violence

4.47 In most jurisdictions the threat to commit certain acts of family violence also constitutes family violence.[71] In some jurisdictions threats to assault, cause physical injury, or damage property are included, but threats to intimidate or be emotionally abusive or engage in conduct amounting to stalking are not.[72] In other jurisdictions, however, threatening to commit non-physical violence—such as intimidation, stalking and economic abuse—are specifically included.[73]

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describe intimidation or harassment. Less explicit is the *Family Violence Protection Act 2008* (Vic) ss 5, 7 which generally refer to conduct that is threatening, tormenting, harassing or intimidating. See P Parkinson, J Cashmore and J Single, *Post-Separation Conflict and The Use of Family Violence Orders* (2009), 19–21 for examples of how parents post-separation used the language of 'stalking'.

66 *Family Violence Protection Act 2008* (Vic) s 5. See also *Domestic Violence Act 1995* (NZ) s 3(3).

67 *Restraining Orders Act 1997* (WA) s 11B; *Domestic and Family Violence Act 2007* (NT) s 18(2).

68 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 38. The court has discretion to vary such an order.

69 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), [3.1.12].

70 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 4, 14; *Family Violence Act 2004* (Tas) s 7; *Domestic Violence and Protection Orders Act 2008* (ACT) s 13(2).

71 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 4(c); *Family Violence Protection Act 2008* (Vic) ss 5(1)(a)(iv), 5(2); *Domestic and Family Violence Protection Act 1989* (Qld) s 11(1)(e); *Restraining Orders Act 1997* (WA) s 6(1)(f); *Family Violence Act 2004* (Tas) s 7 (a)(v); *Domestic Violence and Protection Orders Act 2008* (ACT) s 13(1)(d), (g); *Domestic and Family Violence Act 2007* (NT) s 5(f). *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8(4) treats certain threatening behaviour as emotional or psychological abuse.

72 See, eg, *Restraining Orders Act 1997* (WA) s 6(f).

73 See, eg, *Domestic and Family Violence Act 2007* (NT) s 5(f).

Commissions' views

4.48 The Commissions note the conclusion of the AGS in *Domestic Violence Laws in Australia* that the family violence legislation of states and territories

> does not appear to be 'substantially different' across the jurisdictions in respect of crucial matters such as … the types of conduct that may constitute domestic violence.[74]

4.49 Nonetheless, the Commissions consider that there are some key differences that ought to be addressed. One option for reform is to have a standard definition of family violence across state and territory family violence legislation. A uniform definition would remove any confusion about the meaning of family violence across the jurisdictions. A model definition was proposed in the Model Domestic Violence Laws Report but was not taken up.[75] The Commissions note that drafting a uniform definition acceptable to all states and territories would be a significant task, especially given that jurisdictions adopt differing terminology to describe family violence—including domestic violence and domestic abuse. The protection of victims of violence should not, however, be compromised by achieving a consistent definition, if consistency represents the lowest common denominator. The Commissions seek stakeholder views on the feasibility of this option.

4.50 An alternative is to concede that while definitions of family violence across state and territory family violence legislation need not be drafted in precisely the same terms, there should be a shared understanding of the types of conduct that constitute family violence, covering both physical and non-physical violence. The Victorian family violence legislation provides an instructive model in this regard. As illustrated by the discussion of the purposes of family violence legislation and protection orders in Chapter 3, the underlying purposes are substantially similar[76] so the adoption of a shared understanding of the elements of family violence does not appear to be controversial.

4.51 The Commissions agree with the following recommendation made by the United Nations Department of Economic and Social Affairs Division for the Advancement of Women:

> Legislation should include a comprehensive definition of domestic violence, including physical, sexual, psychological and economic violence.[77]

4.52 In advocating a shared understanding of the elements that comprise family violence, the Commissions note the significant educative role that definitions can play

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74 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), [1.16].

75 Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999), s 3, 18–23.

76 Though the extent to which such purposes are articulated in objects clauses differ, and this is the subject of Proposal 4–25 below.

77 United Nations Department of Economic and Social Affairs Division for the Advancement of Women, *Handbook for Legislation on Violence Against Women*, 1 July 2009, [3.4.2.1].

in communicating what family violence is to those within the legal system, as well as the broader community. Removal of confusion which may result from conflicting understandings of what constitutes family violence may also provide reassurance to the community.

4.53 The Commissions are interested in hearing views about whether the definition of family violence—in addition to setting out examples of conduct which constitute violence—should also provide that family violence is violent or threatening behaviour or any other form of behaviour that coerces, controls and/or dominates a family member and/or causes him or her to be fearful. The Commissions note that this formulation was proposed by the VLRC and part of this formulation is contained in the definition of family violence in the Victorian family violence legislation.[78]

4.54 The Commissions express views on particular legislative schemes and certain elements of the definition of family violence, below.

Need for a definition of family violence in NSW family violence legislation

4.55 The NSW family violence legislation is notable in its omission to define 'domestic violence'—although it defines a 'domestic violence offence'. The Commissions reiterate the view, previously expressed by the NSW Law Reform Commission, that there should be a separate definition of 'domestic violence' in the NSW family violence legislation which should include reference to psychological harm.[79] It is important for the definition to capture conduct which of itself may not amount to a criminal offence, expanding the circumstances in which victims of violence may seek protection. Apart from physical violence, the definition should capture the other types of family violence addressed below.

Sexual assault

4.56 In the Commissions' view, sexual assault should be expressly recognised in the definitions of family violence in the family violence legislation of each state and territory. Raising the profile of sexual assault in the definitions may go some way to addressing the general invisibility of sexual assault as a form of family violence.[80]

4.57 The Commissions agree with the conclusions of the VLRC in this regard that:

> Including sexual forms of family violence in the definition serves two main purposes. First, it makes it clear to family violence victims that they do not have to endure sexual assault, that it is not considered acceptable in our society and that legal

78 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), Rec 14; *Family Violence Protection Act 2008* (Vic) s 5(1)(vi).

79 See New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report No 103 (2003), [4.14]–[4.22].

80 The invisibility of sexual assault in family violence cases is discussed in Ch 15.

> protection is available. Secondly, it educates the community about sexual violence within family relationships and that it is unacceptable.[81]

4.58 This will clearly necessitate amendment to the family violence legislation of Western Australia, which does not recognise sexual assault. The Commissions are interested in views about whether the general definition of 'domestic violence' in s 13 of the ACT family violence legislation should be amended to include express reference to sexual assault even though various offences of sexual assault are included in sch 1 as 'domestic violence' offences. The Commissions tend to the view, however, that the general definition in the ACT family violence legislation should refer expressly to sexual assault.

4.59 Further, as discussed below, the Queensland definition of family violence—although it refers to 'indecent behaviour without consent'—may also need to be amended to capture sexual offences against children where consent is not a defence.

Economic abuse

4.60 Economic abuse should be expressly recognised in the definitions of family violence in the family violence legislation of each state and territory. This will necessitate amendment to the family violence legislation of NSW, Queensland, Western Australia and the Northern Territory.

4.61 Economic abuse is a particular form of violence that has been identified as used against older women. The Australian Domestic and Family Violence Clearinghouse has highlighted the problem of abuse of older women being 'lost in the cracks' between the family violence and elder abuse services systems.[82] It notes the serious under-reporting of violence against older women, noting a greater reluctance of older women to disclose personal matters.[83] Older women living alone may be more vulnerable to economic abuse by an adult child following the death of a partner.[84]

4.62 Ideally, legislation should set out examples of economic abuse. Such examples help to educate judicial officers, lawyers and those engaging with the legal system. The family violence legislation of Victoria and South Australia provide instructive models in this regard.

4.63 The Commissions propose below that s 44 of the *Crimes Act 1900* (NSW)—a 'domestic violence offence' dealing with failure to provide any wife, apprentice, servant or insane person with necessary food, clothing or lodgings—should be amended to ensure that its underlying philosophy and language are appropriate in a

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81 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), 103.

82 L McFerran, *The Disappearing Age: A Discussion Paper on a Strategy to Address Violence Against Older Women* (2009) Australian Domestic and Family Violence Clearinghouse, 2 (citations omitted).

83 Ibid, 2 (citations omitted).

84 Ibid, 3.

modern context.[85] The Commissions consider that the proposed inclusion of economic abuse in the family violence legislation of NSW may be more appropriate.

Emotional or psychological harm/abuse

4.64 The Commissions note the various formulations of emotional or psychological harm or abuse—or related conduct that 'intimidates,' 'harasses' or 'coerces'—referred to in the family violence legislation of the various states or territories. While one option is to have a consistently worded definition, the Commissions consider that, at the least, the emphasis should be on a shared understanding that emotional abuse is a recognised form of family violence.

4.65 However, there are two respects in which the Commissions offer a tentative view. One is in relation to the use of legislative examples; the other concerns possibly inappropriate emphasis on proof of emotional abuse in relation to certain types of family violence. Each of these is addressed below.

4.66 ***Use of legislative examples.*** The category of violence covering emotional or psychological abuse or intimidation/coercion is one that is particularly likely to impact differently on various groups in the community. It is therefore desirable that the family violence legislation of each state and territory include examples of such conduct that would affect diverse groups in the community. In this regard, the Commissions endorse the recommendation made by the VLRC that a definition of family violence 'should be broad enough to include abuses specific to certain groups in the community'.[86]

4.67 Examples of such conduct as they affect varying groups and that appear desirable to include in family violence legislation include:

- threatening to: institutionalise a person; withdraw care on which the person is dependent; withhold medication or prevent the person accessing necessary medical equipment or treatment—potentially relevant to aged persons and those suffering from a disability or illness;

- racial taunts; and preventing a person from making or keeping connections with the person's family, friends or culture, including cultural or spiritual ceremonies or practices—potentially relevant to migrants, Indigenous people and persons from diverse cultural and linguistic backgrounds; and

- threatening to disclose a person's sexual orientation against the person's wishes—relevant to those from the gay, lesbian, bisexual and transgender community.

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85 See Proposal 4–12.

86 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), Rec 11.

4.68 Highlighting such examples in legislation will serve an important educative function. The Commissions note that some concern has been expressed about judicial officers relying on legislative examples as exhaustive rather than illustrative of prohibited conduct. An example was given on the ALRC's Family Violence Online Forum of a judicial officer who took the approach that the two examples of 'harassment' in the Northern Territory family violence legislation constrained a consideration of conduct that did not fall within the ambit of those examples.[87]

4.69 The Commissions are interested in hearing whether, in practice, legislative examples of certain types of family violence conduct are being treated as exhaustive.[88] In any event, family violence legislation should make it clear that such examples are not intended to be exhaustive. Moreover, proper statutory interpretation is an issue appropriately addressed by judicial and legal education.

4.70 ***Appropriate use of emotional or psychological abuse category.*** In some cases, family violence legislation refers to emotional or psychological abuse to describe conduct that would not otherwise amount to a criminal offence (if proved to the requisite standard), for example, repeated derogatory taunts. This approach is appropriate. In other cases, even where conduct could amount to a criminal offence, a person must also prove emotional abuse to obtain a protection order. For example, the South Australian family violence legislation focuses on either the impact of harm to a victim or the intention of the person engaging in family violence. Sexual assault is included as an example of conduct that could result in emotional or psychological harm.[89] The Commissions are concerned that requiring a person to prove emotional or psychological harm as the result of sexual assault adds a further evidentiary burden. The very fact of sexual assault should fall within conduct constituting family violence, without the need to prove that such conduct had a certain effect on the victim. The same could be said of depriving a person of his or her liberty, which is also cited as an example of conduct that could cause emotional or psychological harm in the South Australian legislation.[90]

4.71 There is some room for definitions of family violence to focus on the harm to the victim. However, where conduct would, in any event, amount to a criminal offence if it could be proven to the criminal standard of proof, a definition should not add an unnecessary evidentiary burden on victims to prove that such conduct caused them emotional or psychological harm. Proof of emotional harm following sexual assault is not necessary for a criminal prosecution—nor ought it to be to obtain a protection order.

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

88 See Question 4–2 below.

89 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8(4)(a).

90 Ibid s 8(4)(b).

Kidnapping or deprivation of liberty

4.72 The Commissions consider that, for the sake of clarity, the definition of family violence in the family violence legislation of Queensland and the Northern Territory should include kidnapping or deprivation of liberty.

Damage to property

4.73 In the Commissions' view, the family violence legislation of Tasmania should be amended to include damage to property and the threat to commit such damage in the definition of family violence. The absence of this category of violence is anomalous. As stated in the review of that jurisdiction's legislation, property damage is a common feature of family violence incidents. Property damage is recognised as family violence not only across the family violence legislation of the other states and territories and also, for example, in the *Migration Regulations 1994* (Cth) and in overseas jurisdictions such as New Zealand. The absence of property damage—as a traditionally recognised form of violence—in the Tasmanian legislation is in contrast to Tasmania's recognition and criminalisation of less commonly recognised forms of family violence, namely emotional and economic abuse.

Injury to animals

4.74 The definition of family violence in each of the states and territories should be broad enough to capture relevant conduct that causes death or harm to an animal, such as a family pet, irrespective of whether the animal is technically the property of the victim. There are a number of ways of achieving this. Harm to an animal can be specifically incorporated into the definition of family violence, or it can fall within the general category of emotional or psychological abuse. Where harm to an animal is linked to property damage, definitions of property can be extended to make it clear that property covers not only property that is owned by the victim but also property in his or her possession or otherwise used or enjoyed.[91]

4.75 It appears that the family violence legislation of the following jurisdictions will need to be amended to capture harm to animals which may not technically be the property of the victim:

- NSW—as its legislation does not refer to such harm, nor does it contain the category of emotional or psychological abuse, nor an expanded definition of property either in s 7—which refers to intimidation—or insofar as it picks up property offences in the *Crimes Act* 1900 (NSW) s 195, which refers to property 'belonging to another'.

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91 This is, for example, how property is referred to in the definition of 'abuse' in the Ibid s 8(2)(d).

- Queensland—as its legislation only specifically refers to wilful damage to the other person's property—including his or her pet—and does not contain a category of emotional or psychological abuse.[92]

- Western Australia—as its legislation links harm to an animal to property belonging to the victim, and although it contains a category covering emotional abuse, it requires such abuse to be 'ongoing'.[93] One or two instances of killing or injuring a family pet may not qualify as 'ongoing'.

- Northern Territory—as its legislation allows for injury or death of an animal either on the basis that it damages the victim's property or intimidates the victim by causing reasonable apprehension of harm to his or her property.[94]

Exposure of children to violence

4.76 The National Council's report, *Time for Action: The National Council's Plan for Australia to Reduce Violence Against Women and their Children* noted that:

> Children and young people exposed to sexual assault and domestic and family violence experience anger, sadness, shame, guilt, confusion, helplessness and despair. Children do not need to be physically present when violence occurs to suffer negative consequences. Living in an environment where violence occurs is extremely damaging to children and there is little difference in outcomes for children whether they see the violence or not.
>
> Living with domestic and family violence can directly affect infants, causing negative developmental, social, emotional and behavioural consequences. At a time of rapid neurological growth, an infant's development may be compromised by exposure to ongoing violence, whether or not they are the target of the violence. Infants may have symptoms typical of post-traumatic stress.[95]

4.77 The Commissions are of the preliminary view that family violence legislation ought to acknowledge the detrimental impact of family violence on children. Later in this chapter, the Commissions propose that each family violence Act expressly acknowledge these effects either in a preamble or a provision setting out the nature, features and dynamics of family violence.[96]

4.78 In addition, the Commissions tend to the view that the definitions of family violence in the family violence legislation of each state and territory should either acknowledge exposure of children to family violence as a category of violence in its

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92 *Domestic and Family Violence Protection Act 1989* (Qld) s 11.
93 *Restraining Orders Act 1997* (WA) s 6.
94 *Domestic and Family Violence Act 2007* (NT) s 5(b), 6(1)(b)(ii).
95 The National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), 40 (citations omitted).
96 See Proposal 4–22 below.

own right—as is the case in Victoria—or enable the making of orders to protect children from such exposure.

4.79 The Commissions note that Maurine Pyke's *Review of South Australian Domestic Violence Laws* in 2007 identified, as an option for reform, amending the definition of family violence to include causing or allowing a child to see or hear family violence, or putting or allowing the child to be put at real risk of such exposure.[97]

4.80 Exposure of children to family violence encompasses more than just witnessing family violence. Indeed the terminology of 'witnessing' may be problematic in the sense that it may have a tendency to downplay the fact that children are living with the reality of family violence. The Victorian family violence legislation provides instructive examples of behaviour that causes a child to hear or witness or otherwise be exposed to family violence.[98] These include the child comforting or providing assistance to a family member who has been physically abused by another family member, and being present when police officers attend an incident involving physical abuse of a family member by another family member.

4.81 In making these proposals, the Commissions have been persuaded by the considerable amount of research documenting the fact that exposure of children to family violence causes long-term emotional, psychological, physical and behavioural issues. For example, Emma Bevan and Daryl Higgins' research concluded that:

> Physical abuse and witnessing family violence significantly predicted psychological spouse abuse and trauma symptomatology, with witnessing family violence individually predicting the two outcomes. [99]

4.82 Family law judgments have also referred to the dangers of children being exposed to violence. For example, in *M v M*, Mullane J referred to the risk of injury and fear, as well as the risk that children will learn from the abusive behaviour and ultimately treat it as acceptable.[100] In *T and N*, Moore J referred to the 'abundance of research from social scientists about the highly detrimental effect upon young children of exposure to violence and the serious consequences such experiences have for their personality formation' and went on to catalogue such effects.[101]

4.83 The Commissions are, however, interested in hearing whether such a proposal would have negative effects for mothers who are victims of family violence and are held accountable for not protecting children from violence at a time when they are under intense pressure.

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97 M Pyke, *South Australian Domestic Violence Laws: Discussion and Options for Reform* (2007), [18.2].

98 *Family Violence Protection Act 2008* (Vic) s 5.

99 See, E Bevan and D Higgins, 'Is Domestic Violence Learned? The Contribution of Five Forms of Child Maltreatment to Men's Violence and Adjustment' (2002) 17(3) *Journal of Family Violence* 223, 241.

100 *M v M* (2000) FLC 93–006, [94].

101 *T and N* (2003) FLC 93–172, [36].

Linkage to criminal law

4.84 The Commissions note that family violence legislation in both NSW and the ACT sets out certain offences which are 'domestic violence' offences. The Commissions consider that the states and territories should have flexibility to do this in their definitions of family violence provided that other elements of family violence are also acknowledged in the definition. Linking family violence to certain criminal offences has the advantage of clarity. However, the Commissions consider that the list of offences should be reviewed by the respective state and territory governments with a view to ascertaining whether:

- each of the offences ought to remain classified as a 'domestic violence offence';
- there are any additional offences that ought to be included; and
- there are any offences that need to be updated or amended.[102]

4.85 As stated above, over-definitions of family violence can detract from, or devalue, the experience of victims of family violence, and under-definitions can cause gaps in protection.

4.86 The Commissions are particularly interested in understanding why it is necessary to categorise the following offences as 'domestic violence' offences (as the ACT legislation does) and whether they have been used as the basis for obtaining protection orders:

- causing bushfires;
- engaging in unreasonable obstruction in relation to the use of government premises;
- behaving in an offensive or disorderly manner while in or on government premises; and
- refusing or neglecting to leave government premises when directed.

4.87 There may, of course, be valid reasons why particular offences that do not appear obviously to be of a 'family violence' nature have been categorised in this way. For example, the reason for the inclusion of trespass in the ACT legislation was justified as follows:

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102 For example, the language and philosophy of *Crimes Act 1900* (NSW) s 44 concerning legal liability and failure to provide 'any wife, apprentice, or servant or any insane person with necessary food, clothing, or lodging' appears somewhat archaic.

> The inclusion of trespass as a domestic violence offence in this Act is in response to concern raised in the community that its exclusion can potentially have implications for a victim's safety. Police identified circumstances where they have been obliged to grant bail to a person who has been apprehended for trespass in a domestic violence context. As trespass is currently not included as a domestic violence offence, the offender is released back into the community within a short period of time. The inclusion of trespass as a domestic violence offence gives police an option to remand an offender in custody when the offence trespasses in a domestic violence context. Its inclusion will enhance the intention of the Act to raise a presumption against bail for domestic violence offences on the basis of protecting victims from further offences.[103]

4.88 The Commissions consider that the NSW and ACT Governments, in undertaking the proposed review of 'domestic violence offences', should also give particular attention to those offences in respect of which their legislation differs. For example, NSW does not categorise incest, causing bushfires and negligent driving as 'domestic violence offences', but the ACT does.

Proposal 4–1 (a) State and territory family violence legislation should contain the same definition of family violence covering physical and non-physical violence, including conduct the subject of Proposals 4–3 to 4–5 and 4–7 to 4–10 below. The definition of family violence in the *Family Violence Protection Act 2008* (Vic) should be referred to as a model.

OR

(b) The definitions of family violence in state and territory family violence legislation should recognise the same types of physical and non-physical violence, including conduct the subject of Proposals 4–3 to 4–5 and 4–7 to 4–10 below. The definition of family violence in the *Family Violence Protection Act 2008* (Vic) should be referred to as a model.

Question 4–1 Should the definition of family violence in state and territory family violence legislation, in addition to setting out the types of conduct that constitute violence, provide that family violence is violent or threatening behaviour or any other form of behaviour that coerces, controls or dominates a family member or causes that family member to be fearful?

Proposal 4–2 The *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should be amended to include a definition of 'domestic violence', in addition to the current definition of 'domestic violence offence'.

103 Explanatory Statement, Domestic Violence and Protection Orders Bill 2008 (ACT), 4.

Proposal 4–3 State and territory family violence legislation should expressly recognise sexual assault in the definition of family violence to the extent that it does not already do so.

Proposal 4–4 State and territory family violence legislation should expressly recognise economic abuse in the definition of family violence to the extent that it does not already do so.

Proposal 4–5 State and territory family violence legislation should include specific examples of emotional or psychological abuse or intimidation or harassment that illustrate acts of violence against certain vulnerable groups including: Indigenous persons; those from a culturally and linguistically diverse background; the aged; those with a disability; and those from the gay, lesbian, bisexual and transgender community. Instructive models of such examples are in the *Family Violence Protection Act 2008* (Vic) and the *Intervention Orders (Prevention of Abuse) Act 2009* (SA). In each case, state and territory family violence legislation should make it clear that such examples are illustrative and not exhaustive of the prohibited conduct.

Question 4–2 Some state and territory family violence legislation lists examples of types of conduct that can constitute a category of family violence. In practice, are judicial officers and lawyers treating such examples as exhaustive rather than illustrative?

Proposal 4–6 The definition of family violence in state and territory family violence legislation should not require a person to prove emotional or psychological harm in respect of conduct which, by its nature, could be pursued criminally—such as sexual assault. In particular, the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) should be amended to ensure that sexual assault of itself is capable of meeting the definition of 'abuse' without having to prove emotional abuse.

Proposal 4–7 The *Domestic Violence and Protection Orders Act 2008* (Qld) and *Domestic and Family Violence Act 2007* (NT) should be amended expressly to recognise kidnapping or deprivation of liberty as a form of family violence.

Proposal 4–8 The *Family Violence Act 1994* (Tas) should be amended to recognise damage to property and threats to commit such damage as a form of family violence.

Proposal 4–9 The *Crimes (Domestic and Personal Violence) Act 2007* (NSW), *Domestic Violence and Protection Orders Act 2008* (Qld), *Restraining Orders Act 1997* (WA), and *Domestic and Family Violence Act 2007* (NT) should be amended to ensure that their definitions of family violence capture harm or injury to an animal irrespective of whether that animal is technically the property of the victim.

Proposal 4–10 State and territory family violence legislation should include in the definition of family violence exposure of children to family violence as a category of violence in its own right.

Proposal 4–11 Where state or territory family violence legislation sets out specific criminal offences that form conduct constituting family violence, there should be a policy reason for the categorisation of each such offence as a family violence offence. To this end, the governments of NSW and the ACT should review the offences categorised as 'domestic violence offences' in their respective family violence legislation with a view to (a) ensuring that such categorisations are justified and appropriate; and (b) ascertaining whether or not additional offences ought to be included.

Proposal 4–12 Incidental to the proposed review of 'domestic violence offences' referred to in Proposal 4–11 above, s 44 of the *Crimes Act 1900* (NSW)—which deals with the failure to provide any wife, apprentice, servant or insane person with necessary food, clothing or lodgings—should be amended to ensure that its underlying philosophy and language are appropriate in a modern context.

Criminal law

4.89 The discussion below addresses interaction issues between the definitions or terminology in family violence laws and the criminal law:

- in the limited circumstances where the criminal law defines 'family violence'; and

- where each law defines a *particular* type of conduct that may constitute family violence.

Interaction of definitions of 'family violence' in criminal and family violence laws

4.90 There are limited examples of definitions of 'family violence' or 'domestic violence' in the criminal laws of Australia. One area where the criminal law has defined 'family violence' is in the context of defences to homicide.[104] This is the case under the *Crimes Act 1958* (Vic), and the Criminal Code Abusive Domestic Relationship Defence and Another Matter) Amendment Act 2010 (Qld), each of which is addressed below.[105]

4.91 A consideration of the Victorian and Queensland legislation below raises the issue of how family violence should be defined where it is recognised as relevant as a defence to homicide, either in its own right, or as part of a broader concept of self-defence.

Victorian criminal legislation

4.92 Section 9AH of the *Crimes Act 1958* (Vic) allows evidence of family violence to be adduced in cases of murder,[106] defensive homicide[107] and manslaughter,[108] where family violence is alleged. It does not operate as a separate defence in itself, but allows considerations of family violence to be relevant to self-defence.[109] Types of evidence that can be adduced include evidence about the history of the relationship between the accused person and a family member, and the general nature and dynamics of relationships affected by family violence. Under s 9AH, where family violence is alleged, the defence of self-defence is available even if an accused person is responding to harm that is not immediate, or his or her response uses disproportionate force.

4.93 'Violence' is defined more narrowly in s 9AH of the *Crimes Act 1958* than it is under the Victorian family violence legislation. It is defined in the *Crimes Act* to include physical abuse, sexual abuse, psychological abuse—including intimidation, harassment, damage to property, and certain threats—and causing a child to see or hear certain types of abuse or putting a child at real risk of seeing or hearing that abuse. Unlike the Victorian family violence legislation, it does not include economic abuse or the more general category of behaviour that in any other way controls or dominates the

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104 The issue of whether family violence should be a defence to homicide is discussed in Ch 7.

105 In each case, the Act and Bill provide that a number of acts of violence may meet the threshold of the relevant definition even though some or all of those acts when viewed in isolation may appear to be minor or trivial: *Crimes Act 1958* (Vic) s 9AH(5); Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Bill 2009 (Qld) cl 3.

106 *Crimes Act 1958* (Vic) s 9AC.

107 Ibid s 9AD.

108 Ibid s 9AE.

109 These provisions of family violence only apply to homicide offences, so the common law test as outlined in *Zecevic v The Queen* (1987) 162 CLR 645, 661 continues to apply to all other offences where self-defence is applicable: P Priest, *Defences to Homicide* (2005) <www.vicbar.com.au/webdata/CLEFiles /Defences%20to%20Homicide.pdf> at 22 January 2010.

person and causes the person to feel fear for his or her or a family member's safety or well-being.[110]

4.94 However, an historical analysis of the definition of family violence in the *Crimes Act 1958* reveals no intention to introduce a definition that was more limited than that in Victoria's family violence legislation. The amendments to the *Crimes Act 1958* were made in response to recommendations made by the VLRC in its report on defences to homicide in 2004. At the time, Victoria's family violence legislation was the *Crimes (Family Violence) Act 1987*, which did not contain a definition of family violence. The VLRC in its report on defences to homicide stated that it had chosen to adopt as a model the definition under the *Domestic Violence Act 1995* (NZ), which had received some support in consultations on its inquiry into family violence.[111]

4.95 The adoption by the VLRC of the New Zealand definition preceded its later recommendation, in its 2006 report on family violence, about the content of the definition of family violence—which did include, for example, economic abuse. The definition of family violence adopted in the *Crimes Act 1958* is the New Zealand definition of family violence. The broader definition of family violence in the *Family Violence Protection Act 2008* (Vic) did not exist at the time the amendments to the *Crimes Act 1958* were made.

Queensland criminal legislation

4.96 On 16 February 2010 the *Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Act 2010* (Qld) was assented to and commenced. The Act amends the *Criminal Code Act 1889* (Qld) to insert a new section 304B which introduces a new partial defence to murder of 'killing in an abusive domestic relationship'. In the Second Reading Speech, the Attorney-General Cameron Dick stated:

> The new partial defence to murder will apply to victims of seriously abusive relationships who kill their abusers. The defence will be the first of its kind in the country and will operate to provide legal protection for victims in this category of offending.[112]

4.97 The defence only applies where the person killed had committed 'serious domestic violence' against the accused in the course of the relationship. Significantly, the Act provides that references to 'an act of domestic violence in a domestic relationship' are to be interpreted in the same way as that state's family violence legislation—the *Domestic and Family Violence Protection Act 1989* (Qld).[113]

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110 *Family Violence Protection Act 2008* (Vic) s 5.

111 Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004), 334–335.

112 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 November 2009, 3669 (C Dick—Attorney-General and Minister for Industrial Relations), 3669.

113 *Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Act 2010* (Qld) s 3.

Therefore, 'domestic violence' in Queensland has the same meaning under civil and criminal legislation. The distinguishing factor in the criminal legislation is the requirement for the family violence to be 'serious' in order for the defence to apply. The Attorney-General stated in the Second Reading Speech that:

> The use of the term 'serious' within the provision in relation to the level of domestic violence is used as a matter of emphasis to place the nature of the domestic violence in the Supreme Court murder trial in context. … All domestic violence must be condemned not only by government but in all our communities and in our homes. However, the use of the term 'serious' in the bill acts to create an appropriate threshold for the application of this partial defence to a charge of murder.[114]

Commissions' views

4.98 In the Commissions' preliminary view, where a state or territory's criminal legislation recognises family violence as relevant to a defence to homicide—either in its own right or as part of a broader concept of self-defence—family violence should be defined broadly to include both physical and non-physical violence, in the same way that it should be defined under family violence legislation.[115]

4.99 In the Commissions' preliminary view there is considerable merit in a jurisdiction's family violence legislation and criminal legislation adopting a common understanding of the types of conduct that constitute family violence, in those cases where the criminal law recognises family violence as relevant to a defence to homicide. This is irrespective of whether the criminal legislation limits the availability of defences to homicide in a family violence context to cases involving 'serious' family violence. Ideally, the definition of family violence used in a state or territory's civil and criminal legislation should align. There would appear to be a stronger case for *uniformity* of the definition of 'family violence' within a state or territory's family violence and criminal laws, than is the case across state or territory jurisdictions. In the latter case, the emphasis should be on adopting a shared understanding of what constitutes family violence.

4.100 The Commissions have considered whether the differing policy objectives of civil protection legislation and criminal legislation warrant a more restrictive definition of family violence in the criminal context. On balance, the Commissions tend to the view that the different policy objectives of the criminal law and family violence legislation are not compromised by the adoption of a commonly shared definition.[116] Those different policy objectives may be addressed by placing emphasis, where necessary, on the *seriousness* of the family violence, rather than excluding certain types of violence. That is the approach taken in the Queensland criminal legislation, which provides one model for reform. It appears appropriate that the degree of severity

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114 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 November 2009, 3669 (C Dick—Attorney-General and Minister for Industrial Relations), 3670.

115 See Proposal 4–1.

116 As noted above, in some cases these legislative schemes share common aims.

of family violence capable of being relied upon as a defence to murder is higher than that which may be needed to obtain a protection order.

4.101 Where a jurisdiction allows evidence of family violence to be adduced in the context of a broader concept of self-defence, like Victoria, the issue of severity will most likely be one of the factors considered by the jury in determining whether the accused had reasonable grounds for believing his or her conduct was necessary.[117]

4.102 In Chapter 7 the Commissions pose a series of questions about how the criminal law can best recognise family violence as a defence to homicide, including seeking feedback on problems or issues which arise from current models that recognise family violence as relevant to a defence to homicide.

4.103 As discussed above, the fact that the Victorian criminal legislation has a narrower definition in its family violence legislation is more accidental rather purposeful. The definition of family violence used in Victoria's family violence legislation was not enacted at the time the family violence amendments were made to the Victorian *Crimes Act.* In the Commissions' preliminary view, the definition of family violence in s 9AH of the *Crimes Act* should be replaced with the definition of family violence in s 5 of Victoria's family violence legislation. Alternatively, the definition of family violence in s 9AH of the *Crimes Act* should be amended to include economic abuse. The Commissions understand that the Victorian *Crimes Act* is currently under review.

4.104 The inclusion of economic abuse in the definition of family violence in s 9AH of the *Crimes Act 1958* (Vic) will not necessarily mean that economic abuse of itself will constitute a defence to homicide. Rather, it will ensure that the pattern of family violence to which a person has been subjected—including physical and non-physical violence—will be relevant to self-defence where a person kills a family member who has been violent towards her or him.

Proposal 4–13 The definitions of family violence in a state or territory's family violence legislation and criminal legislation—in the context of defences to homicide—should align, irrespective of whether the criminal legislation limits the availability of defences to homicide in a family violence context to cases involving 'serious' family violence.

117 See discussion of *Director of Public Prosecutions v Sherna* [2009] VSC 494 in Ch 7.

Proposal 4–14 The definition of 'family violence' in s 9AH of the *Crimes Act 1958* (Vic)—which largely replicates the definition in s 3 of the *Domestic Violence Act 1995* (NZ)—should be replaced with the definition of 'family violence' in s 5 of the *Family Violence Protection Act 2008* (Vic). Alternatively, the definition of family violence in s 9AH of the *Crimes Act 1958* (Vic) should be amended to include economic abuse.

Definitions of, or terminology referring to, acts that may constitute family violence across criminal and family violence laws

4.105 As stated above, some state and territory definitions of family violence pick up some definitions of criminal law offences. For example, the Victorian family violence legislation provides that the definition of 'assault' for the purpose of family violence is the same as the definition of assault in s 31 of the *Crimes Act 1958* (Vic).[118] Similarly, the Western Australian family violence legislation provides that various definitions, including those of 'assault', 'intimidate', 'kidnapping or depriving the person of his or her liberty' and 'pursue' are the same as the equivalent definitions in the *Criminal Code* (WA).[119]

4.106 However, there are some examples where the different ways in which the family violence law and criminal law of a jurisdiction define family violence produces potentially anomalous outcomes. Some specific examples are set out below, as are the Commissions' proposals to address such anomalies.

4.107 ***Stalking—Northern Territory***. 'Stalking' is defined differently—and in some respects more narrowly—under the *Domestic and Family Violence Act* (NT) than it is for the purpose of delineating conduct constituting a criminal offence under the *Criminal Code* (NT). Under the *Criminal Code* (NT) s 189 relevant stalking behaviour extends, for example, to telephoning or sending electronic messages to the victim, interfering with property in the victim's possession and giving offensive material to the victim—none of which is canvassed in the definition of stalking in the family violence legislation. The definition of 'stalking' in the *Criminal Code* (NT) (unlike the family violence legislation) also allows for a combination of behaviours to constitute stalking, in addition to repeated instances of the same conduct. In theory, this could mean that a victim in the Northern Territory may not be able to obtain a protection order in family violence proceedings against a person engaging in stalking for conduct that could be the subject of a criminal prosecution for stalking.

4.108 The Commissions are interested in hearing about practical interactions between the stalking provisions in the Northern Territory's criminal and family violence laws.

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118 *Family Violence Protection Act 2008* (Vic) s 4.
119 *Restraining Orders Act 1997* (WA) s 6.

4.109 ***'Domestic violence'—Queensland***. The definition of 'domestic violence' in s 11 of the *Domestic and Family Violence Protection Act 1989* (Qld) includes 'wilful injury'. How does this interact in practice with 'common assault' as it is defined in s 245 of the *Criminal Code* (Qld)? The latter includes striking, touching or moving a person without his or her consent. A person may touch or move someone without causing injury, which appears to make the definition of 'wilful injury' in the family violence legislation more restrictive than the definition of 'assault' in the criminal legislation. The definition of 'domestic violence' in s 11 also includes 'indecent behaviour to the other person without consent'. However, in the *Criminal Code* there are some sexual offences against children where consent is not a defence. The scope of the definition of 'domestic violence' in the family violence Act means that a person would not be able to obtain a protection order—for example, on behalf of a child—in circumstances where criminal redress may be available.

4.110 The Commissions are interested in hearing about whether there are other examples where the scope of conduct that could warrant prosecution is broader than conduct that could warrant an application for a protection order.

Question 4–3 Are there any other examples where the criminal law of a state or territory would allow for prosecution of conduct constituting family violence in circumstances where a state or territory's family violence legislation would not recognise the same conduct as warranting a protection order?

4.111 There may of course be occasion for a particular term in family violence legislation to be defined more broadly than its corresponding term in criminal legislation, given the different objectives of the civil protection order regime. However, this should not be done in a way that may cause confusion. An example where different definitions and terminology across state or territory family violence and criminal legislation may cause confusion is discussed next.

4.112 ***Emotional or psychological harm, mental harm—South Australia***. In the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) one of the categories of abuse is that which causes, or is intended to cause, 'emotional or psychological harm'. Such harm is defined as including:

- mental illness;
- nervous shock; and
- distress, anxiety or fear, that is more than trivial.[120]

120 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8(3).

4.113 *The Criminal Law Consolidation Act 1935* (SA) uses the term 'mental harm'. It defines 'harm' as meaning 'physical or mental harm (whether temporary or permanent)'.[121] 'Mental harm' is in turn defined as 'psychological harm and does not include emotional reactions such as distress, grief, fear or anger unless they result in psychological harm'.

4.114 On first reading, the scope of each of the definitions—read in isolation—is arguably ambiguous, and when read together, somewhat confusing—especially from the point of view of a victim of family violence who may try to obtain a protection order based on emotional or psychological harm, in circumstances where there is also the prospect of commencing criminal proceedings for offences such as: causing serious harm,[122] causing harm,[123] acts endangering life or creating risk of serious harm.[124]

4.115 It appears that the definition of 'mental harm' in the *Criminal Law Consolidation Act 1935* excludes emotional harm—given that any emotional reaction within the ambit of the definition has to amount to psychological harm. That may be a valid policy position. However, the criminal law does not define psychological harm. The absence of a definition of that term, combined with the fact that the *Intervention Orders (Prevention of Abuse) Act 2009* conflates the definition of 'emotional or psychological harm', has the potential to cause confusion. Would proof of 'mental illness' or 'nervous shock'—for the purpose of obtaining a protection order—qualify as proof of 'mental harm' for the purposes of a criminal prosecution for an offence, such as 'causing harm'—assuming that proof is established beyond reasonable doubt?

4.116 At the time of writing, the *Intervention Orders (Prevention of Abuse) Act 2009* had not come into effect, so it is not known whether the interaction in practice of the definitions discussed above is problematic.

Commissions' views

4.117 In terms of policy, it is not justifiable to have a definition of family violence in family violence legislation that makes it more difficult for a victim to obtain a protection order than to commence a prosecution—in circumstances which warrant criminal prosecution.

4.118 State and territory governments should review the definitions and terminology used in defining family violence in their respective family violence Acts to ensure that they align with corresponding concepts or definitions in their criminal laws or, at least, ensure that the interaction of such terminology or definitions does not prevent a person obtaining a protection order in circumstances where a criminal prosecution could be pursued.

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121 *Criminal Law Consolidation Act 1935* (SA) s 21.
122 Ibid s 23.
123 Ibid s 24.
124 Ibid s 29.

4.119 In particular, the definition of 'stalking' in the Northern Territory family violence legislation should be amended. Further, those aspects of the definition of 'domestic violence' referring to 'wilful injury' and 'indecent behaviour without consent' in the Queensland family violence legislation should be reviewed.

4.120 In addition, the Commissions consider that the South Australian Government should review whether the interaction of the definition of 'emotional or psychological harm' in its family violence legislation, and 'mental harm' in its criminal legislation is likely to confuse victims and their legal representatives involved in both civil and criminal proceedings. This review should consider whether it would be desirable, for example, for (a) the family violence legislation to distinguish between emotional and psychological harm; or (b) the criminal legislation to define 'psychological harm'; and (c) for both the family violence and criminal legislation to adopt a commonly shared understanding of the meaning of 'psychological harm'.

Proposal 4–15 State and territory governments should review their family violence and criminal legislation to ensure that the interaction of terminology or definitions of certain conduct constituting family violence would not prevent a person obtaining a protection order in circumstances where a criminal prosecution could be pursued. In particular,

(a) the definition of stalking in *Domestic and Family Violence Act* (NT) s 7 should be amended to include all stalking behaviour referred to in the *Criminal Code Act* (NT) s 189; and

(b) the Queensland government should review the inclusion of the concepts of 'wilful injury' and 'indecent behaviour without consent' in the definition of 'domestic violence' in s 11 of the *Domestic and Family Violence Protection Act 1989* (Qld), in light of how these concepts might interact with the *Criminal Code* (Qld).

Proposal 4–16 The South Australian Government should review whether the interaction of the definition of 'emotional or psychological harm' in the definition of 'abuse' in s 8 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA), and 'mental harm' in s 21 of the *Criminal Law Consolidation Act 1935* (SA) is likely to confuse victims and their legal representatives involved in both civil family violence and criminal proceedings. In particular, the review should consider whether it would be desirable for:

(a) the *Intervention Orders (Prevention of Abuse) Act* to distinguish between emotional and psychological harm;

(b) the *Criminal Law Consolidation Act 1935* to define 'psychological harm'; and

(c) both above mentioned Acts to adopt a commonly shared understanding of the meaning of 'psychological harm'.

Family law

4.121 The *Family Law Act* distinguishes between 'family violence' and abuse of a child. Potentially, the same conduct in relation to a child constitutes both family violence and child abuse.[125] Family violence is defined to mean

> conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety.
>
> Note: A person reasonably fears for, or reasonably is apprehensive about, his or her personal wellbeing or safety in particular circumstances if a reasonable person in those circumstances would fear for, or be apprehensive about, his or her personal wellbeing or safety.[126]

4.122 This definition of 'family violence' is a semi-objective definition, as it requires reasonableness (objective element) but also requires the decision-maker to place themselves in the position of the potential victim (subjective element).[127] This is stricter than the purely subjective test for family violence which previously existed under s 60D of the *Family Law Act*.[128] The definition is also narrower in some respects than the definitions in state and territory family violence legislation. Objective definitions have been criticised as 'it is essentially a contradiction in terms to apply the notion of reasonableness to the experience of fear, and to do so fails to understand the psychological impact of violence, particularly in situations where there has been a history of control'.[129]

4.123 Conduct that causes a victim to fear for his or her safety may seem benign to an outsider. Dr Elspeth McInnes of the National Council of Single Mothers and their Children gave the following example to the Senate Legal and Constitutional Legislation Committee:

> We had a case where a mother detailed how her ex partner had brutally murdered the family pet, a cat, in front of the child and the mother. It was in an episode of high agitation and aggression and he had threatened that this would happen to other family members who defied him. He used to like to send kitten cards to the child and the mother when she was attending court. Everybody would look at that on the outside

125 Child protection is discussed in Part C.
126 *Family Law Act 1975* (Cth) s 4(1).
127 B Fehlberg and J Behrens, *Australian Family Law—The Contemporary Context* (2008), 215.
128 Ibid.
129 Ibid.

> and say 'Isn't that nice, he's sending a lovely card with a kitten'. But the message was 'remember the cat'.[130]

4.124 Women's Legal Services Australia submitted to the *Family Courts Violence Review* (Chisholm Review) that the definition of 'family violence' in the *Family Law Act* should be broadened to reflect better the nature and dynamics of family violence as a pattern of behaviour, including by removing the reasonableness test.[131]

> There is a tendency to see family violence as a series of incidents, when in fact it is a pattern of behaviour that involves the use of violence as a tool of power and control. Victims of family violence learn to 'read' the perpetrator of violence and know what is coming next. It may appear to an outsider that a specific incident should not 'reasonably' cause the victim to fear for their safety, but her experience tells her otherwise.[132]

4.125 A number of other stakeholders also submitted to the Chisholm Review that the definition of 'family violence' in the *Family Law Act* was too narrow including National Legal Aid, which submitted that 'an expanded and more prescriptive definition' similar to the one in the Victorian family violence legislation should be adopted.[133]

4.126 Abuse in relation to a child is defined to mean:

> (a) an assault, including a sexual assault, of the child which is an offence under a law, written or unwritten, in force in the State or Territory in which the act constituting the assault occurs; or
>
> (b) a person involving the child in a sexual activity with that person or another person in which the child is used, directly or indirectly, as a sexual object by the first-mentioned person or the other person, and where there is unequal power in the relationship between the child and the first-mentioned person.[134]

4.127 Significantly, the Family Violence Strategy of the Family Court of Australia acknowledges that the definition of 'family violence 'in the *Family Law Act* is too narrow to meet the objectives of the Strategy. As a result, the Family Violence Committee adopted 'a more comprehensive definition of the elements of violence':

> Family violence covers a broad range of controlling behaviours, commonly of a physical, sexual, and/or psychological nature, which typically involve fear, harm, intimidation and emotional deprivation. It occurs within a variety of close interpersonal relationships, such as between spouses, partners, parents and children, siblings, and in other relationships where significant others are not part of the physical household but are part of the family and/or are fulfilling the function of family.[135]

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130 Senate Standing Committee on Legal and Constitutional Affairs—Parliament of Australia, *Inquiry into the Provisions of the Family Law Amendment (Shared Parental Responsibility) Bill 2005* (2006), [3.97].

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

132 Ibid.

133 R Chisholm, *Family Courts Violence Review* (2009), 143.

134 *Family Law Act 1975* (Cth) s 4.

135 Family Court of Australia, *Family Violence Strategy* (2004–2005), 3 (citation omitted).

4.128 Dr Rae Kaspiew notes that differences in legislative definitions and practice-based definitions risk potentially inconsistent approaches in legal and family dispute resolution processes.[136]

Interaction of definitions: family violence legislation and the Family Law Act

4.129 One of the principles to be applied by the Family Court of Australia and other courts exercising jurisdiction under the *Family Law Act* is that they must have regard to the need to ensure safety from family violence, as defined in the Act.[137] There are a number of other provisions which require the Family Court to consider family violence. Insofar as the Family Court has to decide what is in a child's best interests, a primary consideration is the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.[138] An additional consideration is any family violence involving the child or a member of the child's family.[139] On its face, this means that the Family Court of Australia is potentially considering family violence in much narrower terms than the generally broader conceptualisations under state and territory family violence legislation.

4.130 However, while the definition of 'family violence' in the *Family Law Act* is comparatively narrow, the definition of 'family violence order' captures orders—including interim orders—made under prescribed laws of a state or territory to protect a person from family violence.[140] This is important because the Family Court is bound to consider family violence orders that apply to a child or a member of the child's family in ascertaining what is in a child's best interests, but only if they are final or contested.[141] In addition, in making parenting orders, the Family Court has to ensure that the order is consistent with any family violence order and does not expose a person to an unacceptable risk of family violence.[142]

4.131 The prescribed laws under sch 8 of the *Family Law Regulations*[143] cover: state and territory family violence legislation; other Acts that confer jurisdiction on courts to make family violence orders and; at least in one case,[144] an Act that confers jurisdiction on courts to make restraint orders outside the boundaries of the family violence context as defined in that state's family violence legislation.[145]

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136 R Kaspiew, 'Family Violence in Children's Cases under the Family Law Act 1975 (Cth): Past Practice and Future Challenges' (2008) 14 *Journal of Family Studies* 279, 287.

137 *Family Law Act 1975* (Cth) s 43(1)(ca). In this chapter, subsequent references to the Family Court of Australia are taken to include courts exercising jurisdiction under the *Family Law Act*, including the Federal Magistrates Court, unless the context indicates otherwise.

138 Ibid s 60CC(2)(b).

139 Ibid s 60CC(3)(j).

140 Ibid s 4.

141 Ibid s 60CC(3)(k).

142 Ibid s 60CG.

143 *Family Law Regulations 1984* (Cth) sch 8.

144 *Justices Act 1959* (Tas).

145 *Family Violence Act 2004* (Tas) s 4 (definition of 'family relationship').

4.132 This means that the Family Court has to take family violence orders 'as they are', that is, orders based on the particular definitions and the grounds for obtaining those orders in the particular state or territory jurisdiction. In other words, in practice, the Family Court may be required to consider a conceptualisation of family violence that is broader than that envisaged under the *Family Law Act*. In cases where a person appearing before the Family Court has a pre-existing final or contested protection order, the differences in definitions between the state or territory and federal scheme may have little effect. Further, in ascertaining what is in a child's best interests, the Family Court has broad discretion to consider any other fact or relevant circumstance that the court thinks is relevant,[146] which may extend to a consideration of violence falling outside the parameters of the definition of family violence in the *Family Law Act*.

4.133 However, it appears to the Commissions that there may be unjustified anomalies in the treatment of family violence issues, which turn on whether a party to family law proceedings who is a victim of family violence has, in fact, obtained a state or territory protection order. Consider the following hypothetical:

Hypothetical

A is from Victoria and is involved in family law proceedings involving the determination of parenting orders. A has obtained a final family violence order under the Victorian family violence legislation on the grounds of a pattern of economic abuse. In making a parenting decision under the *Family Law Act*, a family court is bound to consider that final order.

B is from Victoria and is also involved in family law proceedings involving the determination of parenting orders. B never applied for, and therefore never obtained a protection order under Victorian family violence legislation, even though B has suffered family violence including economic abuse. In making a parenting decision under the *Family Law Act* the Family Court is bound to consider family violence—and given the absence of a state protection order, B—unlike A—will need to satisfy the semi-objective test in s 4 of the *Family Law Act*. If B does not satisfy that test, the Family Court may not be bound to consider the family violence suffered by B—although it may do so in its broad discretion if it considers the conduct constituting the claim to be a relevant fact or circumstance that it should take into account.

146 *Family Law Act 1975* (Cth) s 60CC(3)(m).

C is from Queensland and is involved in family law proceedings involving the determination of parenting orders. Under Queensland family violence legislation C was not able to obtain a family violence order on the basis of suffering economic abuse, even though she suffered such abuse over a period of years. In order for C's claim of family violence to be considered by the Family Court C—unlike her counterpart A in Victoria—will need to satisfy the semi-objective test in s 4 of the *Family Law Act*. If C fails to satisfy this test, the Family Court is not bound to consider the family violence suffered by C, although it may do so in its broad discretion if it considers the conduct constituting the claim to be a relevant fact or circumstance that it should take into account.

4.134 The Commissions are interested in hearing whether, as a matter of practice, the different definitions between family violence in the *Family Law Act* and in the family violence laws of a particular state or territory have any impact in matters where there are pre-existing state and territory family violence orders, as well as in matters where there are not. Preliminary consultations that the Commissions have conducted tend to indicate that definitional issues do not have great significance in practice. Nonetheless, the Commissions seek input from stakeholders on the following questions.

Question 4–4 In practice, what effect do the different definitions of family violence in the *Family Law Act 1975* (Cth) and in state and territory family violence legislation have in matters before federal family courts:

(a) where a victim who has suffered family violence

  (i) has obtained a state or territory protection order; or

  (ii) has not obtained a state or territory protection order; and

(b) on the disclosure of evidence or information about family violence?

Question 4–5 Does the broad discretion given to courts exercising jurisdiction under the *Family Law Act 1975* (Cth) and the approach taken in the Family Court of Australia's Family Violence Strategy overcome, in practice, the potential constraints posed by the definition of 'family violence' in the *Family Law Act*?

4.135 An extension of the definition of family violence in the *Family Law Act* has consequences for the current legislative scheme. Under s 61DA(2), the presumption of equal shared responsibility does not apply where there is family violence. Dr Altobelli argues that the fact that *any* family violence falling within the definition in s 4 of the

Act rebuts the presumption is both a strength and a weakness. The strength is signalling the unacceptability of any family violence; the weakness is fettering the judiciary's ability to craft appropriate parenting orders in the best interests of children.[147] This is linked to a consideration of the typologies of violence, discussed below.

Typologies of violence

4.136 An issue that arises in considering the parameters of the legislative definition of family violence in the *Family Law Act* is whether it is feasible for the Act to differentiate between types of family violence.

4.137 Since the 1980s social scientists—including the American sociologist Michael Johnson—have developed various theories to describe different types of family violence.[148] The typologies generally reflect the proposition that family violence committed by men, and that committed by women, have different meanings and impacts. These typologies have been the subject of extensive debate. The following five typologies have been identified:

- coercive controlling violence—also referred to as intimate or patriarchal terrorism;
- common couple violence—also referred to as situational couple violence;
- violent resistance;
- separation-instigated violence; and
- mutual violent control.

4.138 The typologies do not purport to deal with other types of violence, such as violence against children, or family violence within Indigenous communities.[149]

Coercive controlling violence

4.139 This type of violence has control at its core and is almost exclusively committed by men against women. Johnson describes it as 'a product of patriarchal traditions of men's rights to control "their" women' and

147 T Altobelli, 'Family Violence and Parenting: Future Directions in Practice' (Paper presented at AIJA Family Violence Conference, Brisbane, 2 October 2009), 43.

148 Others who have written in this area include Kathleen Ferraro, Peter Jaffe and Nancy der Steegh. See, eg, N Ver Steegh and C Dalton, 'Report from the Wingspread Conference on Domestic Violence and Family Courts' (2008) 46 *Family Court Review* 454.

149 B Fehlberg and J Behrens, *Australian Family Law—The Contemporary Context* (2008), 196.

> as a form of terroristic control of wives by their husbands that involves the systematic use of not only violence but economic subordination, threats, isolation and other control tactics.[150]

4.140 Other features of this category of violence are that the violence usually escalates and that the victim rarely fights back or stops fighting back after initial attempts to do so.[151] Joan Kelly and Johnson comment that it is not atypical for victims of this category of violence to report that the psychological effect of their experience is worse than the physical impact.[152]

Common couple/situational couple violence

4.141 This type of violence is not characterised by the dynamics of power and control. It arises from specific situations or arguments. It usually involves minor forms of violence compared to coercive controlling violence. Kelly and Johnson state that this form of violence is used by both men and women. It is less likely to escalate over time, and is more likely to cease after separation.[153]

Violent resistance

4.142 This category of violence describes the situation where a spouse uses violence—but not control—in response to coercive controlling violence. Violent resistance is almost entirely engaged in by women.[154]

Separation-instigated violence

4.143 As its name suggests, separation-instigated violence is violence instigated by the separation of an intimate couple where there was no prior history of violence in the relationship or in other settings.[155] Kelly and Johnson comment that the violence represents an 'atypical and serious loss of psychological control'; that it is unlikely to occur again; and that those who use it 'are more likely to acknowledge their violence rather than use denial'.[156]

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150 M Johnson, 'Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women' (1995) 57 *Journal of Marriage and Family* 283, 285, cited in B Fehlberg and J Behrens, *Australian Family Law—The Contemporary Context* (2008), 194.

151 B Fehlberg and J Behrens, *Australian Family Law—The Contemporary Context* (2008), 195 (citation omitted).

152 J Kelly and M Johnson, 'Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Intervention' (2008) 46 *Family Court Review* 476, 483.

153 Ibid, 485–488.

154 Ibid, 484–485.

155 T Altobelli, 'Family Violence and Parenting: Future Directions in Practice' (Paper presented at AIJA Family Violence Conference, Brisbane, 2 October 2009), 17.

156 J Kelly and M Johnson, 'Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Intervention' (2008) 46 *Family Court Review* 476, 487–488.

4.144 A 2009 study by the University of Sydney found that of 181 parents in Australia who had been involved in parenting disputes after separation:

> While there were certainly some histories of severe pre-separation violence, for a majority of respondents, the basis for the family violence order was post-separation conflict, without any reported history of violence in the course of their cohabitation.[157]

Mutual violent control

4.145 This form of violence refers to situations where both partners use violence to control the other. Johnson and Kathleen Ferraro note that this type of violence is rare and that not much is known about its dynamics.[158]

Role of typologies in law

4.146 There are issues about whether such typologies have any role to play in legal frameworks and, if they do, what that role should be. Altobelli advocates the use of typologies of family violence espoused by social scientists such as Johnson, Kelly and Peter Jaffe to enable more nuanced judicial responses to family violence in crafting parenting arrangements which are child-focused but also protect victims and children.[159] He stresses the importance of considering the context of violence, noting that the definition of family violence in the *Family Law Act* focuses on conduct having a certain effect, irrespective of context.[160] Altobelli relies, in part, on Nancy Ver Steegh's following hypothetical to support the case for differentiation:

> Consider a situation where partner A slaps partner B. First imagine that when the incident takes place there is no prior history of physical violence or of other abusive behaviours between A and B. Then imagine that, although this incident is the first instance of physical violence, A has previously undermined B's efforts to seek employment, denigrated B's parenting in front of the children, and isolated B from her family and friends. Then imagine a situation where A broke B's nose the week before and A is threatening to kill B and harm their children. The act of slapping is the same in each situation but the outcome and consequences are very different.[161]

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157 P Parkinson, J Cashmore and J Single, *Post-Separation Conflict and The Use of Family Violence Orders* (2009) 1, 10.

158 M Johnson and K Ferraro, 'Research on Domestic Violence in the 1990s: Making Distinctions' (2000) 62 *Journal of Marriage and the Family* 948, 950 cited in J Wangmann, '"She Said …" "He said …" : Cross Applications in NSW Apprehended Domestic Violence Order Proceedings', *Thesis*, University of Sydney, 2009, 45.

159 T Altobelli, 'Family Violence and Parenting: Future Directions in Practice' (Paper presented at AIJA Family Violence Conference, Brisbane, 2 October 2009), 20.

160 Ibid, 13, 42.

161 N Ver Steegh and C Dalton, 'Report from the Wingspread Conference on Domestic Violence and Family Courts' (2008) 46 *Family Court Review* 454; cited in T Altobelli, 'Family Violence and Parenting: Future Directions in Practice' (Paper presented at AIJA Family Violence Conference, Brisbane, 2 October 2009), 11–12.

4.147 Altobelli notes the dangers in the differentiation process:

> The consequences of inaccurate differentiation are potentially serious. At one end of the spectrum there is the risk of endangering victims and their children. At the other end there is the danger of unnecessarily restricting parental contact with children.[162]

4.148 These typologies have been the subject of criticism and debate. For example, Fehlberg and Behrens, while acknowledging that the typologies provide useful ways of thinking about violence, also caution that they may tend to oversimplify a complex problem, particularly if they are applied in a legal setting.

> There are potential dangers with taking it further. Its use in actual legal application could justify the adoption of an unhelpful set of dichotomies, in which violence is classified as 'common couple' violence and therefore not harmful, or 'patriarchal terrorism' and therefore harmful.[163]

4.149 Dr Wangmann also cautions against the incorporation of the typologies into the legal system, including on the basis that the categories 'may inadvertently reinforce current myths about [family] violence'.[164]

Commissions' views

Expanding definition

4.150 It is unacceptable that differences in definitions across family violence legislation and the *Family Law Act* may result in different treatment of persons suffering similar types of family violence.

4.151 In the Commissions' preliminary view, the definition of family violence in the *Family Law Act* is too narrow. The definition should be expanded to include certain types of conduct recognised under state and territory family violence legislation. This would include the types of conduct the subject of the Commissions' proposals in relation to the definition of family violence in family violence legislation—such as economic abuse, sexual assault, and exposing children to violence. The Commissions consider that the definition of family violence in the Victorian family violence legislation is an instructive model in this regard.

4.152 A more expansive definition would assist in educating those engaged in the family law system about the complexities and nuances of family violence. The explicit recognition of economic abuse, for example, may also be of particular relevance to

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162 T Altobelli, 'Family Violence and Parenting: Future Directions in Practice' (Paper presented at AIJA Family Violence Conference, Brisbane, 2 October 2009), 19.

163 B Fehlberg and J Behrens, *Australian Family Law—The Contemporary Context* (2008), 196.

164 J Wangmann, '"She Said …" "He said …" : Cross Applications in NSW Apprehended Domestic Violence Order Proceedings', *Thesis*, University of Sydney, 2009, 48.

victims who are resolving property disputes and spousal maintenance orders under the *Family Law Act.*[165]

4.153 The Commissions note that this suggested approach is consistent with that taken by the Family Law Council in its December 2009 advice to the Australian Government Attorney-General.[166] The Council advocated that the *Family Law Act* define 'family violence' in the same way that it has been defined under the Victorian family violence legislation,[167] noting that this approach would remove the objective element contained in the definition.[168]

4.154 The Commissions consider that the definition of family violence should be widened by removing the semi-objective test of reasonableness. It is inappropriate to apply a test of reasonableness to the experience of fear. To do so ignores the psychological impact of family violence, especially within the context of a controlling relationship.[169]

4.155 The Commissions note that the Chisholm Review recommended that, if the Australian Government did not adopt its recommendations about reforming the shared parenting provisions, then it should

> strengthen the provisions of the Act relating to family violence, including more detail about the nature and consequences of family violence, and that it consider in this connection adapting some of the provisions of the Victorian or other state and territory legislation relating to family violence.[170]

4.156 The Commissions note, however, that the Chisholm Review took a different stance on the removal of the reasonableness requirement, expressing the view that the:

> correct interpretation of the requirement of reasonableness would take the context into account, and ask whether a person in the victim's position, having experienced the history of violence, and knowing the meaning [for example, of a particular gesture] would have a reasonable fear … [and that] the inclusion of the concept of reasonableness has merit, and the question is whether it has in fact been interpreted in ways that is unfair to victims.[171]

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165 The relevance of family violence in property disputes under the *Family Law Act* is discussed in Ch 9.

166 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).

167 Ibid, 25, Rec 1.

168 Ibid, 26.

169 This view is expressed in the context of defining family violence. There may be room for such an approach in articulating the grounds for obtaining a protection order. The latter is discussed below.

170 R Chisholm, *Family Courts Violence Review* (2009), Rec 3.6.

171 Ibid, 147.

4.157 The Chisholm Review stated that the information available before it did not indicate that the definition had in fact malfunctioned in that way, and did not recommend removal of the 'reasonableness' requirement. The Review did, however, state that 'further consideration should be given to this issue if more relevant information comes to light about the operation of the definition in practice'.[172]

4.158 As noted above, the Commissions tend to the view that the reasonableness requirement should be removed, and are particularly interested in views from stakeholders about the operation of the requirement in practice. A consultation with some federal magistrates suggests that the reasonableness requirement has little practical impact.

4.159 The Commissions recognise that an expansion of the definition of family violence may affect the operation of the shared parental responsibility provisions in the Act, and note that reform of these provisions was considered in the Chisholm Review. The Commissions agree with the Family Law Council that further consideration be given to the 'possible legislative side-effects of broadening the definition'.[173]

Role of typologies of violence in definition

4.160 While the typologies developed by social scientists may have an important role to play in increasing understandings about the potential dynamics of different types of family violence, it is inappropriate for such typologies to be translated into legislative frameworks. Legislative inclusion of the typologies could lead to a rigid and artificial hierarchy. It is the Commissions' preliminary view that the definition of family violence in the *Family Law Act* should not distinguish family violence on the basis of typologies, although these may form an instructive and illustrative component in judicial education on family violence. Judicial officers should retain a broad discretion to deal with matters on their facts in the best interests of children.[174]

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172 Ibid.

173 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), 26.

174 As discussed below, to assist in the development of a common interpretative framework, the *Family Law Act* and each of the family violence Acts of the states and territories should contain a section setting out the features and dynamics of family violence: see discussion under 'Guiding Principles' below.

Cultural change

4.161 Changes in definition cannot in themselves bring about cultural change in attitudes towards violence. One stakeholder has expressed concern about the extent to which family violence is referred to as 'conflict' or 'entrenched conflict' in the family law system, including in the case law.[175] There is room for improvements in judicial and legal education in this regard. The Commissions endorse the recommendation made by the Chisholm Review that:

> The Government, the family law courts and other agencies and bodies forming part of the family law system consider ways in which those working in the family law system might be better educated in relation to issues of family violence.[176]

Proposal 4–17 The definition of family violence in the *Family Law Act 1975* (Cth) should be expanded to include specific reference to certain physical and non-physical violence—including conduct the subject of Proposals 4–3 to 4–5 and 4–7 to 4–10 above—with the definition contained in the *Family Violence Protection Act 2008* (Vic) being used as a model.

Proposal 4–18 The definition of 'family violence' in the *Family Law Act 1975* (Cth) should be amended by removing the semi-objective test of reasonableness.

Victims' compensation

Definition of family violence in victims' compensation legislation

4.162 Most victims' compensation Acts do not define family violence. Compensation is generally triggered by a nexus to a criminal act and a consequent injury or death.[177] The victims' compensation schemes in NSW and the Northern Territory, however, expressly define or refer to family violence, as set out below.

4.163 The *Victims Support and Rehabilitation Act 1996* (NSW) expressly recognises 'domestic violence' as a compensable 'act of violence'. It also recognises as compensable injuries 'domestic violence injuries', and injuries arising from the intimidation and stalking of a person within the meaning of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) in apparent contravention of a protection order.

4.164 The *Victims Support and Rehabilitation Act* defines a 'domestic violence offence' as a personal violence offence within the meaning of the *Crimes (Domestic*

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175 *Comment on ALRC Family Violence Online Forum: Women's Legal Service Providers*. See also *Eddy v Weaver* [2009] FMCAfam 188, [4], [122], [123].

176 R Chisholm, *Family Courts Violence Review* (2009), Rec 4.3. Training and education is addressed generally in Ch 19.

177 Victims' compensation schemes are discussed in detail in Ch 19.

and Personal Violence) Act against persons in defined relationships.[178] The definition of 'domestic violence' is therefore linked to that in the family violence legislation of NSW. The definition does not include, for example, economic or emotional abuse, as these are not recognised under the *Crimes (Domestic and Personal Violence) Act*.

4.165 The *Victims of Crime Assistance Regulations* (NT) defines when a victim suffers 'domestic violence injuries' in the following way:

> (1) A victim suffers domestic violence injuries if:
>
> (a) the victim suffers 1 or more injuries as a direct result of:
>
> (i) a violent act involving a pattern of abuse, committed by an offender with whom the victim is in a domestic relationship; or
>
> (ii) a violent act of unlawful stalking under section 189 of the *Criminal Code* in contravention, or apparent contravention, of a domestic violence order; or
>
> (iii) a combination of violent acts mentioned in subparagraphs (i) and (ii) if committed by the same offender; and
>
> (b) the injuries are more than transient or trifling, though they need not be serious.[179]

4.166 The Regulations also define a 'pattern of abuse' and link the definitions of 'domestic relationship' and 'domestic violence order' to the definitions of those terms in the *Domestic and Family Violence Act 2007* (NT).

Commissions' views

4.167 As discussed in Chapter 3, the purpose of victims' compensation schemes include providing assistance to victims of crime, assisting them in recovering from crime, and giving statutory recognition to the harm that they suffer from criminal offending.

4.168 It would therefore be inappropriate for legislation establishing victims' compensation schemes to adopt definitions of family violence used in family violence legislation to the extent that those definitions include conduct that does not constitute a criminal offence—such as emotional abuse or economic abuse.[180] The adoption of a definition that captures non-criminal conduct would clearly be in direct conflict with the purposes of such schemes, as they are currently framed.

4.169 The Commissions note that they have proposed that the NSW family violence legislation should be amended to include a wider definition of family violence, which may capture conduct that is not necessarily a criminal offence.[181] The Commissions do

178 *Victims Support and Rehabilitation Act 1996* (NSW) sch, cl 7A.
179 *Victims of Crime Assistance Regulations* (NT) reg 5.
180 These are offences in Tasmania.
181 Proposal 4–2.

not propose, however, that this extended definition of family violence be applied in the context of the NSW victims' compensation legislation, which awards victims for injuries resulting from a criminal act.

4.170 However, there are other ways that legislation governing victims' compensation schemes can be amended to allow victims of family violence to be better compensated for their injuries. These options are discussed in Chapter 19.

Migration legislation

4.171 Under the *Migration Regulations*, 'relevant family violence' is defined as conduct, whether actual or threatened towards:

> (a) the alleged victim; or
>
> (b) a member of the family unit of the alleged victim; or
>
> (c) a member of the family unit of the alleged perpetrator; or
>
> (d) the property of a member of the family unit of the alleged victim; or
>
> (e) the property of a member of the family unit of the alleged perpetrator
>
> that causes the alleged victim to reasonably fear for, or to be reasonably apprehensive about, his or her own wellbeing or safety.[182]

4.172 The focus of the definition is therefore not on categorising certain types of conduct—such as physical or emotional abuse—but rather on the effect of conduct on the victim. In this regard, the definition has a similar approach to that of 'family violence' adopted in the *Family Law Act*.

4.173 For emotional abuse to qualify as family violence under the *Migration Regulations*, it must be considered to have been serious enough to cause fear or apprehension for the person's well-being or safety. Acts that only have the 'effect of causing diminution of a person's feeling of well being' will not suffice.[183]

Commissions' views

4.174 The Commissions are interested in hearing from stakeholders affected by the operation of the definition of family violence in the *Migration Regulations*. Persons from a culturally diverse background—including women who are sponsored by Australian citizens and residents, who are particularly vulnerable to abuse due to the threat of deportation—are important voices in this Inquiry.

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182 *Migration Regulations 1994* (Cth) reg 1.21(1). The purpose of these regulations is discussed in Ch 3.

183 *Helmsesi* [2002] MRTA 5231; *Malik v Minister for Immigration and Multicultural Affairs* (Unreported, FCA, Wilcox J, 19 April 2000); P Easteal, 'Violence Against Women in the Home: Kaleidoscopes on a Collision Course?' (2003) 3 *Queensland University of Technology Law and Justice Journal* 1, 18. Compare *Wright* [2001] MRTA 6123 where emotional and financial deprivation, and manipulation were considered because they caused fear or apprehension, and not just reduced wellbeing.

4.175 The Commissions note the similarity of approach between the *Migration Regulations* and the *Family Law Act* in defining family violence. The Commissions' initial impression is that the definition in the *Migration Regulations* is too narrow, for the same reasons expressed in relation to the definition in the *Family Law Act*. One option, therefore, would be to amend the definition in a similar way as that proposed for the definition in the *Family Law Act*—namely to expand it to recognise specific types of physical and non-physical violence, with the definition in the Victorian family violence legislation being used as model, and by removing the test of reasonableness.

4.176 The Government may wish to reconsider the appropriateness of locating the family violence provisions—which impact on the lives and safety of a particularly vulnerable group in our society—in regulations, where they are currently housed, as opposed to primary legislation. Such provisions may be more appropriately placed in the *Migration Act*.

4.177 However, the Commissions make no formal proposals in this regard, noting that reform of migration legislation is outside the Commissions' Terms of Reference. As noted in Chapter 1, the Commissions consider that the Australian Government should initiate an inquiry into how family violence is treated in federal legislative schemes not falling within the present Terms of Reference. Information received by the Commissions concerning the practical application of the definition of family violence in the *Migration Regulations* may be used in any further inquiry into the treatment of family violence in federal legislative schemes.

Question 4–6 How is the application of the definition of 'relevant family violence' in the *Migration Regulations 1994* (Cth) working in practice? Are there any difficulties or issues arising from its application?

Summary and effect of Commissions' overall approach

4.178 The overall effect of the Commissions' approach, reflected in Proposals 4–1 to Proposals 4–18, is that a common understanding of the types of conduct (both physical and non-physical) that constitute family violence would be adopted in the definition of family violence in the following legislation:

- state and territory family violence legislation;
- *the Family Law Act*;
- the criminal law—in the limited circumstances where 'family violence' is defined in the context of defences to homicide; and
- potentially, the *Migration Regulations*.

4.179 This does not mean that each piece of legislation must define family violence in precisely the same words, or even use the same language in describing certain categories of conduct, although that is an alternative option for reform. In addition, state and territory governments should retain the flexibility to link family violence to particular criminal offences in their respective jurisdictions.

4.180 The Commissions tend to the view that conduct is either family violence or it is not. That is not to say that all types of conduct that constitute family violence should be criminalised nor that family violence should be given the same treatment in the various legal frameworks under consideration. In each case, the severity and context of particular family violence may carry varying weight in different legal proceedings, depending on the reasons for advancing evidence of family violence and the purposes of the respective legal frameworks.

4.181 The Commissions do not therefore consider that the adoption of a common understanding of what constitutes family violence—including, as proposed later in this chapter, a common understanding of the features and dynamics of family violence—in any way compromises the objects and purposes of the legislative schemes that are the subject of this approach.[184]

4.182 The Commissions have also considered the significant benefits that would flow from the adoption of a common interpretative framework. Currently, a victim of family violence involved in multiple proceedings has to contend with the fact that conduct recognised in one jurisdiction as family violence may not necessarily be recognised as such in another. One stakeholder noted that this may not only cause confusion but may 'even feel like systemic abuse'.[185]

4.183 The adoption of a common understanding of family violence is likely to have a positive flow-on effect in the gathering of evidence of family violence for use in more than one set of proceedings. This is likely to be of practical importance given the frequency, for example, of family violence allegations in the Family Court,[186] and the frequency of overlap of family law proceedings and protection order proceedings.

4.184 Such adoption is also likely to overcome the potential for family violence to be treated differently in family law proceedings depending on whether or not a party to those proceedings—who is a victim of family violence—has, in fact, obtained a state or territory protection order.

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184 The purposes of the various legislative schemes relevant to family violence are discussed in Ch 3. As noted above, the Commissions do not propose to apply this approach to legislation establishing victims' compensation schemes.

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

186 A 2007 study found that more than half of the cases in the Federal Magistrates Court and the Family Court involved allegations of violence: L Moloney and others, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-reform Exploratory Study* (2007) Australian Institute of Family Studies, vii.

4.185 Another significant benefit of adopting a commonly shared understanding of family violence is that it will facilitate the registration and enforcement of protection orders under the proposed national registration of family violence orders scheme.[187]

4.186 In addition, it will facilitate the capture of statistics about family violence based on a commonly shared understanding of family violence, thereby providing more useful and comparable data upon which policies to address family violence can be addressed.[188]

4.187 As well, the Commissions consider that the adoption of a commonly shared understanding of what constitutes family violence will complement the recommendations made by the Family Law Council to establish a common knowledge base regarding family violence.[189]

4.188 The Commissions note than an alternative approach would have been to adopt a pyramid-like structure of definitions of family violence—possibly with the broadest definition to be applied in the family violence legislation and the narrowest in the criminal law. However, this approach is problematic. It is unclear where one would place family law and migration law in this pyramid. There also appears to be no policy reason for carving out particular types of conduct that are recognised as family violence in law under one legislative regime, without implicitly passing judgment that such types of violence are not worthy of recognition by the legal system.

4.189 The Commissions acknowledge that the adoption of a broad commonly shared definition of family violence may increase the risk of litigation abuse—particularly in the vexatious use of cross applications for protection orders. Mechanisms to manage such risks will need to be identified and adopted.[190] However, the benefits to victims and the systemic advantages of adopting a broad commonly shared definition appear to outweigh the potential disadvantages.

Persons protected

Family violence legislation

4.190 In each jurisdiction, in order for a person to obtain a protection order under family violence legislation that person needs to be in a defined relationship with the person engaging in violence. The relationships covered by family violence legislation across the jurisdictions differ widely in some respects. Table B below sets out a snapshot summary of the relationships that are covered across the jurisdictions.

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187 This scheme is discussed in Ch 10.

188 Australian Bureau of Statistics, *Conceptual Framework for Family and Domestic Violence* (2009).

189 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), pt 6.

190 See discussion below on grounds for obtaining a protection order. See also the discussion on vexatious litigants in Ch 10.

Table B

	Spouse	Partner (not married) incl same sex)	Intimate personal relationship	Child	Relative	Indigenous	Carer	Other relationships
NSW	✓	✓	✓	definition of relative includes son, daughter etc but definition does not expressly refer to child	✓ defined categories	✓	✓	✓live in same household; long-term residents in same residential facility at same time
Vic	✓	✓	✓	linked to residence or child of intimate relationship	✓ defined categories	✓	x	✓any person regarded as family member
Qld	✓includes either biological parent		✓engaged also whether or not sexual if dated and lives enmeshed.	✓ included in definition of relative	✓by blood or marriage (non-exhaustive examples)	✓referred to in definition of relative	✓informal care relationships-defined	✓definition of relative includes person whom relevant person regards as a relative or vice versa eg members of certain communities with NESB and people with particular religious beliefs
WA	✓	✓ (defacto)	✓	✓linked to residence or guardianship	concept of 'related' is defined			✓personal relationship of a domestic nature where lives interrelated and actions affect the other
SA	✓	domestic partners	✓	✓ linked to custody, guardianship, loco parentis role, residence)	✓ by blood, marriage, domestic partnership, adoption	✓	✓	members of some other culturally recognised family group

Table B continued.

	Spouse	Partner (not married) incl same sex)	Intimate personal relationship	Child	Relative	Indigenous	Carer	Other relationships
Tas	✓	✓significant relationships as defined						
ACT	Domestic partner	✓domestic partner	✓intimate relation other than domestic partnership—not linked to living in same household	✓child of domestic partner or former domestic partner—no other restriction on this	✓sets out defined categories plus anyone else who could reasonably be considered to be a relative	✓included as example of anyone else who could reasonably be considered to be a relative	x	✓definition of relative includes anyone else who could reasonably be considered to be a relative
NT	✓	✓defacto	✓whether or not sexual if dating or if engaged	covered by reference to relative	✓examples of relatives given. Non exhaustive list	✓included in definition of family relationship	✓	any person who has or had custody or guardianship or right of access to another person. Ordinarily or regularly lives or has lived with other person or someone else who is in family relationship with other person or is or has been in family relation with a child of other person

4.191 The Tasmanian *Family Violence Act 2004* covers the narrowest range of relationship—applying only to spouses and unmarried couples.[191] The legislation does not cover relations between parents and children, persons and ancestors, or siblings. Persons in these types of relationships and other relatives can seek restraining orders under the *Justices Act 1959* (Tas), but the grounds for obtaining a restraining order under this Act are more limited than those under the family violence legislation.[192] In addition, the penalties for breaching restraining orders under the *Justices Act* are significantly lower than those that attach to breaches of an order under the family violence legislation.[193] In effect, this means that certain family relationships are given less protection from violence by the law than others.

4.192 The 2008 *Review of the Family Violence Act 2004* referred to criticisms by some stakeholders that the definition was too narrow to capture

> the range of relationships which should attract the protection of the Act; and that the definition of family relationship should be sufficiently broad to cover all intimate personal relationships … people who are ordinarily members of the household and family relationships which reflect the extent of kinship within Indigenous and culturally and linguistically diverse communities.[194]

4.193 The former South Australian family violence legislation also covered a narrow range of relationships for the purpose of family violence. However, the *Intervention Orders (Prevention of Abuse) Act* includes more categories of persons under the rubric of 'domestic abuse' than its predecessor—the *Domestic Violence Act 1994* (SA). Categories of persons not previously recognised but now included are:

> (a) persons in some form of intimate personal relationship (other than marriage or domestic partners) in which their lives are related and the actions of one affects the other;
>
> (b) persons who are related according to Aboriginal or Torres Strait Islander kinship rules or are members of some other culturally recognised family group;
>
> (c) carers within the meaning of the *Carers Recognition Act 2005*;
>
> (d) those otherwise related by blood, marriage, domestic partnership or adoption.[195]

4.194 Most state and territory family violence Acts include relatives within their ambit—although the class of persons is variously defined. Six jurisdictions expressly

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191 *Family Violence Act 2004* (Tas) ss 4, 7, referring to the *Relationship Act 2003* (Tas) s 4. The unmarried couple must be unrelated to each other.

192 See *Justices Act 1959* (Tas) s 106B—for example, economic abuse and emotional abuse are not covered.

193 Compare Ibid s 106I (10 penalty units, imprisonment for six months) with *Family Violence Act 2004* (Tas) s 35 (tiered penalties depending on number of offences—up to imprisonment for five years).

194 Urbis (for the Tasmanian Government Department of Justice), *Review of the Family Violence Act 2004 (Tas)* (2008), 12.

195 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8; *Domestic Violence Act 1994* (SA) s 3.

recognise the extended concept of a relative among Indigenous peoples. Three jurisdictions extend protection to persons within violent carer relationships (including paid carers) whereas three jurisdictions expressly provide that a relationship with a paid carer or a carer acting on behalf of another person or organisation does not fall within the ambit of family violence legislation.

4.195 Some jurisdictions recognise violence between persons who merely live together in the same household (that is, without being in a relationship) as family violence.[196] Other jurisdictions recognise meaningful personal relationships between people outside conventional definitions. In Victoria a family member can include any person whom the relevant person regarded as being like a family member having regard to the circumstances of the relationship.[197] In Western Australia a 'personal relationship of a domestic nature in which the lives of the persons are, or were, interrelated and the actions of one person affects or affected, the other person' is within the scope of the legislation.[198]

4.196 The United Nations Department of Economic and Social Affairs Division for the Advancement of Women has recommended that family violence legislation should apply at a minimum to:

> individuals who are or have been in an intimate relationship, including marital, non-marital, same sex and non-cohabiting relationships; individuals with family relationships to one another; and members of the same household.[199]

4.197 One issue that was raised with the Commissions in consultation was whether family violence legislation should distinguish between intimate partner violence and other types of family violence given the broad range of persons covered under some family violence legislation. The Commissions are interested in hearing views in this regard.

Commissions' views

Equality of treatment of family violence victims

4.198 The Commissions have some concern that certain family relationships in Tasmania—such as between parents and children and between siblings—are afforded less legal protection and redress on breach of a 'restraint' order than spouses and couples. In the Commissions' preliminary view, the Tasmanian Government should review the operation of the *Family Violence Act 2004* and the *Justices Act 1959* pt XA with a view to establishing equality of treatment of family members who are victims of family violence.

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196 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 5(d); *Domestic and Family Violence Act 2007* (NT) 9(d). See also *Domestic Violence Act 1995* (NZ) s 4(1)(c).

197 *Family Violence Protection Act 2008* (Vic) s 8(3).

198 *Restraining Orders Act 1997* (WA) s 4(2).

199 United Nations Department of Economic and Social Affairs Division for the Advancement of Women, *Handbook for Legislation on Violence Against Women*, 1 July 2009, 26.

4.199 The Commissions are interested in hearing whether this issue arises in other jurisdictions.

Categories of persons to be protected

4.200 The Commissions note the disparities in relation to persons protected by family violence legislation and also that protection orders may be obtained in each state and territory for persons who are not in a defined family relationship. The Commissions favour a modern inclusive approach to the definition of family, broad enough to capture groups who are particularly vulnerable to violence.

4.201 The disproportionately high level of family violence suffered by Indigenous women is a major issue.[200] In the Commissions' view, the persons protected by the family violence legislation of each state and territory should capture those who fall within Indigenous concepts of family, as well as those who are members of some other culturally recognised family group. The two jurisdictions that currently do not take this approach are Western Australia and Tasmania.

4.202 The Commissions note that the 2008 review of the Tasmanian family violence legislation stated that it had not tested the extent to which stakeholder views favouring a broadening of the definition to include Indigenous and other kin relationships had 'thought through' the implications of a criminal justice response in this regard. It stated 'that if a broader definition were to be explored by the Tasmanian government, the implication of a criminal justice response is a critical point to test with stakeholders'.[201]

4.203 It has been reported that the operating procedures of the family violence courts in Western Australia adopt the definition of family violence from the *Family Law Act 1975* rather than the definition of family violence found in the 2004 amendments to the *Restraining Orders Act 1997* (WA) because it was considered to be 'more inclusive of the nature of family violence in Aboriginal relationships'.[202]

4.204 The Commissions are interested in stakeholder views as to whether relationships with carers—including those who are paid—should be included in the relationships covered by family violence legislation. The specific inclusion of carers, for example, would recognise the particular vulnerabilities of the elderly and those with disabilities to family violence. It is anomalous that such a category is included in some jurisdictions but not others. However, the Commissions are interested in hearing whether the expansion of the definition to include such relationships poses any issues, including challenges in implementation.

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200 The National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), 17.

201 Urbis (for the Tasmanian Government Department of Justice), *Review of the Family Violence Act 2004 (Tas)* (2008), 12.

202 Law Reform Commission of Western Australia, *Court Intervention Programs*, Consultation Paper (2008), 233 fn 49.

Proposal 4–19 The Tasmanian Government should review the operation of the *Family Violence Act 2004* (Tas) and the *Justices Act 1959* (Tas) pt XA to establish equality of treatment of family members who are victims of family violence.

Proposal 4–20 State and territory family violence legislation should include as protected persons those who fall within Indigenous concepts of family, as well as those who are members of some other culturally recognised family group. In particular, the *Family Violence Act 2004* (Tas) and the *Restraining Orders Act 1997* (WA) should be amended to capture such persons.

Question 4–7 Should state and territory family violence legislation include relationships with carers—including those who are paid—within the category of relationships covered?

Model provisions reflecting best practice?

4.205 An issue in this Inquiry is the extent to which it is appropriate or desirable for the Commissions to address key differences in family violence legislation across the states and territories—for example, by model provisions that contain best practice approaches—even in the absence of specific interactions between family violence laws and family and criminal law.

4.206 Not all states and territories have dedicated family violence legislation—in the sense that some legislation that deals with family violence also deals with obtaining protection orders for other forms of personal violence. The dedicated family violence legislation across the jurisdictions varies substantially in its detail and scope. For example, the Victorian and ACT legislation comprises 272 and 217 provisions respectively,[203] while the South Australian and Tasmanian legislation comprises only 42 and 44 provisions respectively.[204] In addition, there is variation in family violence legislation as to:

- the range of persons who are able to avail themselves of the protection of such orders, as discussed above;
- the extent to which the Acts specify guiding objects and principles;[205]
- the extent to which police are obliged by legislation to take action where family violence is suspected;

203 *Family Violence Protection Act 2008* (Vic); *Domestic Violence and Protection Orders Act 2008* (ACT).
204 *Intervention Orders (Prevention of Abuse) Act 2009* (SA); *Family Violence Act 2004* (Tas).
205 Objects and principles are discussed in Ch 3 and below.

- the grounds for making an order;[206]
- whether or not police have the power to issue orders themselves;
- the power to make protection orders in criminal proceedings;
- the penalties that attach to a breach of an order; and
- the availability and types of conditions attached to protection orders concerning counselling and rehabilitation programs for those who use violence.[207]

4.207 It is not feasible to seek consistency on all aspects of family violence legislation—nor is consistency across the board on all issues necessarily desirable. In 1999, the Domestic Violence Legislation Working Group—comprising Commonwealth, state and territory officials—published the Model Domestic Violence Laws Report, which contained model laws dealing with protection orders.[208] The model laws project was not taken up, and was subject to some criticism by Professor Rosemary Hunter and Professor Julie Stubbs on the ground that it appeared to focus simply on resolving inconsistencies.[209] There is also a concern that model laws should not impose standards that are of the lowest common denominator.

4.208 By way of comparison, the United States has a Model Code on Domestic and Family Violence, that was not designed to provide a uniform code that would create consistency between the states.[210] Its purpose was to provide a model that states could use and consider when contemplating reforms to their domestic and family violence laws. The Code is described in its introduction as a 'public policy statement' and a 'framework' and the Code's drafters note each chapter and section 'can be independently assessed and accepted or modified'.[211] In two instances, alternative solutions are set out.

4.209 While pursuing model family violence laws is beyond the scope of this Inquiry, the Commissions consider that there are a number of discrete areas of family violence laws that ought to be the subject of best practice approaches across the jurisdictions.

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206 Grounds for obtaining an order are discussed below.

207 See Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), [2.1.34], ch 3. Police powers to issue orders are discussed in Ch 5 and the making of protection orders in criminal proceedings, and conditions attached to protection orders are discussed in Ch 6.

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

209 R Hunter and J Stubbs, 'Model Laws or Missed Opportunity?' (1999) 24 *Alternative Law Journal* 12, 16.

210 National Council of Juvenile and Family Court Judges (US), *Family Violence: A Model State Code—Model Code on Domestic and Family Violence* (1994).

211 Ibid, v–vi. Many states have relied heavily upon the Code when making and amending their family violence laws—National Council of Juvenile and Family Court Judges (US), *Family Violence: Legislative Update* (1996); National Council of Juvenile and Family Court Judges (US), *Family Violence: Legislative Update* (1997). The Code, has not however, led to a significantly greater level of harmonisation of law.

Some of those areas—guiding principles, objects, and grounds for obtaining a protection order—that are inextricably linked to the achievement of a common interpretative framework are addressed in this chapter; while others are addressed in the following chapters in this part. The effect of targeting discrete areas is to establish an irreducible core of best practice in family violence laws.

Guiding principles and a human rights framework

4.210 Definitions form only one limb of an interpretative framework. Principles form another. Definitions serve a useful and specific function, and need to be capable of being readily applied and understood in legal proceedings. It is appropriate for definitions to be gender-neutral, because the law should be capable of applying equally to both sexes, and to provide a mechanism for protection or redress, regardless of the sex of the victim or of the person engaging in violence. However, guiding principles can set out a framework to guide legislative interpretation. In addition, provisions which set out the features of family violence provide an opportunity to address such aspects as its gendered nature.

4.211 The Model Domestic Violence Laws Discussion Paper was criticised by Hunter and Stubbs for failing to include a set of guiding principles.[212] Most of the family violence Acts of the states and territories do not contain a section setting out principles or address the specific features and dynamics of family violence. However, there are some notable exceptions, and these are considered below.

Principles

4.212 There is some precedent in family violence legislation—and criminal legislation—for the articulation of principles to guide legislative interpretation and to educate those applying or engaging with the law. As discussed in Chapter 3, the family violence legislation of Victoria sets out in its preamble a number of principles, including that:

- non-violence is a fundamental social value that must be promoted;
- family violence is a fundamental violation of human rights and is unacceptable in any form; and
- family violence is not acceptable in any community or culture.[213]

4.213 The NSW family violence legislation does not expressly state that family violence is a fundamental violation of human rights, but it clearly places itself in a human rights framework by stating that its objects are to enact provisions consistent

212 R Hunter and J Stubbs, 'Model Laws or Missed Opportunity?' (1999) 24 *Alternative Law Journal* 12, 12.
213 *Family Violence Protection Act 2008* (Vic) preamble.

with certain principles underlying the *Declaration on the Elimination of Violence against Women*, as well as the United Nations *Convention on the Rights of the Child*.[214]

4.214 The *Crimes Act 1958* (Vic) also contains a number of principles to guide legislative interpretation in sexual assault cases. These include the fact that:

- sexual offences are significantly underreported;
- sexual offenders are commonly known to their victims; and
- sexual offences often occur in circumstances where there is unlikely to be any physical signs of an offence having occurred.[215]

Features of family violence

4.215 As discussed in Chapter 3, the family violence Acts of Victoria, NSW and South Australia, to varying degrees, also set out a number of features and dynamics of family violence, including:

- its gendered nature—that is, that it is predominantly committed by men against women, children and other vulnerable persons;
- the detrimental impact it has on children;
- the fact that it occurs in all areas of society—irrespective of location, socio-economic status, age, culture, gender, sexual identity, ethnicity or religion; and
- that it may involve overt or subtle exploitation of power imbalances and may consist of isolated incidents or patterns of behaviour.[216]

4.216 Apart from recognising the damaging effects of violence on children, and the fact that it occurs in all areas of society, none of the Acts mentions the fact that family violence also has a particularly damaging impact on other groups in society. These include: Indigenous persons; those from a culturally and linguistically diverse background; gays, lesbians and transgender persons; older people; and victims with disabilities.[217]

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214 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(1). International conventions are discussed in Ch 2.

215 *Crimes Act 1958* (Vic) s 37B.

216 See *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(3); *Family Violence Protection Act 2008* (Vic) preamble; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 10(1)(a)–(c).

217 See, eg, The National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), 18.

4.217 In describing the dynamics of family violence, none of the family violence Acts distinguishes between the dynamics of intimate partner violence and other family violence.

Commissions' views

Principles

4.218 In the Commissions' preliminary view the family violence legislation of each state and territory should contain guiding principles which include express reference to a human rights framework. The principles contained in the preamble to the Victorian family violence legislation provide an instructive model in this regard—although the principles should also refer expressly to relevant international conventions.

4.219 The endorsement of a human rights framework is particularly relevant, for example, for Indigenous peoples and those from culturally diverse backgrounds, by reinforcing that customary laws or cultural practices do not override the rights of family members to be safe and live free from violence—and indeed, free from fear, a freedom which has been referred to as the 'forgotten freedom'.[218]

4.220 The adoption of guiding principles across family violence legislation will serve an educative function, as well as promote a common interpretative framework, complementing the proposed adoption of a commonly shared understanding of the meaning of family violence.

Features

4.221 The family violence legislation of each state and territory should also contain a provision that explains the features and dynamics of family violence—including its gendered nature, detrimental impact on children, and the fact that it can involve exploitation of power imbalances, and occur in all sectors of society. Both the NSW and Victorian family violence legislation provide an instructive model in this regard.

4.222 In addition, the Commissions consider that, just as the Victorian and NSW family violence legislation highlight the particularly damaging effects on children of exposure to family violence, family violence legislation should also acknowledge the particularly damaging impact of family violence on other groups in society including: Indigenous persons; those from a culturally and linguistically diverse background; those from the gay, lesbian, bisexual and transgender community; older people; and victims with disabilities. These categories are not mutually exclusive, and some persons may suffer the compounding effect of multiple disadvantages. Persons from such groups are an important voice in this Inquiry.

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218 J Spigelman, 'The Forgotten Freedom: Freedom From Fear' (Paper presented at Sydney University Law School Distinguished Speakers Program 2009, Sydney, 17 November 2009).

4.223 Highlighting the impact of violence on these groups complements the Commissions' proposal that family violence legislation include examples of emotional or psychological abuse that would affect diverse groups in the community.[219] The Commissions consider that the combined effect of these proposals may assist in the challenging task of ensuring that experiences of family violence of such groups is properly recognised across the legal system.

4.224 The Commissions have not determined precisely how the legislative provisions might refer to the impacts of family violence on diverse groups. It may well be that the precise formulation could be informed by the processes recommended by the Family Law Council to establish a common knowledge base about family violence. Some preliminary thoughts, by way of illustration, are that family violence legislation could refer to the following, possibly in a more abridged fashion:

- the fact that there is a disproportionate level of family violence among Indigenous communities, and the particular dynamics of Indigenous family violence such as violence within extended kinship networks;[220]

- the barriers faced by victims from culturally and linguistically diverse backgrounds, including communication and language difficulties, and cultural barriers such as beliefs about traditional gender roles and the importance of the family;[221]

- the features of elder abuse—that it commonly consists of economic abuse, as well as the withholding of medication, involuntary social isolation, and neglect;[222]

- the particular problems faced by victims with disabilities because of their dependence on others for support, the compounding effect of their disability on their lack of power and control in a relationship, and the fact that their disability is exploited by their abusers;[223] and

- the problems faced by those from the gay, lesbian, bisexual and transgender community—including the fear of homophobia, transphobia, the fear of being outed and the fear of discrimination from the legal system due to their gender or sexual orientation.[224]

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219 See Proposal 4–5.

220 P Memmott, R Stacy, C Chambers and C Keys, *Violence in Indigenous Communities* (2001) Crime Prevention Branch of the Attorney-General's Department, 1.

221 Department for Community Development (WA), *A Review of Literature Relating to Family and Domestic Violence in Culturally and Linguistically Diverse Communities in Australia* (2006), 49–50.

222 D Bagshaw, S Wendt and L Zannettino, *Preventing the Abuse of Older People by Their Family Members* (2009) Australian Domestic and Family Violence Clearinghouse, 5.

223 G Hauge, R Thiara, A Mullender and P Magowan, *Making the Links: Disabled Women and Domestic Violence Final Report* (2008) Women's Aid (UK), 13–14.

224 Inner City Legal Centre—Safe Relationships Project, *Submission FV 17*, 13 January 2010.

4.225 The Commissions are interested in hearing views from stakeholders in this regard.

4.226 Finally, in the Commissions' preliminary view, the *Family Law Act* should also include a section detailing the features and nature of family violence. This would complement the proposed approach of adopting a commonly shared understanding of family violence across the family law and family violence legislative schemes.

4.227 The Commissions note that this approach is also consistent with an alternative recommendation made by the Chisholm Review for the provisions in the *Family Law Act* referring to family violence to be strengthened, including more detail about the nature and consequences of family violence.[225]

Proposal 4–21 State and territory family violence legislation should contain guiding principles, which should include express reference to a human rights framework. The preamble to the *Family Violence Protection Act 2008* (Vic) provides an instructive model, although it would be preferable if the principles also referred expressly to relevant international conventions such as the *Declaration on the Elimination of Violence against Women*, and the United Nations *Convention on the Rights of the Child*.

Proposal 4–22 State and territory family violence legislation should contain a provision that explains the nature, features and dynamics of family violence including: its gendered nature; detrimental impact on children; and the fact that it can involve exploitation of power imbalances; and occur in all sectors of society. The preamble to the *Family Violence Protection Act 2008* (Vic) and s 9(3) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) provide instructive models in this regard. In addition, family violence legislation should refer to the particular impact of family violence on: Indigenous persons; those from a culturally and linguistically diverse background; those from the gay, lesbian, bisexual and transgender community; older persons; and people with disabilities.

Proposal 4–23 The *Family Law Act 1975* (Cth) should be amended to include a provision that explains the nature, features and dynamics of family violence.

225 R Chisholm, *Family Courts Violence Review* (2009), Rec 3.6.

Objects

4.228 Objects clauses setting out the purposes of family violence legislation are another important limb in achieving a common interpretative framework across the states and territories.

4.229 The various purposes of family violence legislation and the extent to which they are addressed in objects clauses are addressed in Chapter 3. In that discussion, it is evident that while most family violence Acts contain object clauses, the Western Australian legislation does not, although it has a provision which sets out certain matters to be considered by the court in considering whether to make a protection order, from which certain objects can be implied. [226]

4.230 Further, of those Acts that do have objects clauses, the degree of articulation and specificity differs. In particular, while most state and territory legislation sets out various purposes of family violence legislation, the Queensland legislation only sets out the purpose of ensuring the safety and protection of persons in particular relationships.

4.231 In addition, the objects clause in the Tasmanian legislation is comparatively brief, and simply highlights that 'in the administration of [the] Act, the safety, psychological wellbeing and interests of people affected by family violence are the paramount considerations'. [227]

Commissions' views

4.232 An articulation of core common purposes across state and territory family violence legislation is a critical pillar of a common interpretative framework. Objects clauses therefore serve an important role in complementing proposed provisions setting out guiding principles and the features and dynamics of family violence. They also serve an educative function. It is essential that they are given some prominence in family violence legislation. The Commissions are therefore of the preliminary view that the *Restraining Orders Act 1997* (WA) should be amended to include an objects clause.

4.233 Objects clauses in family violence legislation do not need to express purposes using precisely the same wording, nor is there a need for every purpose in one jurisdiction to be replicated in the others. However, there should be a cluster of core purposes that are commonly acknowledged and articulated across each of the states and territories. The Commissions consider that the Queensland family violence legislation, in particular, should state its other core purposes. The Commissions also consider that the Tasmanian family violence legislation should articulate its purposes more clearly.

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226 *Restraining Orders Act 1997* (WA) s 12. Section 12 was amended in 2004 to insert a further paragraph (ba) 'the need to ensure that children are not exposed to acts of family and domestic violence'.

227 *Family Violence Act 2004* (Tas) s 3.

4.234 The Commissions tend to the view that core purposes should include—apart from the main one of ensuring or maximising the safety and protection of persons who fear or experience family violence—the following aims:

- ensuring that persons who use family violence accept responsibility for their conduct,[228] or promoting the accountability of those who use family violence for their actions;[229] and

- reducing or preventing family violence and the exposure of children to the effects of family violence.[230]

4.235 The Commissions note that most jurisdictions do not currently include a purpose aimed at increasing responsibility or accountability for those who use family violence. This is a significant omission. In contrast, most jurisdictions—apart from Queensland, Western Australia and Tasmania—do express a purpose of reducing or preventing family violence and the exposure of children to such violence.

4.236 There should be flexibility for states and territories to articulate purposes in addition to core ones. So, for example, it is entirely appropriate that the South Australian family violence legislation also specify that its purposes include:

- providing special police powers of arrest, detention and search in connection with issuing, serving and enforcing protection orders; [231]and

- further protecting persons suffering or witnessing family violence—in the giving of evidence and the protection of identity.[232]

4.237 The Commissions are also interested in hearing views from stakeholders about the need to include other purposes that are not currently referred to in any of the state and territory family violence legislation. For example, in the Second Reading Speech of the *Domestic and Family Violence Bill* 2007 (NT), the Attorney-General stated that:

> Another central objective of the legislation is to ensure minimal disruption to the lives of families affected by violence. There will be a new presumption when making

228 *Domestic and Family Violence Act 2007* (NT) s 3(1)(b).

229 *Family Violence Protection Act 2008* (Vic) s 1(c). See also *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 10(1)(d) which states that intervention should be designed to encourage defendants to accept responsibility and take steps to avoid engaging in family violence. See also R Hunter and J Stubbs, 'Model Laws or Missed Opportunity?' (1999) 24 *Alternative Law Journal* 12, 12.

230 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(1)(b); *Family Violence Protection Act 2008* (Vic) s 1(b); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 5(a); *Domestic Violence and Protection Orders Act 2008* (ACT) s 6(a); *Domestic and Family Violence Act 2007* (NT) s 3(1)(c).

231 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 5(b).

232 Ibid s 5(c).

> orders in favour of an applicant with children in their care remaining in the family home.[233]

4.238 This stated objective does not, however, appear in the objects clause of the Northern Territory family violence Act—nor any other family violence Act in Australia. Courts have power to make exclusion orders in a number of state and territory jurisdictions.[234] The expression of such a purpose is linked to the making of exclusion orders. Research indicates that 'there is a low utilisation of exclusion conditions in protection orders' and that this may be attributed partly to 'judicial unease' in using them because of concern for the hardship of those engaging in violence.[235]

4.239 The Commissions seek stakeholder views about whether family violence legislation should articulate a purpose concerning the desirability of minimising disruption to the lives of families affected by violence. The Commissions are interested in whether giving this objective some prominence is likely to encourage judicial officers to make exclusion orders in appropriate circumstances, and go some way to addressing the fact that family violence is a leading cause of homelessness for women and children who flee from it.[236]

4.240 The Commissions are also interested in hearing whether there are any other purposes that should be expressly recognised in family violence legislation.

Proposal 4–24 The *Restraining Orders Act 1997* (WA) should be amended to include an objects clause.

Proposal 4–25 State and territory family violence legislation should articulate a common set of core purposes which address the following aims:

(a) to ensure or maximise the safety and protection of persons who fear or experience family violence;

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233 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 17 October 2007, 4846 (S Stirling—Attorney-General), 4848. A similar intention is expressed in the South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2009, 3937 (M Atkinson—Attorney-General), 3943 and the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 10(1)(d) also expresses the principle that intervention should be designed to minimise disruption to protected persons and the children living with them.

234 Exclusion orders are discussed in Ch 6.

235 See K Wilcox and L McFerran, 'Staying Home, Staying Safe' (2009) 94 *Reform* 24, and L McFerran, *Taking Back the Castle: How Australia is Making the Home Safer for Women and Children*, *Australian Domestic & Family Violence Clearinghouse*, 1 July 2007.

236 K Wilcox and L McFerran, 'Staying Home, Staying Safe' (2009) 94 *Reform* 24 (citations omitted).

(b) to ensure that persons who use family violence accept responsibility—or are made accountable—for their conduct; and

(c) to reduce or prevent family violence and the exposure of children to family violence.

Proposal 4–26

(a) The objects clause in the *Domestic and Family Violence Protection Act 1989* (Qld) should be amended to specify core purposes, other than the existing main purpose of providing for the safety and protection of persons in particular relationships; and

(b) the objects clause in the *Family Violence Act 2004* (Tas) should be amended to specify more clearly the core purposes of the Act.

Question 4–8 Are there any other 'core' purposes that should be included in the objects clauses in the family violence legislation of each of the states and territories? For example, should family violence legislation specify a purpose about ensuring minimal disruption to the lives of those affected by family violence?

Grounds for obtaining a protection order

4.241 There are two broad approaches to setting a threshold for obtaining a protection order. One approach is to focus on the commission of past family violence as well as the likelihood that the person engaging in violence will do so again. This is the approach taken in Victoria[237] and Queensland.[238]

4.242 Hunter and Stubbs have criticised the approach of requiring a victim to prove likelihood of further family violence:

> This represents a significant hurdle for complainants, particularly those who, in order to ensure their safety, have separated from their violent partner. Some magistrates have difficulty understanding why women remain fearful after separation, when as they see it, the parties are unlikely to have any future contact with each other …[239]

237 *Family Violence Protection Act 2008* (Vic) s 74. The Commissions note that the consideration of this issue in Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), 112–113, Rec 19 focused solely on expanding the existing grounds to accommodate the proposed expanded definition of family violence.

238 *Domestic and Family Violence Protection Act 1989* (Qld) s 20.

239 R Hunter and J Stubbs, 'Model Laws or Missed Opportunity?' (1999) 24 *Alternative Law Journal* 12, 14.

4.243 Tasmania takes a similar approach of focusing both on past and future conduct, except rather than using the terminology of the person engaging in violence being 'likely to commit' family violence again, it uses the terminology that the person 'may again commit' family violence.[240] 'May', on its face, suggests a less stringent test than 'likely', implying possibility rather than probability. The second reading speeches of the Tasmanian family violence legislation do not indicate why the terminology of 'may' was preferred to 'likely'—or indeed if it was an intentional choice. The Commissions are not aware of any cases that have judicially considered this aspect of the provision and are interested in hearing whether this has been an issue in practice.

4.244 The second broad approach focuses on the effect on the victim. This is the approach taken in NSW and the Northern Territory where the grounds focus on fear. In NSW a person has to have reasonable grounds to fear, and must in fact fear, the commission of a personal violence offence. The subjective test of fear is not however required to be met in certain cases. These include if the protected person is a child or of below average intelligence. Importantly, another exception is where the victim has been subjected to past family violence by the person against whom the order is sought and there is a likelihood that the person engaging in violence will do so again and the court is satisfied that the making of the order is necessary in the circumstances.[241] The Northern Territory legislation only requires an objective standard of fear.[242]

4.245 The South Australian family violence legislation articulates the test as reasonable grounds to 'suspect'—rather than 'fear'—that the relevant person will commit an act of abuse, and that making an order is appropriate in all the circumstances.[243]

4.246 Western Australia, in effect, adopts both approaches in the alternative. That is, a court can make a protection order either because there has been past violence and there is the likelihood of future violence or because the victim has reasonable grounds to fear violence. In each case the court has to be satisfied that the granting of the order is appropriate in the circumstances.[244] The approach of adopting both tests in the alternative is in accordance with the approach ultimately recommended by the Domestic Violence Legislation Working Group in drafting Model Domestic Violence Laws.[245]

4.247 The ACT alone allows for a protection order to be made on the basis that the person against whom it is sought has used family violence.[246] In all jurisdictions the court has discretion not to make a protection order even if the grounds for the order have been met.

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240 *Family Violence Act 2004* (Tas) s 16(1).
241 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 16.
242 *Domestic and Family Violence Act 2007* (NT) s 18.
243 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 6.
244 *Restraining Orders Act 1997* (WA) s 11A.
245 Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999), s 14(1).
246 *Domestic Violence and Protection Orders Act 2008* (ACT) s 46(1).

4.248 Hunter and Stubbs have expressed the view that a test requiring reasonable apprehension of fear has some advantages over a test focusing on past conduct and likelihood of repetition:

> This approach is preferable in that it does not require waiting for a violent act to occur before an order can be made, and is in line with the preventive function of the protection order.[247]

Commissions' views

4.249 The Commissions note the conclusion of the AGS in *Domestic Violence Laws in Australia* that, in terms of its effect, the family violence legislation

> does not appear to be substantially different in respect of crucial matters such as … the grounds on which protection orders may be made.[248]

4.250 Nonetheless, the Commissions consider that there are key differences which should be addressed. It is unacceptable that victims suffering similar experiences of abuse in different jurisdictions may have varying chances of obtaining a protection order based on the legislative threshold for the granting of orders in their jurisdiction. A disparity in the grounds for obtaining a protection order across the states and territories is relevant to the issue of whether family violence laws are capable of interacting with the *Family Law Act*. Consider the following hypothetical:

Hypothetical

Victim A resides in the ACT. She was physically assaulted by her partner. She applies for a protection order and has to prove that her partner assaulted her. She has photographic evidence of the injuries sustained in the assault, as well as the corroborating evidence of a neighbour. The court grants the application. The order is later made final. Victim A is also involved in family law proceedings seeking custody of her children. The Family Court has to consider the protection order made in her favour.

Victim B resides in Queensland. She also was physically assaulted by her partner. She applies for a protection order and has to prove that her partner assaulted her and that he is likely to do so again. She has photographic evidence of the injuries sustained in the assault, as well as the corroborating evidence of a friend.

247 R Hunter and J Stubbs, 'Model Laws or Missed Opportunity?' (1999) 24 *Alternative Law Journal* 12, 14.
248 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), [2.1.9].

She gives evidence that her partner is likely to assault her again, based on her knowledge that when he is under considerable stress at work he 'takes it out on her'. She leads evidence that similar types of assault occurred two years before, when her partner was also under considerable financial and work stress. Her partner contests the application expressing remorse and providing evidence that he has enrolled in an anger management course. The court does not grant the application. Victim B is also involved in family law proceedings seeking custody of her child. Unlike the case of Victim A, there is no protection order to which the Family Court must pay regard.

4.251 The Commissions consider that each state and territory should have similar grounds for triggering the granting of an application for a protection order. This complements the Commissions' proposed approach for a common interpretative framework. Just as there should be a common understanding of what constitutes family violence, so should there be a common understanding of when the law should step in to provide protection.

4.252 The Commissions have some preliminary reservations about an approach that requires proof of likelihood of repetition, noting the evidential hurdle that this may present to victims. The Commissions are also of the preliminary view that the position in the ACT—where it is only necessary to prove the fact that a person has used family violence to obtain a protection order—is unsatisfactory as it does not attempt to consider whether or not a person is actually in need of future protection which is the primary function of the legislation. To frame the grounds so widely is to allow, for example, the indiscriminate granting of protection orders against victims in cross applications where a victim may have resisted violently, but where the primary aggressor does not need protection.

4.253 The Commissions consider that there is some merit in adopting grounds that focus on fear—that is, an approach that focuses on the effect on the victim. In applying for a protection order a victim is, in effect, seeking not only protection from violence but also freedom from fear. Chief Justice James Spigelman, writing extra-curially, notes that the concept of freedom from fear has disappeared from legal discourse:

> This is regrettable because the most significant impact on personal freedom occurs through the mechanism of fear, rather than through actual direct interference with such freedom. …
>
> The most effective, indeed the most common, form of interference with freedom arises from the self-imposed restraint on behaviour because of the threat of adverse consequences if the behaviour is engaged in. Furthermore, the restraint on the behaviour is greater, indeed almost always much greater, than would occur on the basis of calculation of the probability of those consequences actually occurring. …
>
> Once it is accepted that protection of human rights requires not only the prevention of direct interference, but also a response to the threat of interference, then freedom from fear can be seen to inhere in most of the human rights protected by international

> instruments and domestic provisions. Such freedom is not, itself, a freestanding right. It should, however, be recognised as a critical dimension of other rights.[249]

4.254 The Commissions express the preliminary view that it is problematic to include an objective test of fear in the definition of family violence in the *Family Law Act*. Different considerations may apply in adapting such a test for the purpose of meeting a threshold to obtain a protection order. The Commissions are interested in views in this regard.

4.255 The Commissions have not decided, at this stage, how to frame precisely the standard grounds for obtaining a protection order. Given the Commissions' preliminary preference for at least including grounds that focus on the effect on the victim, and the exclusion of grounds that rely solely on proof of likelihood of repetition of violence, there appear to be four options:

- a test similar to that in NSW—which includes an objective test of fear, and a subjective test with the latter capable of being excluded in certain circumstances;
- a test similar to that in the Northern Territory, which imposes only an objective test of fear;
- a test similar to that adopted in South Australia, which imposes an objective test of suspicion that the relevant person will use violence plus a requirement that the court is satisfied that making the order is appropriate in all the circumstances; or
- an approach similar to that in Western Australia and advocated in the Model Domestic Laws—that is, adopting as alternatives the test that focuses on past conduct and likelihood of repetition, and the objective test of fear.

4.256 The Commissions are interested in hearing stakeholder views in this regard.

Proposal 4–27 State and territory family violence legislation should adopt the same grounds for obtaining a protection order.

Proposal 4–28 The grounds for obtaining a protection order under state and territory family violence legislation should not require proof of likelihood of repetition of family violence, unless such proof is an alternative to a ground that focuses on the impact of the violence on the person seeking protection.

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249 J Spigelman, 'The Forgotten Freedom: Freedom From Fear' (Paper presented at Sydney University Law School Distinguished Speakers Program 2009, Sydney, 17 November 2009), 4–6.

Question 4–9 Which of the following grounds for obtaining a protection order under state and territory family violence legislation should be adopted:

(a) a person has reasonable grounds to fear, and, except in certain cases, in fact fears family violence, along the lines of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW);

(b) a person has reasonable grounds to fear family violence;

(c) there are reasonable grounds to suspect that further family violence will occur and the Court is satisfied that making an order is appropriate in all the circumstances, along the lines of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA); or

(d) either the person seeking protection has reasonable grounds to fear family violence or the person he or she is seeking protection from has used family violence and is likely to do so again.

5. Family Violence Legislation and the Criminal Law—An Introduction

Introduction

5.1 The Terms of Reference direct the Commissions to consider the interaction in practice between family violence laws and the criminal law of the Commonwealth, states and territories. This and the following two chapters are dedicated to this issue.

5.2 There are a number of ways that family violence laws interact with the criminal law, as well as various points in the criminal law process where such interactions may occur. Most interactions occur between family violence laws and state or territory criminal law, rather than with federal criminal law. One area canvassed in this chapter is the interaction between family violence laws and federal criminal law.

5.3 Conduct constituting family violence may give rise to protection order proceedings under family violence laws, as well as criminal proceedings. In practice, decision makers, such as police, may favour pursuit of one remedy over the other—rather than viewing them as complementary remedies which serve different purposes. The Commissions, in this chapter, express interest in ascertaining jurisdictional practices or trends in this regard.

5.4 This chapter considers the interaction between family violence laws and state and territory criminal procedures. While protection orders are essentially a civil remedy, the legislative machinery which supports them relies heavily on criminal

procedures—such as police powers of entry, search, seizure, arrest and detention, as well as the imposition of bail by either police or the courts. This chapter also considers the role of police and, to a lesser extent, directors of public prosecution (DPPs) in protection order proceedings under family violence laws. The police and DPPs are bodies normally associated with the functions of investigating and prosecuting crime, respectively.

5.5 Chapter 6 discusses a number of issues arising from the interaction between protection orders under family violence legislation and the criminal law, namely: the making of protection orders in criminal proceedings; the interaction between protection order conditions and the criminal law, and issues arising on breach of protection orders.[1]

5.6 An important question for this Inquiry is ascertaining the proper boundaries of criminal redress for family violence. This chapter raises the issue of whether certain non-physical family violence recognised under some family violence legislation should be criminalised. Chapter 7 continues this discussion, and considers whether the criminal law should recognise 'family violence' as an offence, in sentencing, or as a defence to homicide.

Definitions

5.7 Chapter 4 discusses the extent to which family violence legislation links the definition of family violence to offences in the criminal law, and the consequences that has for victims. As noted in that chapter, the definition of family violence in family violence legislation may determine whether and to what extent conduct constituting family violence overlaps with criminal law. That chapter also discusses the interactions which arise between the definitions or terminology in family violence laws and the criminal law:

- in the limited circumstances where the criminal law defines 'family violence'; and

- where each law defines a *particular* type of conduct that may constitute family violence.

5.8 Clearly, in some circumstances, there may be no interaction between family violence laws and criminal laws. Victims may obtain civil protection orders in circumstances where the conduct the subject of the order does not amount to a criminal offence.[2] The interaction of definitions in family violence legislation and the criminal law may create the potentially anomalous—and unjustifiable—position that in limited

1 In each state and territory jurisdiction, breach of a protection order is a criminal offence.
2 As discussed in Ch 4.

circumstances a victim may not be able to obtain a protection order in circumstances where the conduct constituting family violence could be a criminal offence.[3]

Interactions with federal criminal law

5.9 The Commissions have been asked to consider the interaction between family violence laws and federal criminal law.

5.10 One area where interaction may occur is where conduct which might give rise to a protection order also constitutes an offence under federal criminal law. For example, conduct such as threatening behaviour or harassment that can form the basis for a protection order under family violence legislation can also fall within the ambit of the following federal offences:

- using a carriage service to make a threat;[4]
- using a carriage service to menace, harass or cause offence;[5]
- using a postal or similar service to make a threat;[6] or
- using a postal or similar service to menace, harass or cause offence.[7]

5.11 The Commissions heard in one consultation that, in NSW, such offences are sometimes prosecuted in tandem with protection order proceedings and that, in particular, carriage service offences are sometimes prosecuted where there is conduct involving the sending of abusive text messages.[8]

5.12 In addition, it is possible for a person who commits child abuse—including physical abuse—to be subject to a protection order under family violence legislation, as well as be prosecuted for the federal offence of using carriage services for child abuse material.[9]

5.13 Another area where overlap between family violence laws and federal criminal law may occur is in relation to conduct constituting economic abuse. For example, coercing a family member to claim a social security payment is recognised as

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3 This is discussed in Ch 4 and the Commissions make proposals in this regard.
4 *Criminal Code* (Cth) s 474.15.
5 Ibid s 474.17.
6 Ibid s 471.11.
7 Ibid s 471.12.
8 G Zdenkowski, *Consultation*, Sydney, 6 November 2009.
9 *Criminal Code* (Cth) s 474.22. The offence of using a carriage service for child pornography material may also be of potential relevance in some family violence matters: s 474.19.

economic abuse amounting to family violence in some jurisdictions.[10] Such behaviour could also constitute offences under:

- social security legislation; and
- the *Criminal Code Act 1995* (Cth) relating to fraudulent conduct—such as obtaining a financial advantage by deception or making false or misleading statements in applications.

5.14 The Commissions are interested in ascertaining the frequency with which family violence laws intersect with offences in federal criminal law. In particular, the Commissions are interested in any examples where an offence against federal law has formed the basis for a state or territory protection order under family violence legislation. The Commonwealth Director of Public Prosecutions (CDPP) has informed the ALRC that it is unaware of any such matters.[11] The ALRC also raised this question in its Family Violence Online Forum, and no participant on that forum identified any such example. One possible area where this could arise is in relation to sexual servitude offences under the *Criminal Code* (Cth), where the person committing the offence is in a defined family relationship with the victim.[12]

5.15 The CDPP has advised that while it keeps statistics on the number of prosecutions it has conducted under various sections of Commonwealth statutes, it is unable to identify whether any of those offences have arisen in a family violence context.[13]

5.16 The Commissions are also interested in hearing how, in practice, matters are dealt with where they involve:

- an overlap between family violence legislation and federal criminal law; and
- a joint prosecution of state or territory and federal offences arising in a family violence context.[14]

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10 See, eg, *Family Violence Protection Act 2008* (Vic) s 6.

11 Office of the Director of Public Prosecutions (Cth), *Correspondence*, 8 January 2010.

12 *Criminal Code* (Cth) ch 8 div 270. For example, a person whose conduct causes another person to enter into or remain in sexual servitude is guilty of an offence. Sexual servitude is the condition of a person who provides sexual services and who, because of the use of force or threats—including a threat to cause a person's deportation—is not free, for example, to cease providing sexual services. See generally *R v Tang* (2008) 237 CLR 1; B McSherry, 'Trafficking in Persons: A Critical Analysis of the New Criminal Code Offences' (2006) 18 *Current Issues in Criminal Justice* 385.

13 Office of the Director of Public Prosecutions (Cth), *Correspondence*, 8 January 2010.

14 The CDPP informed the ALRC that joint trial arrangements work very well in practice: Ibid.

5.17 The Commissions understand that the CDPP has little involvement in this regard, and that state and territory prosecutors will typically have carriage of such matters.[15]

Question 5–1 How are matters dealt with in practice that involve:

(a) an overlap between state or territory family violence legislation and federal criminal law; and

(b) a joint prosecution of state or territory and federal offences arising in a family violence context?

In particular, do state and territory prosecutors seek the consent of the Commonwealth Director of Public Prosecutions to prosecute federal offences arising in a family violence context, and inform it of the outcomes of any such prosecutions?

Question 5–2 Are you aware of any cases where an offence against federal criminal law has formed the basis for obtaining a protection order under state or territory family violence legislation?

Commissions' views

Legislation

5.18 On the basis of the Commissions' consultations and inquiries so far, it appears that where family violence laws interact with criminal laws it is much more likely to be an interaction with state or territory criminal law rather than federal criminal law. Nonetheless, the Commissions consider that it is important for the definition of family violence in family violence legislation to be broad enough to capture conduct the subject of potentially relevant federal offences that could form the basis for obtaining a protection order. As stated above, one area where this could arise is in relation to the federal offence of sexual servitude.

5.19 To the extent that family violence legislation links the definition of family violence offences to specific state criminal offences in the absence of a broader definition of family violence—as is the case with the family violence legislation in NSW—there does not appear to be scope for the definition to capture conduct potentially falling within the ambit of federal offences. The Commissions' preliminary view is that this should be addressed, although as mentioned earlier, some conduct, such as abusive phone threats are captured by the definitions. The Commissions make

15 Ibid.

a number of proposals about the definition of family violence in Chapter 4—including a proposal that the NSW family violence legislation should include a definition of 'domestic violence' in addition to the current definition of 'domestic violence offence'.[16] These proposals should go some way to addressing this issue.

Education and statistics

5.20 There is a lack of centralised statistics about the frequency with which federal offences are prosecuted in a family violence context either:

- on their own;
- in addition to proceedings for the obtaining of a protection order under state or territory family violence legislation; or
- in conjunction with a state or territory prosecution for offences arising in a family violence context.

5.21 This makes it impossible to draw any firm conclusions about the extent to which such offences are being used in a family violence context, the degree and nature of interaction with family violence laws, and whether there are any jurisdictional differences in this regard warranting further investigation.

5.22 In the Commissions' preliminary view, it is essential to establish a central database capturing the frequency of prosecutions of federal offences in the family violence context. The CDPP is the appropriate entity to establish and manage such a database, either by itself or in conjunction with other relevant bodies. For example, the Commissions note that the federal sentencing database was jointly established by the National Judicial College of Australia, the Judicial Commission of New South Wales and the CDPP. The maintenance of such a database would require the cooperation and collaboration of state and territory prosecutors involved in the prosecution of federal offences—including police and DPPs—for the purposes of data collection.

5.23 The maintenance of proper statistics would enable principled policy to be developed in this area. For example, interrogation of statistics on the prosecution of federal offences in the family violence context could reveal jurisdictional differences in the extent of prosecutions of certain offences, such as the telecommunications offences relating to making threats. This could highlight a need to investigate whether specific education and training programs need to be delivered to lawyers in certain jurisdictions or areas to educate them about federal laws of potential relevance to family violence.

16 Proposal 4–2.

Proposal 5–1 The definition of family violence in state and territory family violence legislation should be broad enough to capture conduct the subject of potentially relevant federal offences in the family violence context—such as sexual servitude.

Proposal 5–2 The Commonwealth Director of Public Prosecutions—either by itself or in conjunction with other relevant bodies—should establish and maintain a centralised database of statistics that records the number of times any federal offence has been prosecuted in a family violence context including when such an offence is prosecuted:

(a) in addition to proceedings for the obtaining of a protection order under state or territory family violence legislation;

(b) jointly with a state or territory offence in a family violence context; and

(c) in the absence of any other criminal or civil proceeding.

Proposal 5–3 In order to facilitate the establishment and maintenance of the centralised database referred to in Proposal 5–2, state and territory prosecutors—including police and directors of public prosecution—should provide the Commonwealth Director of Public Prosecutions with information about:

(a) federal offences in a family violence context which they prosecute, including the outcomes of any such prosecutions;

(b) the prosecution of any federal offence in a family violence context conducted jointly with a prosecution of any state or territory family-violence related offence; and

(c) whether the prosecution of the federal offence is in addition to any protection order proceedings under state or territory family violence legislation.

Question 5–3 Is there a need for lawyers involved in family violence matters to receive education and training about the potential role of federal offences in protection order proceedings under state and territory family violence legislation? How is this best achieved?

Civil and criminal proceedings

5.24 As noted in Chapter 4, depending on the way in which family violence is defined in the family violence legislation of a particular jurisdiction, conduct constituting family violence may form the basis of an application for a protection order, as well as grounds for a criminal prosecution. The potential for overlap will arise in cases where conduct constituting family violence is defined by reference to specific criminal offences—as in the case of the NSW and ACT family violence legislation. Where family violence legislation describes conduct constituting family violence more generally as including assault, sexual assault, causing injury to a person or to property—even in the absence of specific references to offences—there is also clear potential for overlap between family violence laws and the criminal law.

5.25 There are, however, key differences in the civil and criminal responses. Some of these are summarised in the table below:

	Civil protection order	**Criminal proceedings**
Purpose (see discussion in Chapter 3)	Protect victim from future violence.	Punish offender for past criminal conduct. Other sentencing purposes include: deterrence, rehabilitation, incapacitation, denunciation and restoration
Standard of proof	Balance of probabilities.	Beyond reasonable doubt.
Who initiates	Victim, authorised person, police, and possibly—but less frequently—DPP. In certain cases and in some jurisdictions courts can also initiate making of protection order.	Police lay charges and prosecute less serious offences. State/territory DPPs prosecute more serious offences.
Outcome	Conditions or restrictions placed on person against whom order is made (eg not to harass, be of good behaviour, not to approach victim).	On finding of guilt or conviction offender is sentenced.

Choice of proceedings

5.26 Issues arising from concurrent civil and criminal proceedings in the context of family violence are addressed in this and the following chapter. There may be

legitimate reasons for opting for a protection order instead of a criminal charge. These include that: a protection order offers a speedier response to violence and therefore protection; the offending conduct may not constitute a criminal offence; and there is a lower standard of proof in civil protection order proceedings. However, one issue of significance in this Inquiry is whether, in practice, relevant decision makers—including police—are favouring the pursuit of either a civil or criminal remedy at the expense of the other in circumstances where both civil and criminal redress is possible.

5.27 As noted by Amnesty International, the United Nations Special Rapporteur on Violence Against Women, its Causes and Consequences has raised concerns about the use of protection orders under family violence legislation in Australia instead of, rather than as well as, a criminal response.[17] Amnesty International has stated that:

> Civil protection orders are an essential part of the state's responsibility to protect survivors of violence, but should complement, not replace, a criminal response.[18]

5.28 Commentators have noted that, where there is an overlap between criminal and civil responses,

> [t]he balance involved is a delicate one, between providing a legal mechanism for protecting people who experience domestic violence, but not downplaying its significance by applying what is essentially a private law remedy.[19]

5.29 In 1990 Dr Jocelynne Scutt argued that family violence laws effectively 'decriminalise' family violence:[20]

> The emphasis is on treating assault not as criminal, but to be dealt with by a civil law 'solution'. The man is not penalised for assaulting his wife; he is penalised if at all, for breaking an order of the court.[21]

5.30 In 2008, Heather Douglas wrote that, in Queensland, family violence continues to be dealt with mainly through the obtaining of protection orders under family violence legislation, rather than as criminal matters.

> The development of protection order legislation grew, to some extent, out of frustration with the failure of the criminal justice system. Some of the key obstacles in criminal prosecution and conviction of domestic violence offences are the high standard of proof of 'beyond reasonable doubt' and the fact that many of the standard criminal offences fail to encapsulate certain violent behaviours … These protection order schemes have been embraced by both women and by police. As one magistrate has noted, we have seen a 'rise and rise' in the use of protection orders.[22]

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17 Amnesty International, *Setting the Standard: International Good Practice to Inform an Australian National Plan of Action to Eliminate Violence Against Women* (2008), 45.

18 Ibid, 45 (citation omitted).

19 B Fehlberg and J Behrens, *Australian Family Law—The Contemporary Context* (2008), 200.

20 J Scutt, *Women and The Law* (1990), 451, 457.

21 Ibid, 459. Issues that arise on breach of a protection order are discussed in Ch 6.

22 H Douglas, 'The Criminal Law's Response to Domestic Violence: What's Going On?' (2008) 30 *Sydney Law Review* 439, 444.

5.31 In 2007–2008, the Magistrates Court of Queensland reported that it made a total of 32,081 protection orders and dismissed 5,376 applications for such orders.[23] New South Wales Criminal Courts Statistics also indicate high usage of the protection order system. Statistics for 2008 reveal that 22,684 protection orders were granted in proceedings under the NSW family violence legislation—excluding interim orders.[24]

5.32 The Commissions are interested in hearing whether there are any jurisdictional trends or practices that indicate a preference for pursuing either civil or criminal redress to family violence to the exclusion of the other, in circumstances where both civil and criminal avenues feasibly could be pursued. The 2008 review of the family violence legislation of Western Australia notes a concern that, despite WA Police policy stating that protection orders 'are to be seen as an additional safeguard and are not regarded as an alternative to the laying of charges', the introduction of police-issued protection orders has become, in some instances, an alternative to a criminal justice response.[25] The WA review stated:

> The question is whether police are issuing police orders, not only in appropriate circumstances, but also in circumstances where they should be preferring charges …
>
> Responses from the policy survey indicate that, in some instances, issuing a police order may be preferred to laying charges because issuing a police order requires less police time.[26]

5.33 The WA review expressed concern that some police were potentially trivialising what, to a victim, was a serious offence.[27]

5.34 In contrast, the ALRC heard anecdotally in one consultation with magistrates in Adelaide that in that jurisdiction police prefer laying a charge to taking out a protection order because the latter involves preparation of an affidavit and is more time-consuming.

5.35 While one concern is that civil redress downplays the significance of family violence,[28] concerns have also been raised that applying the criminal law to family violence may inflict further harm to women.[29] Douglas has stated that:

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23 Magistrates Court of Queensland, *Annual Report 2007–2008* (2008), Appendix 11, Table 9. The figure of 32,081 includes final and interim protection orders, as well as variation and revocation of protection orders. The total number of final protection orders made in the same reporting period was 15,632.

24 NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2008*, 6, Table 1.14.

25 Western Australia Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008), 22.

26 Ibid, 22–23.

27 Ibid, 22.

28 In some cases if civil redress were not available, a victim would be left without any protection.

29 H Douglas, 'The Criminal Law's Response to Domestic Violence: What's Going On?' (2008) 30 *Sydney Law Review* 439, 439. The purposes of family violence legislation and the criminal law are discussed in Ch 3.

> It is argued by some that involving the criminal justice system in domestic violence matters may create distress, disadvantages and disillusionment for women that override any hope or protection and safety gained through the criminal justice process. …
>
> In Australia, there is research available that shows that indigenous women in some communities may be reluctant to call on police to protect them from violence where arrest and prosecution focused strategies are in place. … [30]

5.36 Since the 1970s, some feminist scholars and activists have emphasised that there are important reasons for treating family violence as criminal and not civil or private. Scutt, for example, argued that:

> criminal assault [in a family violence context] is effectively decriminalised by the failure of police and courts to treat it as criminal, the 'solution' is seen as passing legislation to grant women a right to an … 'intervention order'.[31]

5.37 Douglas suggested that the

> application of criminal law to domestic violence has encouraged both public condemnation of violence in the intimate sphere and police accountability for the protection of women.[32]

5.38 Whether a civil and/or criminal response is pursued may also depend in practice on the victims' wishes. Whether victims choose to pursue a civil remedy or assist in a criminal prosecution may be influenced by a number of factors, including their experiences of the legal system; their access to support services; and the nature of their relationship with the persons who have been violent to them. As Douglas has noted:

> Both individual judges and research have also recognised that the cyclical and complicated nature of family violence relationships often leads victims to seek to withdraw charges or understate the harm of particular conduct during periods of calm in their relationship.[33]

5.39 In cases of family violence involving allegations of sexual assault, there are parallel levels of attrition at various stages of the criminal process, which is considered in Part D of this Consultation Paper.

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30 Ibid, 442–443 (citations omitted).

31 J Scutt, *Women and The Law* (1990), 451.

32 H Douglas, 'The Criminal Law's Response to Domestic Violence: What's Going On?' (2008) 30 *Sydney Law Review* 439, 443 (citations omitted).

33 Ibid, 454 (citation omitted).

Question 5–4 As a matter of practice, are police or other participants in the legal system treating the obtaining of protection orders under family violence legislation and a criminal justice response to family violence as alternatives rather than potentially co-existing avenues of redress? If so, what are the practices or trends in this regard and how can this best be addressed?

The boundaries of criminal redress

5.40 Criminal law tends to deal best with incident-focused behaviour rather than patterns of either physical acts of violence or non-physical controlling behaviour.[34] An issue that arises in assessing the dividing line between civil and criminal responses to family violence is the extent to which traditionally non-criminal behaviour in a family violence context—typically non-physical forms of violence, such as emotional and economic abuse—should be criminalised.[35] As discussed in Chapter 4, such forms of non-physical violence are recognised to varying degrees in state and territory family violence legislation.

5.41 Tasmania is the only jurisdiction which criminalises economic abuse in the context of family violence. The relevant provision requires the offender to have an intention unreasonably to control or intimidate his or her spouse or partner (the victim), or cause mental harm, apprehension or fear in committing certain acts of economic abuse. These acts include:

- coercing the victim to relinquish control over assets or income;
- disposing of relevant property without the consent of the victim or affected child;
- preventing the victim from accessing joint assets to meet normal household expenditure; and
- withholding financial support reasonably necessary for the maintenance of the victim and any affected child.[36]

5.42 The provision in the Tasmanian family violence legislation which criminalises emotional abuse prohibits a person from pursuing 'a course of conduct that he or she knows, or ought to know, is likely to have the effect of unreasonably controlling or intimidating, or causing mental harm, apprehension or fear in, his or her spouse or

34 Ch 3 discusses the purposes of the criminal law and of family violence legislation.
35 Ch 7 discusses the issue of whether there should be a general offence of family violence.
36 *Family Violence Act 2004* (Tas) s 8.

partner'.[37] The maximum penalty is a fine not exceeding 40 penalty units or imprisonment for a term not exceeding two years.

5.43 In the Second Reading Speech of the Tasmanian family violence legislation, the criminalisation of economic and emotional abuse was explained as follows:

> This [approach] underlines the fact that family violence does not always take on an overtly physical form and that it can involve a range of behaviours aimed at isolating the victim and undermining their capacity to take action …
>
> The creation of offences of economic abuse and emotional abuse are critical if we are to take a more holistic view of the nature of family violence and offer our community the best possible protection against its many forms.[38]

5.44 The Commissions are not aware of any prosecution under the Tasmanian family violence legislation for either economic or emotional abuse. The 2008 review of the *Family Violence Act 2004* (Tas) commented that stakeholders were awaiting the first case resting on the offence of economic abuse.[39] While no charge had been brought for emotional abuse and intimidation, that ground has been used in support of applications for protection orders.[40]

Commissions' views

5.45 In Chapter 4 the Commissions express the preliminary view that economic abuse should be expressly recognised in the definitions of family violence in the family violence legislation of each state and territory. The Commissions also express the view that state and territory family violence legislation, at the least, should share a common understanding that emotional abuse is a form of family violence.

5.46 The Commissions are interested in stakeholder views about whether it is necessary or desirable for economic or emotional abuse to be criminalised in the context of family violence, particularly in light of the Tasmanian approach.[41]

5.47 The Commissions have some preliminary concerns about the criminalisation of such conduct. First, the policing of such offences may be fraught with difficulties. Secondly, each element of such offences has to be proved beyond reasonable doubt and there may be significant evidentiary challenges to meet this standard. The

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37 Ibid s 9. 'Course of conduct' is defined to include limiting the freedom of movement of a person's spouse or partner by means of threats or intimidation.

38 Tasmania, *Parliamentary Debates*, House of Assembly, 18 November 2004, 166 (J Jackson—Attorney-General), 100–101.

39 Urbis (for the Tasmanian Government Department of Justice), *Review of the Family Violence Act 2004 (Tas)* (2008), 11.

40 Ibid, 12.

41 In Ch 7, the Commissions also seek views on whether there should be a general offence of family violence, noting the difficulties in conceptualising the exact parameters of such an offence and, in particular, whether such offence should include non-physical violence such as emotional and economic abuse.

Commissions note in this regard that there do not appear to have been any prosecutions for emotional and economic abuse under the Tasmanian family violence legislation.

5.48 There is also an issue about whether a distinct offence of economic abuse is necessary, given the existence of other offences which cover conduct that could constitute economic abuse—such as offences dealing with obtaining a financial advantage or causing financial disadvantage;[42] obtaining property belonging to another;[43] fraud;[44] and failure to provide the necessities of life.[45] As noted above, coercing a family member to claim a social security payment is recognised as economic abuse amounting to family violence in some jurisdictions.[46] Such behaviour could conceivably also fall within the ambit of offences under social security legislation or the *Criminal Code* (Cth) relating to fraudulent conduct.

5.49 Moreover, given that the breach of a protection order amounts to a criminal offence, any conduct by a person that breached conditions tailored to prevent emotional abuse, intimidation or economic abuse (in jurisdictions which recognise such forms of behaviour as family violence) would, in any event, be criminal.

5.50 Finally, the role of the civil law in addressing economic abuse should not be underestimated. In addition to victims being able to stop further economic abuse through the mechanism of protection orders, it is important for victims of economic abuse to be able to reverse economic disadvantage inflicted upon them. That outcome may also be achievable under the civil law.

5.51 For example, redress under contracts review legislation is available to void or vary unjust financial contracts—such as in circumstances where a victim is coerced by a family member to sign a document transferring property.[47] For example, under the *Contracts Review Act 1980* (NSW), in determining whether a contract or a provision of a contract is unjust in the circumstances relating to the contract at the time it was made, the court is to have regard to the public interest, and a number of other matters, including whether:

- there was any material inequality in the bargaining power between the parties to the contract; and
- it was reasonably practicable for the party seeking relief under the Act to negotiate for the alteration of or to reject any of the provisions of the contract.[48]

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42 See, eg, *Crimes Act 1900* (NSW) s 192D.
43 See, eg, Ibid s 192C.
44 See, eg, Ibid s 192E.
45 These offences are discussed in Ch 13.
46 See, eg, *Family Violence Protection Act 2008* (Vic) s 6.
47 See, eg, *Contracts Review Act 1980* (NSW) s 7.
48 Ibid s 9.

5.52 The existence of family violence circumstances could be relevant to establishing that a victim of such violence was in a materially unequal bargaining position and could not reasonably negotiate with the person using violence for an alteration or rejection of such a contract.

5.53 While the Commissions have some reservations about creating specific offences of economic and emotional abuse in the family violence context, as discussed in Chapter 7 the Commissions consider that there is a case for recognising patterns of emotional and economic abuse—together with other types of abuse—in the conceptualisation of family violence as a defence to homicide.

Question 5–5 Are criminal offences for economic and emotional abuse in a family violence context necessary or desirable?

Interaction with participants in criminal justice system

5.54 While protection orders are a civil remedy they entail the involvement of police and, potentially, DPPs—entities which are normally associated with the criminal processes of investigation and prosecution. This section briefly outlines the role of police in issuing civil protection orders—which may or may not come before a court—as well as in assisting victims to apply to courts for protection orders.

Police-issued protection orders

5.55 In some state and territory jurisdictions, police are able to issue protection orders or 'police safety notices' on persons who have used family violence.[49] When police issue such notices they are generally able to attach conditions to the order that a court is empowered to make, including exclusion orders.[50]

5.56 The duration of police-issued protection orders varies significantly across the jurisdictions. In Western Australia, police-issued protection orders can either last for 24 hours—without the victim's consent—or for 72 hours—with the consent of the victim, parent, guardian, or child welfare officer as relevant.[51] The duration of a police-issued protection order cannot be extended or renewed and another police order cannot

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49 On 1 July 2010 police in New Zealand will be able to issue a safety order directing the person against whom it is made to surrender any firearms and vacate any premises occupied by the person named in the order for whose safety the safety order is made for up to 72 hours: New Zealand Press Association, *Changes Made in Domestic Violence Bill* (2009) <www.tvnz.co.nz> at 2 March 2010; *Domestic Violence Amendment Act 2009* (NZ) s 9.

50 See eg, *Family Violence Protection Act 2008* (Vic) s 29(1); *Family Violence Act 2004* (Tas) s 14(3). Types of protection order conditions and exclusion orders are discussed in Ch 6. Exclusion orders essentially prohibit a person who has used violence from entering or remaining in a residence shared with the victim, including where that person has an equitable or legal interest in the relevant premises.

51 *Restraining Orders Act 1997* (WA) ss 30F, 30G.

be made in relation to the same facts.[52] In Tasmania, such orders may last for 12 months, unless revoked, varied or extended sooner.[53]

5.57 The Northern Territory family violence legislation does not specify the duration of a police-issued protection order. Instead, it provides that first, the police must provide the person against whom the order is made with a copy of the order and secondly, that this copy serves as a summons to appear before the court at the first mention date for the application to show cause why the protection order should not be confirmed by the court.[54] The legislation further requires that 'the time for the return of the [protection order] must be as soon as practicable after it is made'.[55]

5.58 In Victoria, a 'family violence safety notice' issued by the police acts as an application by a police officer for a protection order in favour of the victim, as well as a summons for the person against whom it is issued to appear in court at the first mention date for the application, which is to be within 72 hours of the police order being issued.[56] The 'family violence safety notice' ends on the earlier of: the court refusing to make a protection order; or, if the court makes a protection order, when the order is served.[57]

5.59 In South Australia, the issuing of an interim protection order by a police officer is taken to be an application for a protection order to the court, as well as a summons to the person against whom it is issued to appear in court.[58] The person against whom it is made is required to appear before the court within eight days of the interim protection order being issued or, if the court will not be sitting at the place within that period, within two days after the court next commences sitting at that place.[59] In effect, this limits the duration of police-issued interim protection orders to around 10 days.

5.60 The circumstances in which police officers can issue police orders also vary significantly across the jurisdictions. In Tasmania, for example, a police officer is empowered to issue such a notice if satisfied that the person has committed or is likely to commit a family violence offence.[60] Similarly, in South Australia, a police officer may issue an order if it appears that there are grounds for doing so and the person is present before the police officer.[61]

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52 Ibid s 30H.

53 *Family Violence Act 2004* (Tas) s 14. At the time of writing a challenge has been mounted to the validity of the Tasmanian family violence legislation: G Vowles, *Violence Law Faces Challenge* (2010) <www.themercury.com.au> at 15 March 2010.

54 *Domestic and Family Violence Act 2007* (NT) s 44.

55 Ibid s 42.

56 *Family Violence Protection Act 2008* (Vic) s 31. The period of 72 hours can be extended where the first mention date would otherwise fall on a public holiday.

57 Ibid s 30.

58 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 18.

59 Ibid.

60 *Family Violence Act 2004* (Tas) s 14(1).

61 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 18.

5.61 Other jurisdictions impose more stringent requirements. For example, in the Northern Territory an authorised police officer can issue a protection order only if, among other things, he or she is satisfied that because of urgent circumstances it is not practicable to obtain a protection order from the court.[62] In Victoria, police may only apply to another police officer of the rank of Sergeant or higher for 'family violence safety notices' essentially outside court hours—that is before 9am or after 5pm on a weekday or on the weekend or a public holiday—if, among other things, they are satisfied that on reasonable grounds that, until an application for a protection order can be decided by the court, such a notice is necessary to ensure safety, protection or preservation of property.[63]

5.62 The 2008 review of the Western Australian family violence legislation found that police orders have been well received by victims and service providers and concluded that they should be retained.[64] Police orders were thought to increase victim safety.[65] The WA review recommended, however, that the requirement for the victim's or other relevant person's consent for 72 hour orders be removed, thereby replacing the 24 and 72 hour orders with a single order lasting up to 72 hours.[66] In making this recommendation, the WA review acknowledged the arguments for and against removing the consent requirement from the 72 hour order.

5.63 Arguments for removing consent include that victims in a crisis situation may find it difficult to assess how dangerous a situation is, or may be fearful of giving consent. Arguments in favour of retaining consent include: that victims should not be stripped of their ability to make decisions about their lives; and that orders made without consent increase the likelihood of consensual breaches of the order, creating enforcement challenges for the police.[67]

5.64 In particular, the WA review noted, in relation to its recommendation to allow for 72 hour police orders without consent of the victim or other relevant person:

> Submissions from Aboriginal groups in remote and regional areas of the state clearly do not support this. The specific concern for these groups is the lack of appropriate places a perpetrator may stay, away from the primary residence for this extended period of time. Where there is no housing alternative there is a real risk that a breach of the order may occur leading to further contact with the criminal justice system.[68]

5.65 The rationale for the 72 hour police orders with consent of the victim was explained in the Second Reading Speech of the WA family violence legislation in the following way:

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62 *Domestic and Family Violence Act 2007* (NT) s 41.
63 *Family Violence Protection Act 2008* (Vic) s 24.
64 Western Australia Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008), 11, Rec 1.
65 Ibid, 11.
66 Ibid, Rec 2.
67 Ibid, 14.
68 Ibid, 18.

> The 72 hour orders are an innovation that were sought specifically by Aboriginal women who were part of the consultation process for the writing and drafting of this legislation and also as we consulted the communities to put in place our domestic violence action plan. Many women said specifically that they did not want their men to be incarcerated, although they wanted to be protected from violent behaviour. Therefore, the 72 hour order allows for a cooling-off period. It will allow for immediate support for these women and that can be followed up with an application for a longer term order if the threatened or actual violence has not been resolved or reconciliation has not occurred.[69]

5.66 The 2008 review of the Tasmanian family violence legislation (the Tasmanian Review) noted varying stakeholder perspectives on police powers under the legislation. Some stakeholders argued that, in the context of pro-arrest and pro-prosecution policies, police powers needed to be limited in order to ensure a 'balance' between victims and those who use violence against them.[70] Some argued that police powers to make protection orders should be restricted to interim orders only, and that final or further interim orders should require police to apply to the court.[71] The Tasmanian Review noted that the fact that parties could apply for variation of police orders had two advantages:

> The first is that interim Orders place a burden on the Court with each matter needing to be reviewed and this is avoided in Tasmania, and secondly, the avenue is open to both parties to make application to vary or revoke Orders.[72]

5.67 In a 2009 report investigating responses to Indigenous family violence in Queensland, Professor Chris Cunneen recommended that the Queensland Police Service and Department of Communities investigate the extension of police powers to provide for short-term emergency family violence orders issued by police. The recommendation also stated that any change to police powers in this regard must be accompanied by increased services and programs in the community for those who are violent towards family members.[73] Cunneen's report states that:

> While Indigenous people have higher rates of domestic violence order use than non-Indigenous people, they are much less likely to be the person applying for the order. This raises questions about engagement with and confidence in the legal process, as well as the availability of services to assist with private applications. …
>
> Police indicated that one barrier to the use of domestic violence protection orders was the reluctance of some police to apply for orders because of the paperwork involved in the application.

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69 Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 June 1997, 4014 (R Parker), 4015.

70 Urbis (for the Tasmanian Government Department of Justice), *Review of the Family Violence Act 2004 (Tas)* (2008), 14.

71 Ibid.

72 Ibid, 15.

73 C Cunneen, *Alternative and Improved Responses to Domestic and Family Violence in Queensland Indigenous Communities* (2009), Rec 1.

> The possibility of police-issued domestic violence orders was raised by police as a way of increasing the number of protection orders in remote and rural communities.[74]

5.68 In March 2010, the Queensland Department of Communities asked in its Consultation Paper on the review of Queensland's family violence legislation whether police in Queensland should have the capacity to issue protection orders and, if so, under what circumstances.[75] It noted, for example, that police-issued orders could provide immediate protection to victims, but that their introduction also brought 'a risk that a sharp increase in orders may result, including cross-orders, with the consequential risk of entry into the criminal justice system'.[76]

Commissions' views

5.69 The Commissions are interested in hearing whether police powers to issue protection orders are in fact increasing victim safety and protection in those jurisdictions in which police have such powers.

5.70 The Commissions' preliminary view is that if police are given—or are to be given—powers to issue protection orders, then the rationale should be to enable them to intervene to deal with an emergency or crisis situation in circumstances where it is not reasonably practicable for the matter to be dealt with at that time by a court. Police-issued protection orders should act as an application by a police officer for a protection order in favour of the victim, as well as a summons for the person against whom it is issued to appear in court within a specified short period of time—the model used in Victoria and South Australia. Restricting the hours during which police may impose such orders to outside court hours—particularly in metropolitan areas where courts are more accessible than in remote and rural areas—also appears appropriate.

5.71 Restrictions imposed on a person's liberty through the imposition of police-issued protection orders should be reviewed by a judicial officer as soon as possible. In this regard, the Commissions have serious concerns about the Tasmanian model which allows police to impose orders that may last 12 months, and practically places an onus on the person against whom the order is made to apply for a variation or revocation. The ALRC must aim to ensure that the laws it reviews do not make the rights and liberties of citizens unduly dependent on administrative rather than judicial decisions.[77] The Tasmanian provision providing that police-issued protection orders last for 12 months has the potential to make the rights and liberties of citizens unduly dependent on the decisions of police as opposed to the judiciary and should be repealed.

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74 Ibid, 12.

75 Queensland Department of Communities, *Review of the Domestic and Family Violence Protection Act 1989—Consultation Paper* (2010), Questions 3.3.1, 3.3.2.

76 Ibid, 26.

77 *Australian Law Reform Commission Act 1996* (Cth) s 24.

Question 5–6 In practice, where police have powers to issue protection orders under family violence legislation, has the exercise of such powers increased victim safety and protection?

Proposal 5–4 State and territory family violence legislation which empowers police to issue protection orders should provide that:

(a) police are only able to impose protection orders to intervene in emergency or crisis situations in circumstances where it is not reasonably practicable or possible for the matter to be dealt with at that time by a court; and

(b) police-issued protection orders are to act as an application to the court for a protection order as well as a summons for the person against whom it is issued to appear before the court within a short specified time period. In particular, s 14(6) of the *Family Violence Act 2004* (Tas)—which allows police-issued protection orders to last for 12 months—should be repealed.

The role of police and DPPs in applying to the court for protection orders

Role of police

5.72 In some jurisdictions police play an active role in applying for protection orders on behalf of victims.[78] In most jurisdictions, police are empowered to apply for a protection order,[79] or to help a victim make an application.[80]

5.73 There are, however, significant differences across family violence legislation in respect of the obligations placed on police to take action where family violence is suspected.[81] In NSW, Queensland, and Western Australia, family violence legislation places express obligations on police to investigate family violence. NSW and Western Australia have the strongest legislative directions in relation to pro-protection policing.

5.74 In NSW, a police officer investigating a family violence matter is obliged to make an application for a protection order under family violence legislation if he or she suspects that a family violence offence or child-abuse related offence has been, or is being committed, or is likely to be committed, against the person for whose protection

78 Police powers in relation to investigating family violence are discussed separately below. Pro-arrest policies are explained in Ch 19.

79 See, eg, *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 20(1)(a); *Family Violence Act 2004* (Tas) s 15(2)(a); *Domestic Violence and Protection Orders Act 2008* (ACT) s 18(2); *Domestic and Family Violence Act 2007* (NT) s 28(1)(c).

80 *Domestic Violence and Protection Orders Act 2008* (ACT) s 18(2).

81 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), 29.

the order would be made.[82] The legislation sets out the circumstances in which a police officer need not apply for an order, including where the victim intends to make the application. In such cases, a police office must make a written record of his or her reasons for not making an application.[83]

5.75 Similarly, in Western Australia a police officer is required to investigate whether an act of family violence is being, has been, or is likely to be committed if the police officer reasonably suspects that the act is a criminal offence or has put the safety of a person at risk.[84] After such investigation a police officer is required to make an application for a protection order, or a police order, or a written record of why neither of those actions was taken.[85]

5.76 In Queensland, if a police officer reasonably suspects that a person is one for whose protection a protection order under family violence legislation could be made, he or she is required to investigate or cause to be investigated the complaint or circumstance on which the reasonable suspicion is based until the officer is satisfied such suspicion is unfounded.[86] Following the investigation, a police officer is empowered, but not obliged to, apply for a protection order or take other action if he or she reasonably believes that the person needs protection and there is sufficient reason for the officer to take action.[87]

5.77 In Victoria, the *Code of Practice for the Investigation of Family Violence*, issued by Victoria Police, requires police to apply for a protection order wherever the safety, welfare or property of a family member appears to be endangered by another or a criminal offence is involved.[88]

5.78 In contrast, for example, in the ACT, police are not obliged to investigate on the basis of reasonable suspicion or to apply for protection orders.[89] ACT police are empowered to apply for emergency orders,[90] and are required in certain circumstances to make a written record of reasons for not applying for emergency orders.[91] ACT Policing has advised that it makes little use of emergency orders, but that this is not necessarily a negative position if there is a charge to proceed with. ACT Policing's

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82 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 49.
83 Ibid.
84 *Restraining Orders Act 1997* (WA) s 62A.
85 Ibid s 62C.
86 *Domestic and Family Violence Protection Act 1989* (Qld) s 67(1).
87 Ibid s 67(2).
88 Victoria Police, *Code of Practice for the Investigation of Family Violence* (2005), [5.3.2]. The Code has led to a significant increase in police applications for protection orders: Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006) 145 (citations omitted). The VLRC has expressed the view that with effective implementation of the Code, the addition of a legislative obligation is not yet appropriate: Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), 149.
89 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), 30.
90 *Domestic Violence and Protection Orders Act 2008* (ACT) s 68.
91 Ibid s 83.

pro-arrest policy may mean that there is less reason for an emergency order to be made.[92] Other reasons are noted:

> [Emergency orders] can also be difficult to obtain because the risk has to be imminent. There is narrow scope allowing for the application for an [emergency order]. While the use of [such orders] is low, it may be the fact that the situations in which police attend [do] not fit the criteria for an [emergency order] … [93]

5.79 The NSW Law Reform Commission has previously noted that 'it has been suggested that the [protection order] process is more effective when police lay the complaint as there is a perception that the matter is serious and a police prosecutor acts for the applicant'.[94]

5.80 Arguments for and against a more active police role in applying for protection orders were canvassed by the Victorian Law Reform Commission (VLRC) in its report, *Review of Family Violence Laws*.[95] One disadvantage identified in a submission to that review is that Indigenous peoples may be reluctant to seek assistance for family violence if most applications are brought by police.[96]

5.81 The VLRC expressed the view that 'if the system is going to be flexible and responsive to victims' needs, it is essential that victims can apply for a [protection order] without involving the police'.[97] In particular, it recommended increased Indigenous-specific support services in court to enable Indigenous people to apply for a protection order without police involvement.[98]

5.82 The Model Domestic Violence Laws contain a provision which requires a police officer to investigate whether an act of family violence has been, is being, or is likely to be, committed where that police officer believes or suspects such circumstances exist. The provision did not require a police officer to apply for a protection order following such investigation but required a written record of the reasons for not doing so.[99] Karen Wilcox has commented that:

> Although tightening of police … responsibilities … was canvassed during the Model Laws development stage … states and territories have been slow to adopt provisions which require 'pro-protection' action on the part of police …

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92 ACT Policing, *Correspondence*, 15 March 2010.
93 Ibid. The ACT police's role in the ACT's Family Violence Intervention Program—a coordinated criminal justice response to family violence—is discussed in Ch 19.
94 New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report No 103 (2003), [3.8].
95 See Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), [5.80]–[5.93].
96 Ibid, [5.89] (citation omitted).
97 Ibid, [5.91].
98 Ibid, [5.92].
99 Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999), s 8.

> Given the current emphasis on violence prevention in national and state/territory domestic violence public policy, this oversight is anomalous.[100]

Commissions' views

5.83 The Commissions are interested in hearing stakeholder views on whether family violence legislation should impose express duties on police to investigate family violence matters and whether, in certain circumstances—for example, where a person's life or safety is at serious risk—police should be required to apply for protection orders.

5.84 The Commissions tend to the view that, at the least, an approach similar to that taken in the Model Domestic Violence Laws should be adopted—that is, police should be required to investigate family violence where they have reason to believe or suspect family violence has been, is being, or is likely to be committed. Obviously an expansion of the definition of family violence and of the relationships encompassed within the definition of family will have a flow-on effect on the work of police.[101] The Commissions are interested in hearing whether the obligation to investigate should be limited to take this into account.

5.85 The Commissions endorse the approach advocated in the Model Domestic Violence Laws, adopted by a small number of jurisdictions, that following an investigation police should be required, in those cases where they did not take action, to record the reasons why.

5.86 The Commissions also endorse the views expressed by the VLRC that it is essential that victims can apply for protection orders without involving the police, and that there should be increased Indigenous-specific support services in courts to enable Indigenous people to apply for protection orders without police involvement. The Commissions are particularly interested in hearing the views of Indigenous stakeholders in each state and territory on this issue.

Proposal 5–5 State and territory family violence legislation, to the extent that it does not already do so, should

(a) impose a duty on police to investigate family violence where they have reason to suspect or believe that family violence has been, is being or is likely to be committed; and

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100 K Wilcox, *Recent Innovations in Australian Protection Order Law—A Comparative Discussion* (2010), 12.

101 See discussion in Ch 4.

(b) following an investigation, require police to make a record of their reasons not to take any action such as apply for a protection order, if they decide not to take action.

Question 5–7 In what circumstances, if any, should police be required to apply for protection orders on behalf of victims? Should such a requirement be imposed by state and territory family violence legislation or by police codes of practice?

Question 5–8 Should all state and territory governments ensure that there are Indigenous-specific support services in courts to enable Indigenous people to apply for protection orders without police involvement?

Role of DPPs

5.87 Most legislation regulating DPPs is silent on their role in protection order proceedings under family violence legislation. A notable exception is the *Director of Public Prosecutions Act 1986* (NSW), which expressly empowers the NSW DPP to institute and conduct an application for a protection order under NSW family violence legislation in the local court, children's court or district court. It also empowers the NSW DPP to institute and conduct any appeals in any court arising from such proceedings on behalf of the victim.[102] The *Director of Public Prosecutions Act* also provides that it applies to any proceedings for a protection order under NSW family violence legislation as if the proceedings were a prosecution or proceedings in respect of an offence.[103]

5.88 The NSW DPP's Prosecution Guidelines contain a Protocol for Reviewing Domestic Violence Offences, which mentions that prosecutors may institute and conduct on behalf of a victim proceedings for a protection order or a variation of an existing protection order where necessary to protect the victim.[104]

5.89 Initial inquiries by the Commissions suggest that the NSW DPP does not often exercise its power to institute protection order proceedings under family violence legislation. The Commissions are interested in hearing the circumstances in which the NSW DPP has exercised or would exercise such powers.

5.90 The Commissions are also interested in hearing whether DPPs in other states and territories take an active role in protection order proceedings under family violence legislation. The Commissions heard in consultation that the Queensland DPP does not

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102 *Director of Public Prosecutions Act 1986* (NSW) s 20A.
103 Ibid s 20A(3).
104 Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, Appendix E, ODPP Protocol for Reviewing Domestic Violence Offences, [3.2].

deal with protection orders under family violence legislation, and that they are normally handled by police prosecutors.[105]

5.91 As noted in Chapter 6, the Northern Territory family violence legislation empowers a prosecutor to apply to the court for a protection order when a person pleads guilty or is convicted of an offence that involves family violence—that is, the power is directed to the making of protection orders in criminal proceedings.[106] In Chapter 6, the Commissions ask whether other prosecutors should be empowered specifically to make application for protection orders in similar circumstances.[107]

Question 5–9 In what circumstances, if any, has the NSW Director of Public Prosecutions instituted and conducted protection order proceedings under family violence legislation or conducted a related appeal on behalf of a victim? Do Directors of Public Prosecutions in other states and territories play a role in protection order proceedings under family violence legislation?

Interaction with criminal law procedures

5.92 Although protection orders are a civil remedy, and the standard of proof to obtain them is the civil standard of the balance of probabilities, the procedures followed are those usually associated with criminal matters.[108]

5.93 There have been numerous investigations into policing practices in the context of family violence in Australia since 2001, which have focused on issues such as police attitudes to family violence; training of police; evidence-gathering; inter-agency liaison and communication; pro-arrest and pro-charging policies; and the role of police in applying for, issuing, and enforcing protection orders.[109]

5.94 The following section discusses the special police powers that exist in most jurisdictions in the context of family violence, including police powers of entry, search and seizure, arrest and detention.

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105 Office of the Director of Public Prosecutions (Qld), *Consultation*, Brisbane, 30 September 2009.

106 *Domestic and Family Violence Act 2007* (NT) s 45.

107 Question 6–6.

108 R Alexander, 'Family Violence' in Springvale Legal Centre (ed) *Lawyers Practice Manual Victoria* (2009) 208–1, [2.8.301].

109 See, eg, NSW Ombudsman, *Domestic Violence: Improving Police Practice* (2006); Queensland Crime and Misconduct Commission, *Policing Domestic Violence in Queensland* (2005); Commonwealth Ombudsman, *Policing Domestic Violence–Own Initiative Investigation into the Policing of Domestic Violence in the ACT*, 1 July 2001 for example contained one recommendation directed at police powers of entry—with the Commonwealth Ombudsman recommending that the AFP should include reference to police powers of entry in family violence guidelines, based on the Woden Patrol Pilot Project: Rec 1. See also Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), Ch 5.

Police powers of entry, search and seizure

5.95 At common law, the police may enter a home without a warrant in the following circumstances: by invitation; in order to carry out an arrest; if, on reasonable suspicion, an offence is being committed; or if, on reasonable suspicion, a breach of the peace is occurring or is about to occur.[110]

5.96 In addition, in most Australian jurisdictions, the police have specific legislative powers to enter premises without warrants in cases of family violence. These provisions are designed to overcome

> [t]he difficulty police face in domestic violence cases, where the need to gain entry may be of vital importance for the victim's safety, … that if all appears quiet and the only evidence available about possible violence is, eg a neighbour's telephone call, the police are at risk of making an illegal entry if they enter without permission. They may face a civil action or possibly disciplinary proceedings.[111]

5.97 The scope of these powers varies between jurisdictions. Such powers may be conferred by family violence legislation, or by legislation governing criminal procedure.

Powers of entry under family violence legislation

5.98 The family violence Acts of Victoria, Western Australia, Tasmania and the Northern Territory each confer powers of entry on police.

5.99 In Victoria, a police officer is authorised to enter premises using reasonable force and without warrant if, for example, the officer reasonably believes that a person: has assaulted or threatened to assault a family member; is on the premises in contravention of a protection order; or is refusing or failing to comply with a direction by police to remain in a place, go to and remain at a place, or remain in the company of a designated person.[112]

5.100 In Western Australia, a police officer may enter premises without warrant if the officer reasonably suspects that a person is committing an act of family violence or that such act was committed before the officer's arrival. The police officer may remain on the premises for as long as he or she considers necessary to investigate the matter; ensure that there is no imminent danger of family violence being committed on the premises; or give or arrange for reasonable assistance.[113]

5.101 In Tasmania, a police officer is authorised to enter and remain on premises without warrant and use such force as is necessary to prevent family violence at the request of the person who apparently resides on the premises; or if the officer

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110 ThomsonReuters, *The Laws of Australia* (2010), vol 17 Family Law, 17.5, [13] (as at 7 January 2009).
111 Ibid.
112 *Family Violence Protection Act 2008* (Vic) s 157.
113 *Restraining Orders Act 1997* (WA) s 62B.

reasonably suspects that family violence is being, has been, or is likely to be committed on those premises.[114]

5.102 In the Northern Territory, a police officer is authorised to enter premises if the officer reasonably believes that grounds exist for making a protection order, and it is necessary to remove a person from the premises to prevent an imminent risk of harm to another person or damage to property.[115]

5.103 South Australian family violence legislation confers a comparatively narrower power of entry on police. If a protection order requires a person to surrender specified weapons and articles, then police may enter and search any premises or vehicle where such a weapon or article is reasonably suspected to be.[116]

Powers of entry under other legislation

5.104 In other jurisdictions, powers of entry are conferred on police under legislation other than family violence legislation. In NSW, law enforcement legislation confers a power of entry to investigate or prevent the commission of family violence offences on a police officer if the police officer is invited onto the premises by an apparent resident, or pursuant to a warrant.[117] In Queensland, legislation setting out police powers and responsibilities confers on police powers of entry where an officer reasonably suspects that family violence is occurring or occurred prior to the officer's arrival.[118] The Northern Territory legislation governing police administration also confers on police express power to enter premises where there is a reasonable belief that a contravention of a protection order has occurred, is occurring or is likely to occur.[119]

5.105 The *Crimes Act 1900* (ACT) confers powers of entry where an officer reasonably believes that: an offence or breach of the peace is being committed; a person has suffered physical injury or there is imminent danger of injury to a person or damage to property and it is necessary to enter the premises immediately for preventative purposes.[120] The relevant provision does not refer expressly to family violence.

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114 *Family Violence Act 2004* (Tas) s 10.

115 *Domestic and Family Violence Act 2007* (NT) s 84(1), (2)(a).

116 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 37. A review of South Australian family violence laws preceding the introduction of the 2009 Act raised the option of including a new police power of entry modelled on the Western Australian provisions: M Pyke, *South Australian Domestic Violence Laws: Discussion and Options for Reform* (2007), 98.

117 See *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW); ss 82, 83, 85. A police officer is also entitled to request a person whose identity is unknown to the officer to disclose his or her identity if the officer reasonably suspects that a protection order has been made against the person: s 13A.

118 *Police Powers and Responsibilities Act 2000* (Qld) s 609.

119 *Police Administration Act* (NT) s 126(2A)(b).

120 *Crimes Act 1900* (ACT) s 190. See also s 188.

Powers of search and seizure

5.106 In most jurisdictions, family violence legislation or other legislation governing criminal procedure confers on police powers to:

- search premises;[121]
- search for and seize firearms either with or without warrant;[122]
- search a person and any 'vehicle, package or thing in the person's possession' if the officer reasonably suspects that the person has any object that may cause injury or damage or may be used to escape;[123] or
- search and seize other articles used, or that may be used, to commit family violence.[124]

Police powers of arrest and detention

5.107 Usually, the police only exercise the power of arrest if they intend to charge the person with an offence. This requires some evidence and a judgment as to whether prosecution will be successful. The law of arrest is also framed to favour requiring a person to appear in court by way of summons, rather than by arrest, because of the greater coercive effect of powers of arrest. However, since in family violence cases arrest 'provides a measure of safety', the law of arrest has been modified in some jurisdictions to provide greater powers of arrest and detention in family violence cases.[125] These powers may be conferred either by family violence legislation or by other legislation governing criminal procedure.

Arrest

5.108 In Tasmania and the ACT, a police officer may arrest without warrant if the officer suspects on reasonable grounds that a person has committed or is committing a family violence offence.[126] Tasmanian family violence legislation specifies that in

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121 *Family Violence Protection Act 2008* (Vic) s 157; *Police Powers and Responsibilities Act 2000* (Qld) s 609; *Restraining Orders Act 1997* (WA) s 62B.

122 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 86; *Family Violence Protection Act 2008* (Vic) s 159; *Restraining Orders Act 1997* (WA) s 62B; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 37; *Family Violence Act 2004* (Tas) s 10(5); *Crimes Act 1900* (ACT) s 191; *Police Administration Act* (NT) s 126.

123 *Family Violence Protection Act 2008* (Vic) s 16.

124 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 87; *Family Violence Protection Act 2008* (Vic) s 16; *Police Powers and Responsibilities Act 2000* (Qld) s 609; *Restraining Orders Act 1997* (WA) s 62B(2); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 37; *Family Violence Act 2004* (Tas) s 10(3), (4).

125 ThomsonReuters, *The Laws of Australia* (2010), vol 17 Family Law, 17.5, [21] (as at 7 January 2009).

126 *Crimes Act 1900* (ACT) s 212(2); *Family Violence Act 2004* (Tas) s 11. The definition of a 'domestic violence offence' in the *Crimes Act 1900* (ACT) s 212 is linked to the definition of 'domestic violence' in the *Domestic Violence and Protection Orders Act 2008* (ACT). See also *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 34(1) which provides a power of arrest in circumstances connected to the service of an interim protection order.

deciding whether to arrest a person for family violence, a police officer is to give priority to the safety, wellbeing and interests of any affected person or affected child.[127]

5.109 Three jurisdictions also make specific legislative provision enabling arrest without warrant upon breach of a protection order.[128] In other jurisdictions, for each of the above cases, there would be powers to arrest without warrant on the basis that an offence has been committed.[129]

5.110 There are other, less common, special powers of arrest. In NSW, an authorised officer may issue a warrant for arrest if an application for a final protection order has been made, even though the person is not alleged to have committed an offence.[130] In Victoria, a magistrate or registrar may issue a warrant for arrest on an application for a protection order on the basis of a reasonable belief that it is necessary to achieve certain objects, including: ensuring the safety of the victim and the protection of child victims; preserving the property of a victim; or ensuring a person's attendance at court for a mention.[131]

Detention

5.111 In the majority of Australian jurisdictions, there are powers to enable police to detain people who have used family violence, principally but not exclusively for purposes associated with issuing, serving or applying for protection orders. The precise form of these powers differs. In NSW, Victoria, Western Australia and South Australia, these powers take the form of a power to direct or require a person to remain in a designated place, in default of which the person may be arrested.[132]

5.112 In NSW, for example, if a police officer makes or is about to make an application for a provisional order, he or she has a power to direct a person to remain at the scene of the incident or, in a case where the person has left the scene, at another place where the police officer locates the person. If a person refuses to remain at the specified place, the police officer may arrest and detain the person at the scene of the incident or other place, or arrest and take the person to a police station and detain the

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127 *Family Violence Act 2004* (Tas) s 11.

128 *Family Violence Protection Act 2008* (Vic) ss 38 (safety notice), 50 (intervention order); *Police Powers and Responsibilities Act 2000* (Qld) s 365(1)(j); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 36.

129 See, eg, *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 99.

130 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 88. The officer must issue such a warrant if it appears that the personal safety of the victim will be put at risk unless the defendant is arrested for the purpose of being brought before the court.

131 *Family Violence Protection Act 2008* (Vic) s 50.

132 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 89; *Family Violence Protection Act 2008* (Vic) ss 13–15; *Restraining Orders Act 1997* (WA) s 62F; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 34(1), (2). The Victorian Act also allows the police to direct the person to remain in the company of a designated person.

person there until a provisional protection order is made and served.[133] There is no maximum limit on the time of this detention.

5.113 The Commissions heard in consultation that there are problems in the practical application of the police power in NSW to direct a person to remain at the scene of the incident, particularly in remote areas. Police may need to travel in excess of an hour to attend an incident, including those that occur in remote Indigenous communities. Directing a person who has used violence to remain at the scene of the incident when the victim is there is problematic—especially if the incident is only attended by one police officer who needs to leave the scene to arrange for a provisional protection order. If there is more than one police officer attending the incident, one of those officers has to remain at the scene while the other goes to arrange the provisional order.

5.114 In Queensland, the ACT, and the Northern Territory police are empowered to remove and detain persons who have used family violence,[134] while in Tasmania a person may be detained after arrest, for a number of specified reasons.[135]

5.115 The maximum time limit of these 'holding' powers varies, with Tasmania providing no limit;[136] South Australia limiting the time of detention after arrest at two hours, with an extension allowing an aggregate of eight hours by court order;[137] Queensland, the ACT and the Northern Territory allowing four hours;[138] and Victoria providing for up to six hours on the authority of the police and a maximum of ten hours by order of a court.[139]

5.116 The purposes for which detention powers can be exercised also varies. In Victoria, Queensland, and Tasmania, special provision is made to enable detention for the purposes of arranging for victim safety or services once the purpose of applying for a protection order has been fulfilled.[140] In Tasmania, a person may be detained after arrest to determine which charges should be laid; carry out a risk screening or safety audit; implement measures identified by a safety audit; make a police-issued protection order, or apply to the court for a protection order.[141]

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133 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 89.

134 *Domestic and Family Violence Protection Act 1989* (Qld) s 69; *Domestic Violence and Protection Orders Act 2008* (ACT) s 75; *Domestic and Family Violence Act 2007* (NT) s 84 (removal permitted if necessary to prevent imminent risk of harm to a person or damage to property).

135 *Family Violence Act 2004* (Tas) s 10(4)(e).

136 Ibid s 10.

137 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 34.

138 *Domestic and Family Violence Protection Act 1989* (Qld) s 69; *Domestic Violence and Protection Orders Act 2008* (ACT) s 75; *Domestic and Family Violence Act 2007* (NT) s 84.

139 *Family Violence Protection Act 2008* (Vic) s 18.

140 Ibid s 18(3); *Domestic and Family Violence Protection Act 1989* (Qld) s 69(3); *Family Violence Act 2004* (Tas) s 11(4).

141 *Family Violence Act 2004* (Tas) s 10(4)(e).

Failure to identify primary aggressor

5.117 The Commissions also heard that, apart from any specific issues concerning the exercise of special police powers, there are some concerns on the part of advocates in the family violence sector that police may be failing to identify the primary aggressor and the primary victim when attending incidents, resulting in a significant number of women being charged with family violence offences and having protection order applications taken out against them in inappropriate cases.[142]

5.118 The WA review of family violence legislation also noted concerns about police issuing orders to both parties, and not always correctly identifying the primary aggressor and the primary victim.[143]

> The view put forward by the Western Australia Police is that, although understanding the nature of domestic violence is crucial to ensuring an effective response, ultimately members are only able to respond to the circumstances before them. In ambiguous circumstances, an understanding of who is likely to be the primary aggressor will be a useful guide. However, if the female is the one who clearly appears to be threatening to commit an act of family and domestic violence, the police are obliged to respond to the circumstance before them. According to police, this means that, just as it is not the role of police to take into consideration circumstances that may amount to a defence when considering whether to arrest for the commission of an offence, police are obliged to issue an order against the woman notwithstanding that she may have been subjected to acts of domestic violence many times in the past.[144]

5.119 The WA review stated that:

> It is evident from the submissions received that Police Officers continue to have difficulty in responding to family and domestic violence incidents. Given the highly charged and emotional atmosphere in these situations that is not surprising. In the ACT service providers attend domestic violence incidents with the police. If the complexity of domestic violence investigation requires the assistance of skilled counsellors, then such a change to police investigation procedures in Western Australia needs to be considered.[145]

5.120 In March 2010, the Queensland Department of Communities in its Consultation Paper on the review of Queensland's family violence legislation also noted problems in identifying the primary aggressor, and posed the question whether legislative

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142 NSW Ombudsman, *Domestic Violence Community Stakeholders Forum*, 9 December 2009. See also National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 114 which raises the issue of 'dual arrests' of a victim and an offender, following police intervention, and how such action re-victimises victims of family violence.

143 Western Australia Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008), 21.

144 Ibid, 21–22.

145 Ibid, 22.

amendments should be made to assist in identifying the primary aggressor or ensuring that the legislation protects the party at risk.[146] It noted in this regard that:

> some states in the United States of America have primary aggressor laws which are designed to reduce the rate of dual arrests by requiring police officers to consider a number of factors such as history of domestic violence, the comparative extent of injuries (where both parties exhibit injuries) and the existence of self-defence.[147]

Commissions' views

Police powers

5.121 The Commissions are interested in hearing stakeholder views about whether issues arise in practice concerning the availability, scope and exercise of police powers of entry, search, seizure, arrest and detention in family violence cases, and whether any such issues require legislative redress. In particular, the Commissions are interested in hearing :

- whether limited express legislative powers of entry for family violence in some jurisdictions—particularly South Australia—are causing difficulties;
- whether there is a concern that police proceed by way of summons rather than arrest in some family violence cases; and
- views about the varied maximum duration of holding powers, particularly in the context of jurisdictions encompassing remote and rural areas.

5.122 The Commissions note the concerns expressed about the practical implications of the provision in the NSW family violence legislation empowering police in certain circumstances to direct a person who has used violence to remain at the scene of an incident, particularly where the incident occurs in a remote area.[148] There may be serious implications for a victim's safety and wellbeing if the victim is in close proximity to the person who has used violence, particularly in an emotionally charged atmosphere in the aftermath of violence. A victim should be able to remain in the home while the police, if necessary, remove the person who has used violence from the scene, or direct that person to leave the scene and remain in another designated place for the purpose of the police applying for, issuing or serving a protection order. The Commissions are interested in hearing from stakeholders in other jurisdictions where police do not have such removal powers as to whether this causes any problems in practice.

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146 Queensland Department of Communities, *Review of the Domestic and Family Violence Protection Act 1989—Consultation Paper* (2010), 17–18, Question 2.2.1.

147 Ibid, 17.

148 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 89.

5.123 The Commissions are also interested in stakeholder views about whether there is merit in the approach of those jurisdictions that empower police to detain persons who have used violence to detain such persons for a reasonably short period for the purpose of making arrangements to secure the safety of victims and affected children once the purpose of detention associated with obtaining a protection order has been fulfilled.

Failure to identify primary aggressor

5.124 The Commissions note concerns about police potentially failing to identify primary aggressors and primary victims, resulting in the inappropriate charging of victims or the making of applications for protection orders against primary victims. The Commissions consider that this is an area appropriately addressed by improved police education and training about the dynamics of family violence. Education and training of police officers, and the benefits that may flow from specialised police officers or police units dealing with family violence are discussed in Chapter 20. The Commissions also endorse the suggestion made by the WA review of family violence legislation that consideration should be given to having skilled counsellors attend family violence incidents together with police. The Commissions are, however, interested in views about whether legislative reform is needed in this area, noting that this question has been raised in the review of the Queensland family violence legislation.

Question 5–10 Do any issues arise in relation to the availability, scope and exercise in practice of police powers in connection with family violence to:

(a) enter premises;

(b) search for and seize firearms or other articles; and

(c) arrest and detain persons?

Proposal 5–6 State and territory legislation which confers on police powers to detain persons who have used family violence should empower police to remove such persons from the scene of the family violence or direct them to leave the scene and remain at another specified place for the purpose of the police arranging for a protection order.

Question 5–11 Should state and territory legislation which confers on police power to detain persons who have used family violence empower police to detain such persons for a reasonably short period for the purpose of making arrangements to secure the safety of victims and affected children to the extent that it does not already do so?

Question 5–12 Is there a need for legislative amendments to provide guidance in identifying the primary aggressor in family violence cases?

Bail

5.125 Where there are concurrent proceedings under family violence legislation and criminal proceedings based on conduct the subject of a protection order application, there is potential for there to be overlap or inconsistency between the conditions imposed pursuant to a protection order[149] and bail conditions. This section considers such overlaps, after a brief overview of the description and purpose of bail, and of bail laws in the context of family violence.

Description and purpose of bail

5.126 Bail is a decision on the liberty or otherwise of the accused, between the time of arrest and verdict.[150] Bail is, in theory, 'process-oriented', aiming to ensure that the accused re-appears in court to either face charges or be sentenced.[151] A decision to grant bail is made by either the police or the courts and certain conditions or requirements may be attached to the grant.[152]

5.127 The *International Covenant on Civil and Political Rights* (ICCPR), to which Australia is a signatory, states that:

> it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial.[153]

5.128 The purpose of refusing bail is to protect the community and to reduce the likelihood of further offending,[154] and should not be used to punish or coerce the accused into a course of action.[155] A person who is on bail before trial has not been convicted of an offence, and this accords with the principle of the presumption of innocence.[156]

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149 The types of conditions that can be imposed pursuant to a protection order are discussed in Ch 6.

150 M Findlay, S Odgers and S Yeo, *Australian Criminal Justice* (2005), 117.

151 D Chappell and P Wilson, *Australian Crime and Criminal Justice* (2005), 147.

152 The bail legislation of the states and territories specifies what conditions may be attached. *Judiciary Act 1903* (Cth) s 8 provides that the bail laws of each state and territory apply to federal offences tried in that particular state or territory.

153 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976), art 9(3).

154 D Chappell and P Wilson, *Australian Crime and Criminal Justice* (2005), 147.

155 See *R v Greenham* [1940] VLR 236, 239; *R v Mahoney-Smith* [1967] 2 NSWLR 154, 158.

156 D Chappell and P Wilson, *Australian Crime and Criminal Justice* (2005), 147; M Findlay, S Odgers and S Yeo, *Australian Criminal Justice* (2005), 118.

Criteria for bail determination

5.129 While the criteria for granting bail are generally prescribed by statute, they have their foundations in the common law. The primary factor in determining bail is a consideration of the likelihood of the accused failing to appear.[157] Other considerations include the:

- seriousness of the offence;
- protection of the victim;
- protection of the community from further offending;
- strength of the prosecution's case;
- severity of the possible sentence;
- probability of conviction;
- prior criminal history of the accused;
- potential interference with witnesses;
- court delay;
- requirements for preparing a defence; and
- view of the police and prosecution.[158]

Bail in family violence matters

5.130 Once arrested for an offence related to family violence, a person may be released on bail either by the police or the court. The release of the person arrested may be dangerous for the victim of family violence. Special bail laws have been enacted which have been described to 'tend to counteract the prevalent civil libertarian bias and reverse the onus in general bail legislation towards releasing an arrested person on bail'.[159]

5.131 For example, the family violence legislation of Tasmania contains a presumption against bail. A person is not to be granted bail unless a court, judge or police officer is satisfied that the release of the person on bail would not be likely to

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157 See *Re Robinson* (1854) 23 LJQB 286; *R v Appleby* (1966) 83 WN 300; *R v Mahoney-Smith* [1967] 2 NSWLR 154, 158; *Burton v The Queen* (1974) 3 ACTR 77, 78.

158 See, eg, M Findlay, S Odgers and S Yeo, *Australian Criminal Justice* (2005), 117.

159 ThomsonReuters, *The Laws of Australia* (2010), vol 17 Family Law, 17.5, [28] (as at 7 January 2009).

affect adversely the safety, wellbeing and interests of an affected person or affected child.[160] The 2008 review of Tasmanian family violence legislation noted that there were

> a number of stakeholders who expressed concern that the Act weighs against the rights of the accused. In this regard, the most criticism was levelled at the bail provision s 12(1), and that the onus of proof to grant bail is effectively reversed by the operation of the Act. It should be noted, however, that there is a presumption against the granting of bail where there is a history or threat of domestic violence in most Australian jurisdictions.
>
> [Section] 12 has attracted criticisms in the Supreme Court of Tasmania judgments—*Re S* [2005] TASSC 89, *S v White* [2005] TASSC 27 and *Olsen v Tasmania* [2005] TASSC 40. The central tenet of these cases is perhaps illustrated by Justice Underwood in his submission:
>
> > It is one thing to take into account the safety, wellbeing and interests of an affected person or an affected child, it is quite another to refuse liberty unless the defendant discharges the onus of proof cast on him (or her but it is invariably him) by s 12(1).[161]

5.132 The South Australian family violence legislation amends the *Bail Act 1985* (SA) s 10A to include a presumption against bail for certain family violence offences involving physical violence or the threat of violence.[162]

5.133 Presumptions in favour of bail are displaced in NSW for family violence offences and breach of protection orders in circumstances where the accused has a history of violence; has previously been violent to the victim of the alleged offence in the past or has failed to comply with a protective bail condition.[163] Presumptions in favour of bail are also displaced in Victoria,[164] the ACT,[165] and the Northern Territory[166] in certain family violence circumstances.

5.134 There are no provisions in the *Bail Act 1980* (Qld)) which cater specifically for family violence cases.[167] The *Bail Act 1982* (WA) contains a provision that restricts the jurisdiction to grant bail in respect of breaches of protection orders in urban areas.[168]

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160 *Family Violence Act 2004* (Tas) s 12. This section also sets out factors which a court must consider in making a bail decision, including the availability of suitable accommodation for the victim and any affected child.

161 Urbis (for the Tasmanian Government Department of Justice), *Review of the Family Violence Act 2004 (Tas)* (2008), 15.

162 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) sch 1.

163 *Bail Act 1978* (NSW) s 9A.

164 *Bail Act 1977* (Vic) s 4(4)(b), (ba) (stalking and contraventions of protection orders involving violence or threats to use violence).

165 *Bail Act 1992* (ACT) s 9B (breach of a protection order); s 34 (authorised person must not grant bail to person accused of family violence offence of murder). See also ss 9D(4), 9F (authorised person must not grant bail unless satisfied that the person poses no danger to a protected person while released on bail).

166 *Bail Act 1982* (NT) s 8(1)(aa) (breach of a protection order where accused found guilty in preceding 10 years of specified offences, including serious offences).

167 ThomsonReuters, *The Laws of Australia* (2010), vol 17 Family Law, 17.5, [32] (as at 7 January 2009).

5.135 Legislative provisions governing bail may also require officers to consider specified factors in making bail decisions, such as:

- the safety or physical protection of a victim or other person, or a victim's concerns about the need for protection;[169]
- the likelihood of contravening a protection order;[170]
- the likelihood of injury being caused to, or threats made against a victim;[171]
- any available rehabilitation program assessment;[172]
- the person's demeanour;[173] and
- the availability of suitable accommodation for the victim and any affected child.[174]

5.136 Other provisions enable victims or informants to request review of bail decisions;[175] and require notification of decisions to grant or refuse bail decisions to victims, and if bail is granted, notification of the conditions of bail.[176]

5.137 A participant in the ALRC's Family Violence Online Forum expressed concerns that bail decisions were not, in practice, always communicated.

> In [the ACT] the police are not involved in the application for a protection order so the victim is conducting that proceeding herself. Often she is not aware of the status of the bail conditions and whether, for example, they are different, even contradictory, to the provisions of the protection order. It is often up to the victim to contact the police to find out what is happening with the criminal proceedings. She may not be

168 *Bail Act 1982* (WA) s 16A(3). See also sch 1, pt C, cls 3A, 3B (presumption against bail where serious offence committed while accused on bail for another serious offence unless exceptional circumstances; in deciding whether there are exceptional circumstances in cases of breach of a protection order, there is an obligation on the judicial officer to give the person for whose protection the order was made an opportunity to give evidence on matters relating to the protection order).

169 *Bail Act 1985* (SA) s 10(4); *Justices Act 1959* (Tas) ss 34(2), 35(2), 106F(1A); *Bail Act 1992* (ACT) ss 9F, 23A; *Bail Act 1982* (NT) s 24(3)–(6). Prosecutorial guidelines for family violence offences in NSW also require the prosecutor to put before the bail authority a victim's need or perceived need for protection: Office of the Director of Public Prosecutions (NSW), *ODPP Prosecution Guidelines* <www.odpp.nsw.gov.au/guidelines/guidelines.html> at 12 March 2010, Appendix E.

170 *Bail Act 1985* (SA) s 10(1)(b)(iv), as amended by *Intervention Orders (Prevention of Abuse) Act 2009* (SA) sch 1, cl 2.

171 *Bail Act 1982* (NT) s 24(1)(d) (where person arrested for breach of a protection order).

172 *Family Violence Act 2004* (Tas) s 12.

173 Ibid.

174 Ibid.

175 *Bail Act 1978* (NSW) s 48(1)(a)(iii).

176 *Bail Act 1992* (ACT) ss 16(5), (6), 47A.

aware that bail conditions have been changed, for example, or have any information about the timeline of the criminal matter.[177]

Overlap with protection order conditions

5.138 The conditions of bail may be the same as those imposed pursuant to a protection order under family violence legislation.[178] For example, the *Bail Act 1994* (Tas) expressly provides that bail conditions may include any condition of a protection order or police-issued 'family violence order'.[179]

5.139 In other cases, if a person is to be released on bail, conditions may be imposed which provide the same protection as those which may be attached to a protection order. For example, the *Bail Act 1992* (ACT) provides that a person charged with a family violence offence may be required to observe a number of specified requirements while released on bail, including requirements that the person:

- not contact, harass, threaten or intimidate or cause someone else to engage in such behaviour against a stated person;
- not be on premises where a stated person lives or works;
- not be within a specified distance of the stated person; and
- not enter or remain at home if the person is under the influence of alcohol or other drug and lives at that home with another person.[180]

5.140 The *Bail Act 1978* (NSW) provides that an accused person may be required to enter into an agreement to observe specified requirements as to his or her conduct while at liberty on bail.[181]

5.141 In practice, bail conditions can be imposed in parallel to conditions imposed pursuant to a protection order. Alternatively, a bail condition can be imposed that requires an accused to comply with the conditions of a protection order, with the consequence that a breach of the protection order also amounts to a breach of bail. Officers of the ALRC observed in one local court sitting in Sydney that a magistrate imposed bail conditions that an accused be of good behaviour and abide by the conditions of the protection order.[182] In another case, bail was dispensed with on the

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177 *Comment on ALRC Family Violence Online Forum: Women's Legal Service Providers*.
178 The types of conditions that can be imposed pursuant to a protection order are discussed in Ch 6.
179 *Bail Act 1994* (Tas) s 5(3A) (ba).
180 *Bail Act 1992* (ACT) s 25(4)(f).
181 *Bail Act 1978* (NSW) s 36(2)(a).
182 *Court Observation: Burwood Local Court: Apprehended Violence Order/All Charges and Summons/Defended Hearings List*, 18 December 2009.

basis that the interim protection order containing the mandatory conditions was to continue in force.[183]

5.142 Before imposing a protective bail condition for one of the stated purposes of bail, a judicial officer in WA is required to consider whether 'that purpose would be better served' by the making of a protection order under family violence legislation.[184] The Law Reform Commission of WA addressed the interaction between bail legislation and family violence legislation in its 2009 report on Court Intervention Programs. It noted that:

> It is common for both protective bail conditions and [protection] orders to be imposed in family violence matters. … In some ways protective bail conditions provide greater protection for victims; unlike [protection] orders bail conditions cannot be withdrawn by the victim. … However, [protection] orders have some advantages over protective bail conditions; for example it has been suggested that it is difficult to get the police to act on a breach of bail—they are more likely to act on a breach of a [protection] order.[185]

5.143 The Law Reform Commission of WA expressed the view that magistrates should be able to impose either or both protective bail conditions and protection orders when an offender first comes before the court. It therefore recommended that the *Bail Act 1982* (WA) should be amended to provide that, on imposing a requirement on the grant of bail for the purpose of ensuring that an offender does not commit an offence while on bail, or endanger the safety, welfare or property of any person, a judicial officer should consider whether that purpose might be served or assisted by a protection order, protective bail conditions or both.[186]

Commissions' views

Presumption against bail

5.144 The Commissions are interested in hearing views about the operation in practice of provisions which contain a presumption against bail or displace presumptions in favour of bail in the context of family violence offences. The Commissions are interested in hearing whether the application of such provisions in practice strikes the right balance between ensuring the safety and wellbeing of victims, as well as safeguarding the rights of accused persons. In particular, the Commissions note that the presumption against bail in the Tasmanian family violence legislation is relatively broad in its scope, especially in its potential application to non-physical violence. As

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183 Ibid. As noted in Ch 6, mandatory conditions for protection orders in NSW are that the person against whom the order is made must not assault, molest, harass or otherwise interfere with, intimidate or stalk the victim or a person with whom the victim has a domestic relationship: *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 36.

184 *Bail Act 1982* (WA) sch 1, pt D, cl 2(2)(a).

185 Law Reform Commission of Western Australia, *Court Intervention Programs: Final Report* Project No 96 (2009), 97 (citations omitted).

186 Ibid, 98, Rec 28. It also recommended that WA family violence legislation be amended to enable a judicial officer hearing a bail application to make an interim protection order.

economic abuse and emotional abuse are offences in Tasmania, an accused charged with such offences may be refused bail. The Commissions are interested in hearing views about whether the presumption should be modified or narrowed.

Notifying victims of bail conditions

5.145 It is imperative that victims of family violence—including those who are the subject of a protection order under family violence legislation—are informed of decisions to grant or refuse bail. Where an offender is released on bail, victims should be informed of the conditions of bail. The Commissions note concerns expressed to the Inquiry that, in practice, victims in the ACT are not being informed of bail outcomes despite a statutory obligation to do so. The Commissions are interested in hearing whether, in practice, victims of family violence who are involved in protection order proceedings under family violence legislation are being informed of bail conditions imposed on the offender.

5.146 The Commissions note that there is precedent for a legislative obligation to notify victims of bail decisions in the *Bail Act 1992* (ACT) and consider that such an obligation should be imposed in other jurisdictions. However, any legislative obligation to inform victims of bail decisions must be supplemented by other measures—including education and training of police and prosecutors—to ensure it is implemented. Therefore, a legislative obligation should be reinforced by practical directions to police and prosecutors in, for example, police codes of conduct or operating procedures; and prosecutorial guidelines or policies.

Overlap between bail and protection orders

5.147 Inconsistent bail and protection order conditions may lead to an accused inadvertently breaching bail, and being exposed to arrest and potentially being refused bail. The Commissions are interested in hearing whether, in practice, judicial officers are imposing inconsistent bail and protection order conditions and, if so, what measures can be taken to address this. For example, the practice of imposing a bail condition on an accused to abide by the conditions contained in a protection order appears to be one way of avoiding inconsistency.

5.148 The Commissions consider that where conduct constituting family violence gives rise to concurrent protection order and criminal proceedings, judicial officers should be able to impose either or both protective bail conditions and protection orders. The Commissions endorse the recommendation made by the Law Reform Commission of WA to amend the *Bail Act 1982* (WA) to allow a judicial officer on grant of bail to consider whether specific purposes of bail might be served or assisted by a protection order, protective bail conditions or both.

Question 5–13 In practice, does the application of provisions which contain a presumption against bail, or displace the presumption in favour of bail in family violence cases, strike the right balance between ensuring the safety and wellbeing of victims, and safeguarding the rights of accused persons?

Question 5–14 How often are victims of family violence involved in protection order proceedings under family violence legislation not informed about a decision to release the offender on bail and the conditions of release?

Proposal 5–7 State and territory legislation, to the extent that it does not already do so, should impose an obligation on the police and prosecution to inform the victim of a family violence offence of: (a) decisions to grant or refuse bail to the offender; and (b) where bail is granted, the conditions of release. The *Bail Act 1992 (*ACT) provides an instructive model in this regard. Police codes of practice or operating procedures and prosecutorial guidelines or policies as well as appropriate education and training programs should also address the obligation to inform victims of family violence of bail decisions.

Question 5–15 How often are inconsistent bail requirements and protection order conditions imposed on a person accused of committing a family violence offence?

Proposal 5–8 Judicial officers should be allowed, on a grant of bail, to consider whether the purpose of ensuring that the offender does not commit an offence while on bail or endanger the safety, welfare or property of any person might be better served or assisted by a protection order, protective bail conditions or both, as recommended by the Law Reform Commission WA in relation to the *Bail Act 1982* (WA).

6. Protection Orders and the Criminal Law

Contents

Introduction

6.1 This chapter considers the interaction between protection orders obtained under family violence laws and the criminal law. The first section of this chapter discusses issues that arise when there are concurrent proceedings under family violence laws and the criminal law, including issues concerning liability and the use of evidence.[1] In particular, the discussion focuses on the powers of courts to make protection orders under family violence laws in the course of criminal proceedings.

6.2 The second section of this chapter addresses the potential for conditions in protection orders to overlap with: general prohibitions or requirements imposed by the criminal law; pre-sentencing orders; and orders made on sentencing. Particular attention is given to interaction issues that may arise following the imposition of exclusion orders and rehabilitation orders.

1 The interaction of bail and protection orders under family violence laws is discussed in Ch 5.

6.3 The final section of this chapter discusses a number of issues relevant to breach of protection orders. In each state and territory jurisdiction a breach of a protection order is a criminal offence and, as such, can result in the parties to protection order proceedings entering into the criminal justice system—either as accused persons or witnesses.

Concurrent proceedings under family violence laws and the criminal law

6.4 The family violence legislation of most states and territories expressly recognises that there can be concurrent criminal and civil proceedings.[2] For example, s 62 of the *Domestic and Family Violence Protection Act 1989* (Qld) provides that an application can be made and dealt with under the Act notwithstanding that a person concerned in the application has been charged with an offence arising out of the same conduct. The counterpart provisions in the family violence legislation of Western Australia and the ACT are broader in their scope, each recognising the power of a court to make a protection order if a person has been charged with or convicted—and in the case of the ACT found guilty of—an offence arising out of the same conduct on which the application is based.[3]

6.5 The family violence legislation of New South Wales and the Northern Territory each allow protection orders to be made even if criminal proceedings are commenced against an accused arising out of the same conduct relied on to make the protection order application.[4] The Victorian family violence legislation expressly provides that a protection order can be made at any time before or after the commencement of proceedings for the offence.[5]

Liability and use of evidence issues

6.6 Most state and territory family violence legislation—while recognising the potential for concurrent civil and criminal proceedings—does not address the relationship between the two sets of proceedings nor the issue of what use can be made in the criminal proceedings of matters raised in the protection order proceedings under family violence legislation. There are a few exceptions to this. The first concerns provisions in the family violence legislation of Western Australia and the Northern Territory which deal with liability issues; the second is the provision in the Queensland family violence legislation which deals with references in criminal proceedings to

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2 However, the *Intervention Orders (Prevention of Abuse) Act 2009* (SA), for example, does not contain an express provision in this regard. The handling of concurrent civil and criminal proceedings by specialist family violence courts is discussed in Ch 20.

3 *Restraining Orders Act 1997* (WA) s 63C(1); *Domestic Violence and Protection Orders Act 2008* (ACT) s 113.

4 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 81; *Domestic and Family Violence Act 2007* (NT) s 86.

5 *Family Violence Protection Act 2008* (Vic) s 155.

matters arising from proceedings under family violence legislation. Each of these is addressed below.

6.7 The Northern Territory family violence legislation provides that the making of a protection order under that Act does not affect the civil or criminal liability of the person against whom it is made in relation to the family violence to which the order relates.[6] The Western Australian family violence legislation provides that, except as provided by that Act, neither making nor varying a protection order affects the civil or criminal liability of a person bound by the order in respect of the conduct out of which the application for the protection order arose.[7]

6.8 The Queensland family violence legislation has a provision[8] which applies where a person is charged with an offence arising out of conduct on which an application for a protection order is based, and:

- a court has made or refused to make a protection order;
- a court has revoked or refused to revoke a protection order;
- a court has varied or refused to vary a protection order; or
- proceedings under family violence legislation are current at the time a person is charged with an offence arising out of conduct on which an application is based.

6.9 In such circumstances, Queensland family violence legislation provides that:

> (3) A reference to—
>
> (a) the making, or refusal to make, the order, or a revocation or variation; or
>
> (b) the existence of current proceedings mentioned in subsection (2)(d); or
>
> (c) the fact that evidence of a particular nature or content was given in—
>
> (i) the proceedings in which the order, revocation or variation was made or refused; or
>
> (ii) the current proceedings;
>
> is inadmissible in the trial of the person for an offence arising out of conduct on which the application for the order, revocation, or variation, or relevant to the current proceedings, is based.
>
> (4) To allay any doubt, it is declared that, subject to this section, an application, proceeding or order under this Act in relation to the conduct of the person does not affect any proceeding for an offence against the person arising out of the same conduct.

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6 *Domestic and Family Violence Act 2007* (NT) s 87.
7 *Restraining Orders Act 1997* (WA) s 63C(2).
8 *Domestic and Family Violence Protection Act 1989* (Qld) s 62.

> (5) A person may be punished for the offence mentioned in subsection (4) despite any order against him or her under this Act.[9]

6.10 The Commissions are interested to hear whether the above provision in the Queensland family violence legislation is operating well in practice—and whether a provision of this nature should be extended to other jurisdictions. For example, the Commissions are particularly interested in hearing whether it is common for victims in criminal proceedings to be cross-examined about the evidence that they gave in support of an application to obtain a protection order, when the conduct the subject of the criminal proceedings and the protection order is substantially the same.

6.11 One stakeholder in Adelaide told the Commissions that sometimes an affidavit in support of a protection order may contain less detail than the statement in criminal proceedings. Some detail may be omitted because the victim was distressed at the time of taking the affidavit or, because of time pressures on police at the time of taking the affidavit. The Commissions also heard that a victim may be subjected to cross-examination on the fact that certain material was not included in the affidavit in support of the protection order and that this may impact adversely on the victim.

6.12 The Commissions also heard in consultation that in some jurisdictions, until criminal proceedings are resolved, magistrates tend to prefer to make only interim protection orders,[10] or to adjourn the hearing of any protection order application.[11]

6.13 If a criminal charge related to family violence is proved, then the standard of proof needed for the evidence for the protection order application is exceeded.[12] In any case, in such circumstances a protection order will be mandatory in some jurisdictions for certain offences.[13] While it is potentially problematic to use evidence relating to protection order proceedings in criminal proceedings, the same difficulties do not arise to the use of evidence related to criminal proceedings in protection order proceedings.

Court-initiated protection orders in criminal proceedings

6.14 Some provisions in family violence or sentencing legislation expressly permit a court, on its own initiative, to make protection orders when a person pleads guilty, is found guilty after a contested hearing, or is convicted of an offence that involves

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9 Ibid.
10 Legal Aid Commissions, *Consultation*, Sydney, 10 September 2009.
11 G Zdenkowski, *Consultation*, Sydney, 6 November 2009.
12 Ibid.
13 See discussion below.

family violence.[14] The Northern Territory provision also permits such an order to be made on the application of the prosecution.[15]

6.15 These important provisions may circumvent the need for a victim to make a separate application for a protection order. Three issues arise in relation to these types of provisions. One is whether they confer on the court a discretion to make such an order—or compel it to do so. Another is the point in time in the criminal proceedings when these orders can be made. The final issue is whether a court in a criminal proceeding is specifically empowered to vary an existing protection order. Each of these issues is addressed below.

Discretionary versus mandatory

6.16 There is a significant difference in the level of discretion conferred on courts to make protection orders under family violence legislation in criminal proceedings. Some provisions give courts discretion to make such orders, while others mandate the court to do so—particularly in matters involving serious offences. For example, the Queensland provisions are discretionary, providing that if a person is before a Magistrates Court, the Children's Court, the District Court or the Supreme Court for an offence involving family violence, the court *may* make a protection order if the person pleads guilty to, or is found guilty of, that offence.[16]

6.17 In contrast, the NSW provision is framed in mandatory terms, requiring a court to make a protection order if a person pleads guilty to or is found guilty of certain offences irrespective of whether an application for such an order has been made. However, the provision also provides that the court need not make an order where satisfied that it is not required, for example, because there is an existing order in place.[17] As noted below, another NSW provision mandates the court to make interim protection orders when a person is charged with a serious offence.

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14 See, eg, *Domestic and Family Violence Protection Act 1989* (Qld) ss 16, 30 (power to make order triggered by guilty plea or finding of guilt); *Criminal Law (Sentencing) Act 1988* (SA) s 19A (power to make order triggered by finding of guilt or on sentencing for an offence); *Domestic and Family Violence Act 2007* (NT) s 45 (power to make order triggered by guilty plea or finding of guilt).

15 *Domestic and Family Violence Act 2007* (NT) s 45. See also *Criminal Code Act 1899* (Qld) sch 1 s 359F, which allows the prosecution or an interested person to apply to the court to constitute itself to consider whether a 'restraining order' should be made against a person on a hearing of charge against that person for unlawful stalking. The court may also act on its initiative in this regard. The Commissions understand that, in practice, prosecutors in Queensland make applications for orders under this section: Office of the Director of Public Prosecutions (Qld), *Consultation*, Brisbane, 30 September 2009.

16 *Domestic and Family Violence Protection Act 1989* (Qld) ss 16, 30. See also *Criminal Code Act 1899* (Qld) sch 1, s 359F (on hearing of charge for unlawful stalking judicial officer may constitute the court to consider whether a restraining order should be made against the person). The South Australian provision also confers a discretion on courts to make protection orders on a finding of guilt, or on sentencing: *Criminal Law (Sentencing) Act 1988* (SA) s 19A.

17 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 39.

6.18 The Western Australian family violence legislation mandates the court to make protection orders to protect victims when specified violent personal offences—such as attempt to murder, grievous bodily harm and sexual penetration without consent—are committed.[18] The exception to this requirement is if the victim, for whose benefit the court proposes to make the order, objects to the order being made.[19] In other cases, the Western Australian family violence legislation confers a discretion on the court to make protection orders during other proceedings. In particular, when considering a bail application, the court may make a protection order against the person charged or any other person who gives evidence in relation to the charge.[20]

6.19 In 1999, the Domestic Violence Legislation Working Group advocated conferring a discretion on courts to make protection orders when persons are found guilty of an offence. It expressed concern that mandating courts to make protection orders could increase the likelihood of 'inappropriate or unnecessary orders' being issued.[21]

6.20 The Commissions are interested in ascertaining the extent to which courts which have the power to make protection orders on their own initiative are exercising such power.

Timing of order

6.21 In some jurisdictions courts are only empowered to make protection orders in criminal proceedings when a person has been convicted, found guilty or has pleaded guilty.[22] In other jurisdictions courts are empowered to make protection orders in criminal proceedings *before* a person has been convicted or found guilty. For example, NSW family violence legislation requires courts to make interim protection orders on the *charging* of serious offences, which is defined to include a 'domestic violence offence' other than murder or manslaughter.[23] In the Second Reading Speech of the NSW family violence legislation, Tony Kelly MLC stated:

> Under the reforms victims will automatically be protected by an apprehended violence order if their alleged attacker is charged with certain serious personal violence offences. The automatic apprehended violence orders will be extended to all victims in these types of cases, irrespective of whether they are involved in a relationship with the person. The defendant will not be entitled to contest the order in

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18 *Restraining Orders Act 1997* (WA) s 63A.

19 Ibid s 63A. See also *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 40 (quasi-mandatory language in relation to interim ADVOs for serious offences).

20 *Restraining Orders Act 1997* (WA) s 63. This section also allows a court hearing proceedings under the *Family Court Act 1997* (WA), *Family Law Act 1975* (Cth), or protection proceedings under the *Children and Community Services Act 2004* (WA) to make a protection order against a party to the proceedings or any other person who gives evidence in the proceedings.

21 Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999), 67.

22 For example, *Domestic and Family Violence Protection Act 1989* (Qld) s 30 and *Domestic and Family Violence Act 2007* (NT) s 45. In South Australia protection orders can be made on a finding of guilt or on sentencing: *Intervention Orders (Prevention of Abuse) Act 2009* (SA) sch 1 pt 4.

23 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 40.

> court until the concurrent criminal charges have been finalised. This will spare victims of violence the trauma of being cross-examined at the hearing for the apprehended violence order as well as at the hearing of the criminal charges.[24]

6.22 There was some support in consultation for provisions mandating judicial officers to make protection orders on the charging of a person with a family violence-related offence.[25]

6.23 Western Australian family violence legislation allows a judicial officer, on request or on the court's own initiative, to make a protection order when considering a case for bail.[26] Tasmanian family violence legislation allows a court to make protection orders in 'proceedings for a family violence offence'.[27] The language is not precise, but the reference to proceedings appears to suggest that an order could be made while a trial was on foot—that is, prior to a verdict.

6.24 The Domestic Violence Legislation Working Group did not support provisions enabling courts to make protection orders of their own volition against accused persons when criminal proceedings against them were continuing.[28] It expressed the view that the making of orders on the basis of 'untried facts' would amount to a 'denial of justice'.[29]

Variation

6.25 Some family violence legislation expressly provides that a court may vary an existing protection order of its own initiative on a plea or finding of guilt in relation to an offence involving family violence. In NSW a court is empowered to vary a final or interim order of its own volition where a person pleads guilty to, or is found guilty of, an offence of stalking or intimidation with intent to cause physical or mental harm, or of a 'domestic violence offence'. The court may make such a variation for the purpose of providing greater protection for the person against whom the offence was committed—irrespective of whether or not an application has been made to vary the order.[30]

6.26 In Queensland and the Northern Territory, a court before which a person pleads guilty to, or is found guilty of, an offence that involves family violence must, if a protection order is already in force, consider the order and whether in the

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24 New South Wales, *Parliamentary Debates*, Legislative Council, 29 November 2007, 4652 (T Kelly—Minister for Lands, Minister for Rural Affairs, Minister for Regional Development, and Vice-President of the Executive Council).

25 Australian Domestic & Family Violence Clearinghouse, *Consultation*, Sydney, 27 January 2010.

26 *Restraining Orders Act 1997* (WA) s 63(1).

27 *Family Violence Act 2004* (Tas) s 36. See also *Justices Act 1959* (Tas) s 106J.

28 Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999), 67. The views expressed by the Working Group in this regard did not expressly distinguish between final and interim protection orders.

29 Ibid, 67.

30 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 75.

circumstances it needs to be varied, including for example, by varying the date the order ends.[31] In Western Australia, a court convicting a person of a violent personal offence—including attempted murder, aggravated sexual penetration without consent and aggravated sexual coercion—must, where a 'violence restraining order is in force for the protection of a victim of the offence', vary that order by extending its duration.[32]

Commissions' views

Liability

6.27 The Commissions' preliminary view is that there should be greater legislative clarity about how the making, variation, revocation or refusal to vary or revoke a protection order impacts on the civil or criminal liability of a person for the conduct that gave rise to the protection order. State and territory family violence legislation should make it expressly clear that such actions concerning protection orders do not affect the civil or criminal liability of a person subject to the order.

6.28 Western Australian family violence legislation is an instructive model, in that it expressly provides that the making or the varying of a protection order does not affect the civil or criminal liability of a person bound by the order in respect of the same conduct the subject of the application for the protection order. However, the Commissions consider that such provisions should also extend to the revocation and refusal to vary or revoke a protection order.

Use of evidence

6.29 The Commissions consider that there should be legislative clarity about the use in criminal proceedings of evidence of the following based on conduct that gave rise to proceedings under family violence legislation:

- the making, varying, or revocation of a protection order or the refusal to take any of those actions; and

- the fact that evidence of a particular nature was given in proceedings under family violence legislation.

6.30 There are a number of factors at play in considering whether evidence concerning protection orders should be able to be used in criminal proceedings. These include balancing the desirability of a victim not being cross-examined about prior evidence—which is a factor weighing against using evidence about protection orders in criminal proceedings—with the desirability of a victim not having to give evidence in more than one proceeding—which may be a factor supporting the use of evidence

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31 *Domestic and Family Violence Protection Act 1989* (Qld) s 30(2); *Domestic and Family Violence Act 2007* (NT) s 45(3).

32 *Restraining Orders Act 1997* (WA) s 63A(1)(b).

about protection orders in criminal proceedings. The need to avoid prejudicing criminal proceedings is also an important factor.[33] Witnesses can be cross-examined on prior inconsistent statements—both in jurisdictions in which the uniform Evidence Acts apply[34] as well as jurisdictions, such as Queensland, which have their own evidence legislation.[35]

6.31 The Commissions are interested to hear about how s 62 of the *Domestic and Family Violence Protection Act 1989* (Qld), which limits the use of evidence about protection orders in criminal proceedings, is operating in practice. In particular, how does it interact with *Evidence Act 1977* (Qld) s 18 which provides that 'proof may be given' that a witness made a prior inconsistent statement? The Commissions are also interested in hearing stakeholder views about whether a provision based on s 62 could be adopted in other jurisdictions. The Commissions tend to the view that evidence about the making of protection orders should not be admissible in criminal proceedings—other than:

- for the purposes of considering bail and bail conditions;
- in sentencing;[36] and
- in proceedings for breach of protection orders, where clearly the making of protection orders is a relevant fact to be established.

6.32 Evidence about whether protection orders were made, varied or revoked, or applications for such orders were rejected, could improperly influence juries in their deliberations in matters concerning offence related to family violence. In contrast, judicial officers deciding bail conditions and imposing sentence should be aware of protection orders made under family violence legislation and the restrictions which they place on accused persons and offenders before them.

6.33 An important advantage of this approach is that it enables courts, on their own initiative, to make protection orders where it is appropriate to do so, at any point in time during criminal proceedings without risking prejudice to the fair conduct of those proceedings. In other words, the suggested approach would accommodate the systemic objectives of victim protection and ensuring that an accused receives a fair trial.

6.34 This proposal aims to achieve legislative clarity about the use of evidence of protection orders in criminal proceedings. At this stage, however, the Commissions do not propose that evidence of such orders should be inadmissible in criminal

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33 See Ch 2 which discusses the *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976).

34 Uniform Evidence Acts, s 43.

35 See, eg, *Evidence Act 1977* (Qld) s 18.

36 The overlap between sentencing and protection orders is discussed below. Other issues relevant to sentencing are discussed in Ch 7.

proceedings except in the circumstances outlined above, because the Commissions would like to hear more about the operation in practice of the Queensland provision, which limits the use of such evidence.

Making of protection orders

6.35 The Commissions are of the preliminary view that provisions empowering courts in criminal matters to make protection orders on their own initiative are an extremely important way of alleviating the need for a victim—already involved in criminal proceedings as a witness—to initiate an application for a protection order, and potentially to give further evidence. The Commissions consider that the family violence legislation of each state and territory should contain an express provision empowering courts in this way. The Commissions note that the Victorian family violence legislation does not contain such a provision.

6.36 The Domestic Violence Legislation Working Group did not support provisions enabling courts to make protection orders of their own volition against accused persons where criminal proceedings against them were continuing. This was because the making of such orders on the basis of 'untried facts' would amount to a 'denial of justice'.[37] In the Commissions' preliminary view, however, a court should be able to make such orders of its own initiative where it considers it is appropriate to do so to protect a victim. The legitimate concern about denying justice to an accused in criminal proceedings can be alleviated if, as the Commissions are tentatively considering, family violence legislation makes it clear:

- that the making of a protection order does not affect the criminal or civil liability of a person in respect of conduct the subject of the order; and

- that a protection order is inadmissible in criminal proceedings—other than for the purpose of imposing bail, in sentencing, or in proceedings for breach of protection orders.

6.37 An alternative approach is to limit courts to make interim protection orders in such circumstances.

6.38 The Commissions note the disparity between the jurisdictions concerning whether court-initiated protection orders are mandatory or discretionary. The Commissions tend to the view that it would be preferable for there to be uniformity of approach across the jurisdictions regarding the circumstances in which courts make protection orders in criminal proceedings. The Domestic Violence Legislation Working

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37 Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999), 67. How protection orders interact with family law proceedings concerned with the making of parenting orders is discussed in Chs 8 and 10. In particular, abuse of process issues, including the use of vexatious applications for protection orders to gain a tactical advantage in family law proceedings to determine parenting orders are discussed in Ch 10.

Group expressed concern that the making of mandatory orders could lead to inappropriate or unnecessary orders being issued. The Commissions are therefore interested to hear how the provisions in NSW and Western Australia, which mandate courts to make protection orders in certain circumstances, are working in practice. In particular, the Commissions are interested in hearing:

- whether such provisions have resulted in the issuing of inappropriate or unnecessary orders;
- the types of circumstances that satisfy judicial officers in NSW that the mandatory making of the protection order is not required; and
- whether, if provisions mandating courts to make protection orders in certain circumstances are to remain, such provisions should contain an express exception for when a victim objects to the making of the order.

6.39 In relation to the last bullet point above, the Commissions note that the Western Australian family violence legislation has such an exception, whereas the NSW family violence legislation does not. The Domestic Violence Legislation Working Group recommended the inclusion of such an exception in provisions conferring discretion on courts to make protection orders.

6.40 The Commissions are also interested in stakeholder views on whether it would be beneficial for legislation to empower prosecutors to seek protection orders where a person pleads guilty or is found guilty of an offence involving family violence. In this regard, they are particularly interested in hearing about the extent to which prosecutors in the Northern Territory make applications for protection orders when a person pleads guilty to, or is found guilty of, an offence involving family violence.

Variation

6.41 In the Commissions' preliminary view, a court before which a person pleads guilty or is found guilty of an offence involving family violence, should be required to consider:

- any existing protection order; and
- whether, in the circumstances that protection order needs to be varied to provide greater protection for the person against whom the offence was committed—irrespective of whether or not an application has been made to vary the order.

6.42 This approach does not require the court to vary an existing protection order. Its intended impact is to focus a court exercising criminal jurisdiction on an existing protection order, to ascertain whether its conditions remain appropriate and sufficient to protect the affected victim.

Proposal 6–1 State and territory family violence legislation should be amended, where necessary, to make it clear that the making, variation or revocation of a protection order or the refusal to make, vary or revoke such an order does not affect the civil or criminal liability of a person bound by the order in respect of the family violence the subject of the order.

Question 6–1 Is it common for victims in criminal proceedings to be cross-examined about evidence that they have given in support of an application to obtain a protection order under family violence legislation when the conduct the subject of the criminal proceedings and the protection order is substantially the same?

Proposal 6–2 State and territory family violence legislation should be amended to clarify whether, in the trial of an accused for an offence arising out of conduct which is the same or substantially similar to that upon which a protection order is based, references can be made to:

(a) the making, variation, and revocation of protection orders in proceedings under family violence legislation;

(b) the refusal of a court to make, vary or revoke a protection order in proceedings under family violence legislation;

(c) the existence of current proceedings for a protection order under family violence legislation against the person the subject of the criminal proceedings;

(d) the fact that evidence of a particular nature or content was given in proceedings under family violence legislation.

Such provisions will need to address separately the conduct which constitutes a breach of a protection order under family violence legislation.

Question 6–2 How is s 62 of the *Domestic and Family Violence Protection Act 1989* (Qld)—which renders inadmissible in criminal proceedings certain evidence about protection orders where those proceedings arise out of conduct upon which a protection order is based—working in practice? In particular:

(a) how is it interacting in practice with s 18 of the *Evidence Act 1977* (Qld) which states that 'proof may be given' of a previous inconsistent statement;

(b) does it provide a model for other states and territories to adopt in their family violence legislation in order to provide legislative clarity about the matters raised in Proposal 6–2 above; and

(c) is there a need to make express exception for bail, sentencing and breach of protection order proceedings?

Question 6–3 In practice, to what extent are courts exercising their powers to make protection orders in criminal proceedings on their own initiative where a discretion to do so is conferred on them?

Question 6–4 Are current provisions in family violence legislation which mandate courts to make either interim or final protection orders on: charging; a finding or plea of guilt; or in the case of serious offences, working in practice? In particular:

(a) have such provisions resulted in the issuing of unnecessary or inappropriate orders; and

(b) in practice, what types of circumstances satisfy judicial officers in NSW that such orders are not required?

Question 6–5 If provisions in state and territory family violence legislation mandating courts to make protection orders in certain circumstances remain, is it appropriate for such provisions to contain an exception for situations where a victim objects to the making of the order?

Question 6–6 To what extent are prosecutors in the Northern Territory making applications for protection orders where a person pleads guilty or is found guilty of an offence that involves family violence? Is it desirable for legislation to empower prosecutors in other states and territories to make an application for protection orders where a person pleads guilty or is found guilty of such an offence?

Proposal 6–3 State and territory family violence legislation should include an express provision conferring on courts a power to make a protection order on their own initiative at any stage of a criminal proceeding—including prior to a plea or finding of guilt.

Proposal 6–4 State and territory legislation should provide that a court, before which a person pleads guilty or is found guilty of an offence involving family violence, must consider any existing protection order obtained under family violence legislation and whether, in the circumstances, that protection order needs to be varied to provide greater protection for the person against whom the offence was committed, irrespective of whether an application has been made to vary the order.

Protection order conditions and the criminal law

6.43 Conditions in protection orders may overlap with:

- general prohibitions or requirements imposed by the criminal law;
- pre-sentencing orders; and
- orders made on sentencing.

6.44 In addition, protection orders can impose conditions that restrict behaviour not otherwise prohibited by the criminal law, as well as conditions—such as orders excluding a person from his or her home—which are not typically sentencing options.[38]

Types of conditions

6.45 Before considering issues of overlap between conditions in protection orders obtained under family violence legislation and the criminal law, and areas where conditions may operate independently of the criminal law, it is necessary to consider the types of conditions available under protection orders.

6.46 The Australian Government Solicitor (AGS) has expressed the view that family violence legislation does not appear to be substantially different across jurisdictions in respect of crucial matters such as:

> the types of orders that may be made in the domestic violence context and the kinds of prohibitions, restraints and conditions that an order may impose on the person against whom it is made.[39]

6.47 The types of conditions that are authorised by family violence legislation to be imposed typically include any that the court considers to: protect the victim and any

38 As noted below, a limited number of jurisdictions have place restriction orders as a sentencing option.
39 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), 13.

child from family violence,[40] encourage the person to accept responsibility for the violence committed against the victim, or change his or her behaviour.[41]

6.48 Conditions can also prohibit (or restrict) the person against whom the protection order is made from:

- committing family violence against the victim;[42]
- harassing, threatening or intimidating a victim;[43]
- verbally abusing or assaulting a victim;[44]
- entering the victim's residence, workplace or any other specified premises—including where that person has a legal or equitable interest in the property;[45]
- being anywhere within a specified distance of the victim or a specified place;[46]
- approaching the victim or any specified premises—including within 12 hours of consuming intoxicating liquor or illicit drugs;[47]
- telephoning or otherwise contacting the victim—including by email or by text message, unless in the company of a police officer or specified person;[48] and including attempting to contact the victim at a refuge either directly or through someone else;[49]
- interfering with or damaging the victim's property;[50]
- stalking the victim;[51]

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40 For example, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 35(1).
41 For example, *Domestic and Family Violence Act 2007* (NT) s 21(1)(b).
42 For example, *Family Violence Protection Act 2008* (Vic) s 81(2)(a); *Penalties and Sentences Act 1992* (Qld) s 22.
43 For example, *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 12(1)(i); *Domestic Violence and Protection Orders Act 2008* (ACT) s 48(2)(f).
44 *Family Violence Act 2004* (Tas) s 14(3)(d); *Domestic and Family Violence Act 2007* (NT) s 21(1)(a).
45 For example, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 35(2)(a),(b); *Family Violence Protection Act 2008* (Vic) ss 81(2)(b), 82; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 12(1)(a), (5).
46 For example, *Family Violence Protection Act 2008* (Vic) s 81(2)(e); *Penalties and Sentences Act 1992* (Qld) s 22. See also *Restraining Orders Act 1997* (WA) s 13(2)(c).
47 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 35(2)(a), (c).
48 *Family Violence Protection Act 2008* (Vic) s 81(2)(d). *Restraining Orders Act 1997* (WA) s 13(2)(d) prohibits communicating or attempting to communicate with the victim.
49 *Penalties and Sentences Act 1992* (Qld) s 25(3)(d).
50 For example, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 35(2)(e); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 12(1)(f).
51 For example, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 36.

- locating or attempting to locate the victim;[52]
- causing another person to engage in behaviour prohibited by the protection order;[53]
- taking possession of specified personal property reasonably needed by a victim;[54]
- preventing a victim from obtaining and using personal property reasonably needed by the victim;[55] and
- possessing firearms, prohibited weapons,[56] or a firearms licence.[57]

6.49 In NSW and Queensland protection orders include mandatory conditions. In NSW every protection order is taken to include conditions which prohibit the person from: assaulting, molesting, harassing, threatening, stalking and engaging in any intimidating conduct towards the victim or anyone with whom the victim has a domestic relationship.[58] In Queensland, every protection order is taken to include a condition that the person is to be of good behaviour and not commit family violence.[59]

6.50 In addition to prohibiting or restricting conduct, conditions attached to a protection order can require the person to undertake certain actions, such as: vacate premises—whether or not the person has a legal or equitable interest in the premises;[60] surrender firearms and other weapons; return specified personal property required by the victim;[61] attend an assessment to determine an appropriate form of intervention program and eligibility for such a program;[62] or attend a rehabilitation program.[63] Conditions can also specify the circumstances in which a person against whom a

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52 *Penalties and Sentences Act 1992* (Qld) s 25(3)(e). This section does not prohibit the person against whom the order is made from asking his or her lawyer to contact the victim: s 25(7).

53 For example, *Family Violence Protection Act 2008* (Vic) s 81(2)(f); *Restraining Orders Act 1997* (WA) s 13(2)(f); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 12(1)(h).

54 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 12(1)(g).

55 *Restraining Orders Act 1997* (WA) s 13(2)(e).

56 For example, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 35(2)(d); *Family Violence Act 2004* (Tas) s 16(3)(b). Other legislation frames this in terms of revoking, suspending or cancelling weapons approval or firearms authority, eg, *Family Violence Protection Act 2008* (Vic) s 81(2)(g),(h) or requiring the person to surrender specified weapons or articles that could be used to commit violence against the victim: *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 12(1)(k).

57 *Restraining Orders Act 1997* (WA) s 14.

58 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 36.

59 *Penalties and Sentences Act 1992* (Qld) ss 22, 25(1).

60 *Family Violence Act 2004* (Tas) s 16(3); *Domestic and Family Violence Act 2007* (NT) s 22.

61 For example, *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 12(1)(j). Personal property directions—dealing with the return of personal property to a victim, or allowing a victim or the person against whom a protection order is made to collect personal property following the making of an exclusion order—are discussed in Ch 9.

62 Ibid s 13.

63 *Domestic and Family Violence Act 2007* (NT) s 24.

protection order is made may be on particular premises or approach or contact a particular person.[64]

6.51 In South Australia only, a court making a protection order may make a problem gambling order providing that the person be subject to a problem gambling family protection order under the *Problem Gambling Family Protection Orders Act 2004* (SA) imposing specified requirements or orders of a kind that could be imposed by the Independent Gambling Authority under that Act.[65] Such orders include requiring the person to attend counselling or rehabilitation; prohibiting the person from taking part in gambling activities; and prohibiting the person from contacting or intimidating a family member for the purpose of demanding or requesting money for gambling activities.[66] The ALRC heard in one consultation with magistrates in Adelaide that problem gambling orders are not being imposed as part of the conditions of protection orders.

6.52 Directions not to breach the criminal law may be attached as conditions to a protection order. For example, conditions which provide that a person is not to threaten, assault or stalk another person, or damage another person's property, essentially articulate what is, in any event, conduct typically prohibited by the criminal law. A condition to be of good behaviour is also essentially a condition to abide by the law. Other conditions, however, prohibit conduct which, but for the prohibition in the protection order, would not infringe the law. For example, persons are usually free to contact, communicate with, approach and locate family members, and free to enter and live in their own residence—conduct which can be proscribed by a protection order that includes an exclusion order.[67]

Application of conditions in practice

6.53 The above summary indicates the wide range of conditions potentially available to judicial officers to impose in the making of protection orders under family violence legislation. Professor Rosemary Hunter's study of the handling of family violence protection order proceedings in magistrates courts in Victoria found that the median hearing time for protection order applications, other than contested final orders, was three minutes.[68] She observed that the speed with which protection order applications were dealt with resulted in judicial officers not giving particularised attention to the conditions attached to a protection order. She concluded that conditions were not tailored to the particular allegations of each case.[69] The Commissions are interested in hearing whether this experience is common to other jurisdictions and, in particular, the

64 *Domestic Violence and Protection Orders Act 2008* (ACT) s 48(2)(j).
65 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 24.
66 *Problem Gambling Family Protection Orders Act 2004* (SA) s 5.
67 Exclusion orders are discussed below.
68 Rosemary Hunter, *Domestic Violence Law Reform and Women's Experience in Court* (2008), 81. A great number of protection orders are made by consent, and the making of consent orders is discussed in Ch 10.
69 Ibid, 98.

extent to which protection order conditions are tailored to the circumstances of particular cases across the jurisdictions.

6.54 The application forms for protection orders in most jurisdictions set out the conditions that may be attached to the making of a protection order, with an option for applicants to tick the conditions which they seek.[70] However, the application form for a protection order in Western Australia does not set out the conditions which may be imposed on the making of a protection order.[71]

6.55 The application forms for NSW and Queensland specify the mandatory conditions which attach to a protection order in those jurisdictions. In addition, the application form for a protection order in Victoria includes a note informing the applicant that if there is something that he or she wants the person who has used violence to do, which is not covered in the list, the applicant should discuss this with the Court Registrar.[72]

Commissions' views

6.56 The Commissions consider that in making protection orders it is particularly important that judicial officers are able to impose conditions which proscribe conduct which is otherwise not criminal. All citizens are, in any event, under an obligation not to breach the criminal law. There are, of course, benefits in attaching conditions to protection orders that are, in essence, directions not to breach the criminal law. A breach of a protection order is a criminal offence, and as discussed later in this chapter, it may be easier to prove a breach than to prove the underlying offence to the requisite degree of proof.

6.57 In considering the conditions which courts can impose to proscribe conduct which is otherwise not criminal, the Commissions note that only the family violence legislation of Queensland includes express reference to a prohibition on locating or attempting to locate the victim. The Commissions consider that such a condition is of particular importance in the context of victims fleeing family violence and attempting to sever ties with those who have used violence against them. In the Commissions' preliminary view, all state and territory family violence legislation should include a condition to this effect—and such a condition should be specified on all state and territory application forms for protection orders, thereby allowing victims the option of electing such conditions to be considered by the court.

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70 In South Australia, this information is set out in the Magistrates Court of South Australia, *Affidavit to Support Application for Domestic Violence Restraining Order* <www.courts.sa.gov.au> at 8 March 2010. Local courts in NSW have a pro forma bench sheet attached to the court file which allows the court to tick the relevant orders.

71 Magistrates Court of Western Australia, *Violence Restraining Order Application* <www.magistratescourt.wa.gov.au/content/restraining.aspx> at 9 April 2010.

72 Magistrates' Court of Victoria, *Information for Application for an Intervention Order* (2009) <www.magistratescourt.vic.gov.au> at 2 February 2010. As noted below, however, certain conditions concerning rehabilitation and counselling are not generally included on application forms.

6.58 As a practical matter, it is important that applications for protection orders clearly set out the full range of conditions that a court may attach to a protection order. This acts as a checklist for the court and the victim applying for the order. The forms should be drafted in such a way as to enable victims to indicate the types of conditions they seek. For example, the application for a protection order in Western Australia should be amended to set out the range of conditions that a court may impose in making a protection order.

6.59 Below the Commissions express views in relation to exclusion orders, and rehabilitation and counselling conditions.

Question 6–7 In practice, are the conditions which judicial officers attach to protection orders under state and territory family violence legislation sufficiently tailored to the circumstances of particular cases?

Proposal 6–5 State and territory family violence legislation should provide expressly that one of the conditions that may be imposed by a court making a protection order is to prohibit the person against whom the order is made from locating or attempting to locate the victim of family violence.

Proposal 6–6 Application forms for protection orders in each state and territory should clearly set out the full range of conditions that a court may attach to a protection order. The forms should be drafted to enable applicants to indicate the types of conditions that they would like imposed. In particular, the application form for a protection order in Western Australia should be amended in this regard.

Exclusion orders

6.60 Family violence legislation makes provision for protection order conditions which allow a court to prohibit a person who has used violence from entering and remaining in a residence shared with the victim, including, in some cases, the power to terminate an existing tenancy agreement and replace it with one for the benefit of the victim. In other words, a court can impose a condition requiring the person against whom the protection order is made to vacate premises, notwithstanding any ownership rights in relation to such premises.[73]

6.61 As stated in Chapter 4, courts have been reluctant to make exclusion orders. An exclusion order has the potential to cause great hardship—ultimately homelessness—on the person against whom it is made.[74] The making of an exclusion order may be

73 See, eg, *Family Violence Act 2004* (Tas) s 16(3).

74 As noted below, for a court to not make an exclusion order can also have negative repercussions for a victim and children.

relevant to the sentencing for a family-violence related offence of the person against whom the order was made.

6.62 As noted by the AGS, there is significant variation in:

- the factors that a court has to take into account in making exclusion orders;
- whether the safety and accommodation needs of the victim are prioritised;
- whether there is a statutory presumption in favour of exclusion; and
- the impact of an exclusion order on a residential tenancy.[75]

6.63 Some of these differences are considered below.

Factors a court has to take into account in making an exclusion order

6.64 A Victorian court that makes a protection order is required to consider whether to make an exclusion order.[76] In some jurisdictions, including Victoria, Queensland, and NSW, courts are directed to consider specific requirements before making an exclusion order and these requirements are in addition to those to be considered in making a protection order. These requirements include:

- the desirability of minimising disruption to the victim and any child living with the victim and the importance of maintaining social networks and support;[77]
- the desirability of continuity and stability in the care of any child living with the victim;[78]
- the desirability of allowing any childcare arrangements, education, training or employment of the victim, or any child living with the victim, to continue without interruption or disturbance;[79]
- the effects and consequences on the safety and protection of the victim and any children living or ordinarily living at the residence if an exclusion order is not made;[80] and

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75 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), 146. Some family violence legislation allows courts to alter tenancy agreements in favour of victims during protection order determinations: see K Wilcox, *Recent Innovations in Australian Protection Order Law—A Comparative Discussion* (2010), 11–12. The interaction of family violence laws and state and territory residential tenancy laws is beyond the scope of the Terms of Reference.

76 *Family Violence Protection Act 2008* (Vic) s 82(1).

77 Ibid s 82(2). Special considerations apply where an exclusion order is to be made against a child: s 83.

78 Ibid s 82(2).

79 Ibid.

80 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 17(2)(a).

- whether there is a need for a condition allowing the person against whom the exclusion order is made to remain at or return to the premises to recover personal property.[81]

6.65 In other jurisdictions the factors that a court is bound to consider in making a protection order are the same regardless of whether the protection order includes an exclusion order.[82] For example, in making a protection order, South Australian courts must consider the desirability of: minimising disruptions to victims and any children living with victims; maintaining social networks and support for victims; ensuring continuity and stability in the care of children living with victims; and allowing child-care arrangements, education, training and employment of victims or any children living with victims to continue uninterrupted.[83]

6.66 As stated above, some jurisdictions—such as Victoria and NSW—require courts to have specific regard to the needs of the victim and any child of the victim in deciding whether to make an *exclusion* order.[84] In Victoria, a court is only required to consider the accommodation needs of a person against whom an exclusion order is made if that person is a child.[85] Moreover, there are additional considerations where the person excluded is an Indigenous child. These considerations are the priority for that child to live with his or her extended Indigenous family and relatives, and the need for the child to keep the child's culture and identity through contact with the child's community.[86]

6.67 Other jurisdictions take a similar approach in deciding whether to make a *protection order* in general. For example, in the Northern Territory a court is directed expressly to consider the accommodation needs of the victim in making a protection order but not those of the person against whom the order is made.[87]

6.68 Other jurisdictions take a less victim-focused approach in the making of protection orders—including exclusion orders—by either allowing or directing the court to take into account the needs or interests of the person against whom the order is to be made. For example, the Queensland family violence legislation provides that the court may impose any condition it considers necessary or desirable in the interests of

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81 *Penalties and Sentences Act 1992* (Qld) s 25A(3). Personal property directions are discussed in more detail in Ch 9.

82 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), 146.

83 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 10.

84 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 17(2)(c) requires the court to have regard to the 'accommodation needs of all relevant parties, in particular the protected person and any children'. The court is also required to give reasons for not making an exclusion order in circumstances where one is sought: s 17(4).

85 *Family Violence Protection Act 2008* (Vic) s 83(3). In such cases the court must be satisfied that the child has appropriate alternative accommodation, care and supervision.

86 Ibid s 83(4).

87 *Domestic and Family Violence Act 2007* (NT) s 19(2)(b).

the victim, any named person, and the person against whom the protection order is made.[88]

6.69 The ACT family violence legislation requires that the court must in making a final protection order consider the accommodation needs of the victim and any relevant children, as well as any hardship that may be caused to the person against whom the order is made.[89] Similarly, the Western Australian legislation requires a court making a protection order to consider the accommodation needs of the person against whom the order is made, as well as the victim, and any hardship that may be caused to the person against whom the order is made.[90]

6.70 If police in Victoria issue a family violence safety notice that includes an exclusion order, they are required to consider the accommodation needs of the person against whom the order is made and any dependent children of that person. The police are required to take reasonable steps to secure such persons access to temporary accommodation.[91]

Presumption in favour of exclusion

6.71 Only the Northern Territory family violence legislation contains an express presumption that where a victim, a person who has used family violence against the victim, and a child reside together, the protection of the victim and the child are best achieved by their living in the home. The presumption does not act to prevent a protection order including a condition allowing the person against whom the protection order is made from visiting the child at the home.[92] Such a presumption acts to implement a central objective of the legislation referred to in the Second Reading Speech of the Domestic and Family Violence Bill 2007 (NT), namely 'to ensure minimal disruption to the lives of families affected by violence'.[93]

6.72 Significantly, the presumption only operates where there is a child involved. It has no application in the case of family violence between partners living in the same residence without a child.

Commissions' views

6.73 In Chapter 4, the Commissions ask whether a core purpose of family violence legislation should be to ensure minimal disruption to the lives of those affected by family violence.[94] If such a purpose were to be included as a core purpose, then it appears to the Commissions that the provisions concerning the power to make

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88 *Penalties and Sentences Act 1992* (Qld) s 25(2).
89 *Domestic Violence and Protection Orders Act 2008* (ACT) s 47(1)(c),(d).
90 *Restraining Orders Act 1997* (WA) s 12(1)(d),(e).
91 *Family Violence Protection Act 2008* (Vic) s 36.
92 *Domestic and Family Violence Act 2007* (NT) s 20.
93 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 17 October 2007, 4846 (S Stirling—Attorney-General), 4848.
94 Question 4–8.

exclusion orders may need to be emphasised in family violence legislation. As noted in Chapter 4, research suggests that courts are reluctant to make exclusion orders.

6.74 First, the Commissions consider that courts making protection orders should be required to consider whether to make an exclusion order—as is the case in Victoria. Secondly, the Commissions consider that state and territory family violence legislation should address separately the factors which courts are required to take into consideration in making or declining to make an exclusion order—over and above the factors that are to be considered in making a protection order generally. The Victorian and NSW family violence legislation are instructive models in this regard. The Commissions agree with the view expressed by the AGS that 'the advantage of specifying particular considerations is that it should ensure courts focus on matters considered especially important by the legislature and that the parties are aware of the particular significance of those matters'.[95]

6.75 The combined effect of the two proposals for reform suggested above is to require courts to consider actively whether to make an exclusion order and may increase the likelihood of judicial officers making exclusion orders in appropriate circumstances.

6.76 Judicial officers should be required to give reasons for not making an exclusion order where such an order has been sought. The family violence legislation of NSW provides an instructive model in this regard.

6.77 Making exclusion orders can impose severe hardship—a person who is excluded from the home may become homeless. Equally, not making an exclusion order in appropriate cases can cause severe hardship—women and children subjected to severe violence may need to flee the home. Escaping family violence has been identified as a leading cause of homelessness for women and children.[96] The Commissions therefore consider that judicial officers should explicitly be required to consider the effect that making or declining to make such an order will have on the accommodation needs of all the parties to the proceedings and on any children. This approach is consistent with that recommended by the ALRC in its 1986 Report, *Domestic Violence*.[97]

6.78 The Commissions are interested in hearing views about whether police who make exclusion orders should be required to take reasonable steps to secure temporary accommodation for an excluded person—as is the case in Victoria.

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95 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), 147.
96 K Wilcox and L McFerran, 'Staying Home, Staying Safe' (2009) 94 *Reform* 24 (citations omitted).
97 Australian Law Reform Commission, *Domestic Violence*, ALRC 30 (1986), [100], Rec 14.

6.79 In addition, the Commissions are interested to hear:

- how the presumption in the Northern Territory family violence legislation—that, where a victim, person who has used family violence and child reside together, the protection of the victim and child is best achieved by their remaining in the home—is working in practice; and

- whether the family violence legislation of other states and territories should include a similar presumption.

Proposal 6–7 State and territory family violence legislation should require judicial officers considering the making of protection orders to consider whether or not to make an exclusion order—that is, an order excluding a person against whom a protection order is made from premises shared with the victim, even if the person has a legal or equitable interest in such premises.

Proposal 6–8 State and territory family violence legislation should specify the factors that a court is to consider in making an exclusion order—that is, an order excluding a person against whom a protection order is made from premises shared with the victim, even if the person has a legal or equitable interest in such premises. Judicial officers should be required to consider the effect that making or declining to make an exclusion order will have on the accommodation needs of the parties to the proceedings and on any children, as recommended by the ALRC in the Report *Domestic Violence* (ALRC 30) 1986.

Question 6–8 If state or territory family violence legislation empowers police officers to make an order excluding a person who has used family violence from premises in which he or she has a legal or equitable interest, should they be required to take reasonable steps to secure temporary accommodation for the excluded person?

Proposal 6–9 State and territory family violence legislation should require a court to give reasons for declining to make an exclusion order—that is, an order excluding the person against whom a protection order is made from premises in which he or she has a legal or equitable interest—where such order has been sought.

Question 6–9 How is the presumption in the family violence legislation of the Northern Territory—that where a victim, person who uses family violence and child reside together, the protection of the victim and child is best achieved by their remaining in the home—working in practice? In particular, has the application of the presumption resulted in the making of exclusion orders?

Question 6–10 Should state and territory family violence legislation include an express presumption that the protection of victims is best served by their remaining in the home in circumstances where they share a residence with the persons who have used violence against them?

Rehabilitation and counselling conditions in protection orders

6.80 The AGS noted that there are significant differences across the jurisdictions concerning the making of orders directing a person who has used family violence and who has had a protection order issued against him or her to attend counselling or rehabilitation programs or to refer them to such programs.[98]

6.81 Five jurisdictions address the power of courts to attach conditions to protection orders involving either rehabilitation or counselling. Key differences between the jurisdictions include: whether such orders are mandatory or voluntary; whether they are available only on sentencing; and their effects.

6.82 The family violence legislation of the ACT and Western Australia provides for voluntary counselling orders. In the ACT the Magistrates Court may recommend that the person against whom the protection order is made, or the victim, take part in a 'program of counselling, training, mediation, rehabilitation or assessment'.[99] In Western Australia, a court or the police, in making a protection order, must explain to the parties that counselling and support services may be of assistance and, where appropriate, refer them to specific services.[100]

6.83 By comparison, the family violence legislation of Victoria requires the Family Violence Division, upon the making of a final protection order, to make an order subjecting the person against whom the order is made to an eligibility assessment for attending counselling. It is an offence for the person to fail to attend the eligibility interview without reasonable excuse.[101] If a person against whom a protection order is made is eligible to attend counselling, the Family Violence Division must order the person to attend counselling. It is an offence for the person to fail to attend counselling, without reasonable excuse.[102]

6.84 In the Northern Territory, a court may make an order requiring a person against whom a protection order is made to attend a rehabilitation program, but only if the person consents, the court considers the person to be suitable to take part in the

98 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), 31.
99 *Domestic Violence and Protection Orders Act 2008* (ACT) s 89.
100 *Restraining Orders Act 1997* (WA) ss 8(1)(i), 30E(3).
101 *Family Violence Protection Act 2008* (Vic) s 129.
102 Ibid s 130.

program and there is place in such program.[103] Similarly, under South Australian family violence legislation, a court may subject a person against whom a protection order is made to undergo eligibility assessment for an intervention program, and if the person is eligible and the services are available, require the person to undertake such a program.[104]

6.85 In NSW and Queensland, family violence legislation allows courts to impose any conditions that the court considers necessary and desirable, which could include counselling or rehabilitation orders.[105]

6.86 Application forms for protection orders, in those jurisdictions where there are legislative provisions concerning the imposition of conditions relating to rehabilitation or counselling, do not generally set out conditions relating to rehabilitation or counselling. One exception is the application form for a protection order in Victoria which allows an applicant to indicate that she or he would like the court to encourage the person against whom the order is sought to contact the Men's Referral Service.[106]

Rehabilitation orders pre-sentencing

6.87 In certain jurisdictions, rehabilitation orders may be made as part of the criminal process in the pre-sentencing phase. In NSW and South Australia, for example, courts may defer sentencing for up to 12 months on the date of a finding of guilt, for the purpose of:

- assessing an offender's capacity and prospects for rehabilitation or for participation in an intervention program;[107]
- allowing an offender to demonstrate that rehabilitation has taken place; and
- allowing the offender to participate in an intervention program.[108]

6.88 Such orders may overlap with protection order conditions requiring attendance at a rehabilitation or intervention program.

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103 *Domestic and Family Violence Act 2007* (NT) s 24.

104 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 13.

105 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 35; *Domestic and Family Violence Protection Act 1989* (Qld) s 25.

106 Magistrates' Court of Victoria, *Information for Application for an Intervention Order* (2009) <www.magistratescourt.vic.gov.au> at 2 February 2010.

107 In South Australia 'intervention program' means a program that provides supervised: treatment, rehabilitation, behaviour management, access to support services; or a combination of the above: *Criminal Law (Sentencing) Act 1988* (SA) s 3.

108 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11; *Criminal Law (Sentencing) Act 1988* (SA) s 19B (the latter Act allows the court discretion to adjourn proceedings for a period exceeding the usual maximum of 12 months).

Rehabilitation orders on sentencing

6.89 In some jurisdictions rehabilitation orders can be made on the sentencing of offenders who have committed family-violence related offences. Tasmanian family violence legislation does not expressly provide for the making of rehabilitation or counselling orders in a protection order—although the court is empowered to impose any condition it considers necessary or desirable to prevent family violence.[109] Tasmanian sentencing legislation, however, empowers a court sentencing for a family violence offence to make a 'rehabilitation program order', either with or without recording a conviction.[110] In determining the sentence for a family violence offence, a court is required to take into account the results of any rehabilitation program assessment undertaken by the offender.[111]

6.90 In the Northern Territory, a court which finds a person guilty of an offence may order the person to participate in an 'approved project', which means a rehabilitation program or work, or both, approved by a community work advisory committee under the *Prisons (Correctional Services) Act* (NT).[112] This means that in the Northern Territory, a person against whom a protection order is made can be required to attend a rehabilitation program[113]—as noted above—and, if that person is found guilty of an offence related to family violence, may also be ordered to participate in a rehabilitation program.

6.91 In the ACT, if an offender is convicted or found guilty of an offence, the court in sentencing may make a good behaviour order, which may include a rehabilitation program condition;[114] as well as any other condition that the court considers appropriate, as long as it is not inconsistent with sentencing and sentencing administration legislation.[115] An example of such a condition provided by way of example in the legislation is 'that the offender attend educational, vocational, psychological, psychiatric or other programs for counselling'. [116] This means that in the ACT, a person against whom a protection order is made under family violence legislation may be subject to a rehabilitation or counselling order, and if that same person is found guilty of a family-violence related offence, he or she may also be subject to a good behaviour bond containing a rehabilitation or counselling order.

6.92 Under South Australian sentencing legislation, a court may impose—as a condition of such a bond—a condition that the offender undertake an intervention

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109 *Family Violence Act 2004* (Tas) s 16(2).
110 *Sentencing Act 1997* (Tas) s 7(ea). 'Rehabilitation program order' means an order to attend and participate in a rehabilitation program and in doing so comply with the reasonable directions of a person employed or engaged to conduct such a program: s 4.
111 *Family Violence Act 2004* (Tas) s 13(b).
112 *Sentencing Act 1995* (NT) ss 3, 34.
113 *Domestic and Family Violence Act 2007* (NT) s 24.
114 *Crimes (Sentencing) Act 2005* (ACT) s 13(3)(c). See also pt 6.2.
115 Ibid s 13(3)(g).
116 Ibid s 13(3).

program.[117] If an offender has participated in an intervention program, a court has a discretion to treat the offender's participation and achievements in the program as relevant to sentence. However, the fact that an offender has not participated in, or had the opportunity to participate in, or performed badly in such a program is not relevant to sentence.[118]

6.93 In NSW, a court may impose a good behaviour bond on sentencing, and such bond may contain a condition requiring the offender to participate in an intervention program, [119] or to participate in any program for treatment or rehabilitation that is not an intervention program.[120]

Commissions' views on rehabilitation conditions/orders

6.94 The Commissions tend to the view that it is important for family violence legislation to allow expressly for courts making protection orders to impose conditions requiring persons to attend rehabilitation or counselling programs, where such persons are suitable and eligible to participate in such programs. As stated in Chapter 4, a common purpose of family violence legislation should be to ensure that persons who use family violence accept responsibility or are made accountable for their conduct. One important way of achieving this objective is to endeavour to rehabilitate the offender and stop the cycle of violence. Rehabilitation programs are an essential measure for treating the causes rather than the symptoms of family violence.[121]

6.95 There is a lack of consensus about the effectiveness of general or specific counselling and rehabilitation programs currently operating in Australia.[122] However, because some persons who use violence can benefit from rehabilitation or counselling programs, courts should be empowered to order a person against whom a protection order is made to attend such programs, where the person is suitable and eligible to participate. The fact that imposition of a rehabilitation or counselling order may be an option on sentencing should not preclude the availability of such options at the point in time that a protection order is imposed. This is important for two reasons. First, not all conduct which gives rise to a protection order is criminal. Secondly, even if the offending conduct which gives rise to a protection order is criminal and is prosecuted, if the prosecution fails, protection order conditions could still be imposed aimed at rehabilitation.

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117 *Criminal Law (Sentencing) Act 1988* (SA) s 42(1)(da).

118 Ibid s 10.

119 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95A. Intervention programs are defined in the *Criminal Procedure Act 1986* (NSW) s 346.

120 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 95(c), 95A.

121 Australian Law Reform Commission, *Domestic Violence*, ALRC 30 (1986), 55.

122 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), 161. See also L Laing, *Responding to Men Who Perpetrate Domestic Violence: Controversies, Interventions and Challenges* (2002) Australian Domestic & Family Violence Clearinghouse, Issues Paper 7; K Wilcox, *Recent Innovations in Australian Protection Order Law—A Comparative Discussion* (2010), 12 (citations omitted).

6.96 Obviously, requiring a person to attend a rehabilitation or counselling program—whether as part of a protection order condition or as a sentencing option—assumes that such programs are available. As one District Court judge in Western Australia commented:

> It is a tragedy of the criminal justice system in Western Australia that alcohol treatment programs and family violence counselling programs are not available in the more remote parts of the State. Judges involved in sentencing family violence offenders in the Kimberley, for example, realise that there is almost nothing in the community to support an offender who may be trying to heal the relationship and avoid alcohol.[123]

6.97 The Commissions also tend to the view that there may be some benefit in application forms for protection orders specifying conditions relating to rehabilitation or counselling—or that at least allow a victim to indicate whether she or he wishes the court to encourage the person who used family violence to contact an appropriate referral service. The Commissions are interested in hearing stakeholder views in this regard.

6.98 The Commissions are also interested in hearing whether, in practice:

- judicial officers in those jurisdictions whose family violence legislation does not specify expressly the imposition of rehabilitation or counselling programs as potential conditions attaching to a protection order, in fact, impose such conditions as part of their general power to impose any orders that they consider to be necessary or desirable; and

- there are overlapping or conflicting obligations placed on persons as a result of conditions imposed by protection orders requiring attendance at rehabilitation or counselling programs and any orders to attend such programs as part of the sentencing process.

Proposal 6–10 State and territory family violence legislation should be amended, where necessary, to allow expressly for courts making protection orders to impose conditions on persons against whom protection orders are made requiring them to attend rehabilitation or counselling programs, where such persons are suitable and eligible to participate in such programs.

Proposal 6–11 Application forms for protection orders should specify conditions relating to rehabilitation or counselling or allow a victim to indicate whether she or he wishes the court to encourage the person who has used violence to contact an appropriate referral service.

123 M Yeats, *Correspondence*, 23 December 2009.

Question 6–11 Do judicial officers in jurisdictions, such as NSW and Queensland, in which family violence legislation does not specify expressly rehabilitation or counselling programs as potential conditions attaching to a protection order, in fact, impose such conditions as part of their general power to impose any orders that they consider to be necessary or desirable?

Question 6–12 Are overlapping or conflicting obligations placed on persons as a result of conditions imposed by protection orders under family violence legislation requiring attendance at rehabilitation or counselling programs and any orders to attend such programs either pre-sentencing or as part of the sentencing process?

Other interactions between protection orders and sentencing

Non-contact orders

6.99 The Queensland sentencing legislation allows a court on the sentencing of an offender for a personal offence to make a non-contact order, which prohibits the offender, for a specified period, from:

- contacting the victim against whom the offence was committed; or someone who was with the victim when the offence was committed; and/or
- going to a stated place or within a stated distance of a specified place.[124]

6.100 However, that legislation prohibits such an order from being made if an order can be made under s 30 of the Queensland family violence legislation. Section 30 empowers a court to make a protection order on its own initiative when a person pleads guilty to, or is found guilty of, an offence that involves family violence.[125]

Place restriction orders

6.101 Place restriction orders are available as a sentencing option in NSW and Tasmania.[126] In Tasmania, a court may make an 'area restriction order' if it finds a person guilty of an offence. An 'area restriction order' is an order that the offender must not loiter in an area or class of area specified in the order at any time or during such periods as specified in the order.

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124 *Penalties and Sentences Act 1992* (Qld) ss 43B, 43C.

125 This provision is noted above in the section on making protection orders in criminal proceedings. Non-association orders are available in NSW as a sentencing option for any offence punishable by imprisonment for six months or more: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17A.

126 Ibid s 17A; *Sentencing Act 1997* (Tas) s 70.

6.102 In NSW, place restriction orders are only available on sentencing for offences punishable by imprisonment for six months or more. A place restriction order prohibits the offender from frequenting or visiting a specified place or district for a specified term and can be made by the court if it is satisfied that it is reasonably necessary to make such an order to ensure that the offender does not commit any further offences.[127]

6.103 Place restriction or area restriction orders imposed on sentencing for a family-violence related offence can overlap with or conflict with conditions attached to a protection order prohibiting or restricting a person's access to certain premises. The Commissions are interested in hearing whether such interactions have arisen in practice.

Taking protection order conditions into account in sentencing

6.104 Another issue which arises on the sentencing of an offender for a family-violence related offence is the extent to which courts take into account the conditions that have been imposed by a protection order under family violence legislation. A related issue is whether courts should take protection order conditions into account in sentencing.

6.105 The ALRC heard in one consultation that, in NSW, protection orders are regularly taken into account in sentencing. It is relevant for the court imposing sentence to know the length of the protection order and the extent of the prohibitions placed on the offender to be sentenced. If an order is very restrictive and lasts for an extended time it may influence the penalties to be imposed on sentencing. In addition, it is relevant for the court to know whether any rehabilitation was ordered as part of the protection order because if not, a condition to this effect may be appropriate in a good behaviour bond.[128]

6.106 The Commissions have also heard that District Court judges who sentence offenders for family-violence related offences in Western Australia have available to them a pre-sentence report, and that offenders are invariably represented by counsel. Therefore any existing protection orders are brought to the attention of the sentencing judge.[129]

6.107 Some stakeholders have expressed concern about attendance at rehabilitation programs or willingness to attend such programs being relied upon as mitigating factors in sentencing, in the absence of longitudinal evidence that such programs, in fact, reduce violence.[130]

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127 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17A(2).
128 G Zdenkowski, *Consultation*, Sydney, 6 November 2009.
129 M Yeats, *Correspondence*, 23 December 2009.
130 Australian Domestic & Family Violence Clearinghouse, *Consultation*, Sydney, 27 January 2010.

Commissions' views

6.108 The Commissions are interested to hear whether, in practice, courts sentencing offenders for family-violence related offences are made aware of and take into account existing protection order conditions that are or have been imposed on the offender.

6.109 In the Commissions' view it is appropriate for courts to consider any protection order conditions to which an offender to be sentenced for a family violence offence is subject, where those conditions arise out of the same or substantially the same conduct giving rise to the prosecution for the offence. It is particularly relevant for courts to take into account those conditions which may have caused significant hardship—such as exclusion orders. This approach is consistent with the ALRC recommendation, made in the ALRC's 2006 report on the sentencing of federal offenders, that relevant sentencing factors include any detriment sanctioned by law to which the offender has been or will be subject.[131]

6.110 To avoid making overlapping orders concerning rehabilitation or counselling programs a court sentencing an offender must know whether the person has or is attending such a program pursuant to a protection order condition. It is also relevant, in this regard, for the court sentencing an offender for a family-violence related offence to take into account the duration of any protection order to which the offender is subject.

6.111 The Commissions note, however, that concern has been expressed about relying on attendance at rehabilitation programs as a mitigating factor in sentencing, and are interested in hearing other stakeholder views in this regard, as well as any suggestions about possible options for reform.

Question 6–13 In practice, are courts sentencing offenders for family-violence related offences made aware of, and do they take into account, any protection order conditions to which the offender to be sentenced is or has been subject?

Question 6–14 Have there been cases where there has been overlap or conflict between place restriction or area restriction orders imposed on sentencing and protection order conditions which prohibit or restrict the same person's access to certain premises?

Proposal 6–12 State and territory legislation should provide that a court sentencing an offender for a family-violence related offence should take into account in sentencing the offender:

131 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), 192–196, Rec 6–1.

(a) any protection order conditions to which the person being sentenced is subject, where those conditions arise out of the same or substantially the same conduct giving rise to the prosecution for the offence; and

(b) the duration of any protection order to which the offender is subject.

Breach of protection orders

6.112 In each state and territory, the breach of a protection order is a criminal offence and, as such, can result in the parties to protection order proceedings under family violence legislation entering into the criminal justice system, either as accused persons or witnesses.

6.113 A number of issues arise in relation to breach of protection orders, including those concerning aiding and abetting of breaches, consent to breaches, charging practices, penalties and sentencing practices. Each of these is addressed below.

Aid and abet provisions

6.114 An issue for this Inquiry is the extent to which police may threaten to or actually charge a victim with aiding, abetting, counselling or procuring a breach of a protection order where they believe the victim consented to the breach.

6.115 The Commissions have heard anecdotally that, for example, victims in some jurisdictions, including South Australia, are being charged with aiding and abetting a breach of a protection order. The WA review of family violence legislation found that police were sometimes charging victims who had obtained protection orders and were deemed complicit in a breach of a protection order with aiding and abetting the breach.[132] As one submission to the Victorian Law Reform Commission's (VLRC) review of family violence laws pointed out:

> The threat of being charged with breaching one's own intervention order is a technique used by perpetrators of family violence to stop the protected person from reporting the breach of the order.[133]

6.116 Both the NSW Law Reform Commission and the VLRC have recommended against charging victims for whose benefit a protection order has been obtained for aiding and abetting a breach of such an order.[134] The VLRC recommended that if the police believe that a victim has consented to a breach, they should explain the

132 Western Australia Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008), 32–33.

133 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), 162.

134 New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report No 103 (2003), Rec 45, Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), Rec 33.

procedure for varying or revoking an order. If necessary, police should apply for a variation or revocation on behalf of the victim with his or her consent.[135] The WA review recommended an amendment to the *Criminal Code* (WA) to preclude victims for whose benefit a protection order has been made from being charged with aiding and abetting a breach of the order.[136] It also recommended that the court should be given power to grant leave to proceed in an application to vary or cancel a protection order, of its own motion, at the hearing of an allegation of a breach, where there is evidence of the person protected being complicit.[137]

6.117 NSW family violence legislation provides that a victim for whose benefit a protection order is obtained cannot be charged with aiding, abetting, counselling or procuring the breach of a protection order.[138] The Victorian family violence legislation provides that a 'protected person' does not aid, abet, counsel or procure a breach because the protected person 'encourages, permits or authorises conduct by the respondent' that contravenes a protection order.[139] That Act provides, for example, that a protected person is not guilty of aiding or abetting a breach because she or he 'invited the respondent to have access to the residence' or 'allowed the respondent to spend time with the protected person' in breach of a protection order. The Victorian Act also contains a note stating that, if a victim is dissatisfied with the terms of a protection order, the victim or the police may apply to have the order varied or revoked.[140]

6.118 The family violence legislation of South Australia—yet to commence—provides that a victim for whose benefit a protection order has been made cannot be guilty of aiding and abetting a breach of the order if

> the conduct constituting contravention of the intervention order did not constitute contravention of the order in respect of another person protected by the order or of any other intervention order (of which the person was or ought reasonably to have been aware) in force against the defendant and protecting another person.[141]

Commissions' views

6.119 The capacity to charge victims of family violence for breach of a protection order undermines the policy intent of family violence legislation.[142] Charging victims of family violence for aiding and abetting breaches of orders exposes them to further traumatisation, arguably imposing a further form of abuse. It is inappropriate to charge a victim with aiding and abetting breaches of protection orders because it overshadows the fact that a protection order is made against a person who uses family violence—not

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135 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), Rec 33.
136 Western Australia Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008), 33.
137 Ibid, Rec 6.
138 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14(7).
139 *Family Violence Protection Act 2008* (Vic) s 125.
140 Ibid note to s 125.
141 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 31(3).
142 The purpose of family violence legislation is discussed in Ch 3.

the victim. Relevant state and territory legislation—whether family violence legislation or criminal legislation—should be amended to provide that a person protected by a protection order under family violence legislation cannot be charged with, or found guilty of, an offence of aiding, abetting, counselling or procuring the breach of such an order.

6.120 It may be appropriate, however, for a charge of aiding and abetting a breach to be laid against persons other than the victim for whose benefit a protection order is made. For example, the South Australian family violence legislation provides that if a protection order prohibits a 'defendant from being on rented premises at which a protected person resides' and the landlord had been notified of the prohibition, the landlord is guilty of an offence if he or she assists the defendant to access those premises.[143]

6.121 The Commissions consider that there is some merit in allowing a court hearing an allegation of breach of a protection order to be empowered to grant leave to proceed in an application to vary or cancel a protection order of its own motion, where (a) there is evidence that the victim for whose benefit the protection order was made gave free and voluntary consent to the breach; and (b) the court is satisfied that the victim, in fact, wants to vary or revoke the protection order.

Proposal 6–13 State and territory legislation should be amended, where necessary, to provide that a person protected by a protection order under family violence legislation cannot be charged with or guilty of an offence of aiding, abetting, counselling or procuring the breach of a protection order.

Proposal 6–14 State and territory family violence legislation should empower a court hearing an allegation of breach of a protection order to grant leave to proceed in an application to vary or cancel a protection order of its own motion where:

(a) there is evidence that the victim for whose benefit the protection order was made gave free and voluntary consent to the breach; and

(b) the court is satisfied that the victim wants to vary or revoke the protection order.

Conspiracy to pervert the course of justice

6.122 An unfortunate corollary to charging victims of family violence with aiding and abetting the breach of a protection order is charging such victims with conspiracy to

143 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 32.

pervert the course of justice for conduct engaged in by them to reduce the culpability of the offender—such as withdrawing their statements.

6.123 The crime of conspiracy is committed where two or more people agree to commit a crime or other unlawful act.[144] On a charge of conspiracy the prosecution must prove the fact of the agreement.[145] Conspiracy originated as an offence to punish persons who entered into agreements to abuse the criminal process by bringing false criminal charges against other people.[146] Conspiracy is a common law offence, and the penalty is within the judicial officer's discretion. However, statutes set out some particular conspiracies with specific penalties.[147]

6.124 While conspiracy may be unrelated to issues arising from the breach of a protection order, it is convenient to deal with it here because of the similarities in the policy issues applicable to aiding and abetting the breach of a protection order.

6.125 Below is a case study concerning a victim of severe family violence who was prosecuted for conspiracy. The case study is based on a transcript of the ABC's 7.30 Report[148] and comments made on the ALRC's Online Family Violence Forum.[149] At the time of writing the remarks on sentencing were unavailable.

Case study

In March 2010 a victim of family violence, Deanne Bridgland, was found guilty of conspiracy and attempting to pervert the course of justice, following a five week trial. She was sentenced in the County Court of Victoria to a two year suspended sentence.

Ms Bridgland had been subjected to severe family violence—described by one psychologist as some of the worst that she had ever come into contact with. Her partner—Nicholas Pasinas—had repeatedly bashed her and, on two occasions, snapped her arms. He had also repeatedly raped her and locked her in the garage with her mouth taped shut. Mr Pasinas was remanded in custody for serious assault charges, and despite a protection order being made against him, he called Ms Bridgland up to 12 times a day, and arranged to have her followed.

144 D Brown and others, *Brown, Farrier, Neal and Weisbrot's Criminal Laws—Material and Commentary on Criminal Law and Process in New South Wales* (4th ed, 2006), 1088.

145 Ibid, 1092.

146 Ibid, 1088.

147 For example the *Crimes Act 1958* (Vic) s 321C sets out various penalties for conspiracy to commit an offence, depending on the offence.

148 The 7.30 Report, *Changes to Domestic Violence Laws 'Don't Go Far Enough'* (2010) ABC Television <www.abc.net.au/7.30/content/2010/s2841222.htm> at 9 March 2010.

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

The police recorded his phone calls to her in which he persuaded her to withdraw her statement against him. While in prison he arranged for a friend of his—Paul Coralis—to pick her up and take her to the police station where she provided police with a statement of 'non-complaint' against him, pursuant to his instructions. Evidence was led that she had no choice but to give the statement. She also provided a letter supporting his release on bail. A psychologist commented that Ms Bridgland did what she did 'in order to survive'. The police officer who laid the charges reportedly testified that she thought Ms Bridgland would be killed if she did not escape the relationship. Ms Bridgland was known to be suffering from battered woman syndrome and learned helplessness.

Ms Bridgland was essentially charged with agreeing with her partner to aid him in either having him released from prison or in reducing his culpability. Her lawyers requested the prosecution not to proceed with the charges on the basis that there was no public interest in prosecuting her. The prosecution refused. Mr Pasinas pleaded guilty to the conspiracy charge and helped the prosecution in its case against Ms Bridgland, for which he received a discount on sentence—his sentence was reduced in half to two and a half years imprisonment with a 15 month non-parole period. Mr Coralis was found not guilty.

Commissions' views

6.126 The Commissions have grave concerns about the practice of charging and prosecuting victims of family violence for conspiracy or attempting to pervert the course of justice in relation to conduct engaged in by them to mitigate the culpability of family violence offenders. They are interested in hearing of any circumstances where this has occurred.

6.127 The charging and prosecution of victims of family violence for conduct seemingly undertaken by them to mitigate the culpability of offenders ignores the nature of family violence—particularly the features of coercion and control, and the damaging psychological impact that this has on victims, as well as the fear which it instils. It also overlooks the cyclical and complicated nature of family violence relationships, 'which often lead victims to withdraw charges or understate the harm of particular conduct during periods of calm in their relationship'.[150]

6.128 The legal system—including police, prosecutors and courts—should not be used to traumatise already traumatised victims of family violence. The focus of the criminal justice response to family violence should be to make offenders accountable. It is difficult to conceive what public interest is served by the prosecution of victims of family violence for offences arising out of their conduct in seemingly agreeing to

150 H Douglas, 'The Criminal Law's Response to Domestic Violence: What's Going On?' (2008) 30 *Sydney Law Review* 439, 454 (citation omitted).

mitigate the culpability of offenders. This is particularly so when the nature of such 'agreement' in a family violence context is clouded by issues concerning duress, coercion, and learned helplessness.

6.129 Above the Commissions propose legislative amendment to ensure that victims of family violence cannot be guilty of aiding and abetting the breach of a protection order—or cannot be charged with such offences. It is a logical extension of that policy stance also to propose legislative amendment to ensure that victims of family violence cannot be charged with or be guilty of offences—such as conspiracy or attempt to pervert the course of justice—where the conduct alleged to constitute the elements of those offences is essentially conduct engaged in by a victim to reduce or mitigate the culpability of the offender.

6.130 It is imperative that any legislative change in this area is accompanied by cultural change. This will necessitate education and training of police and prosecutors. The proposed legislative amendment should be reinforced by guidelines governing police and prosecutors—for example appropriate directions could be incorporated in police codes of practice or operating procedures and prosecutorial policies or guidelines.

Proposal 6–15 State and territory criminal legislation should be amended to ensure that victims of family violence cannot be charged with, or be found guilty of, offences—such as conspiracy or attempt to pervert the course of justice—where the conduct alleged to constitute such offences is essentially conduct engaged in by a victim to reduce or mitigate the culpability of the offender. Legislative reform in this area should be reinforced by appropriate directions in police codes of practice, or operating procedures and prosecutorial guidelines or policies.

Consent to breaches

6.131 There is no defence of consent to breach of a protection order in any Australian state or territory. In 1999, the Domestic Violence Legislation Working Group noted in its Report on Model Domestic Violence Laws that stakeholders expressed concern that 'consent' to a breach may often have been a response to fear or a threat.[151] The Western Australian family violence legislation was amended in 2004 to remove the defence of consent to a breach. It was thought that the removal would

> reduce the potential for parties to abuse the restraining order process by giving, and then withdrawing consent, or by asserting consent as a reason for breach of the order.[152]

151 Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999) 215.
152 Explanatory Memorandum, Acts Amendment (Domestic Violence) Bill 2004 (WA), cl 41.

Removal of consent as a defence also sought to signal to the community that a protection order is an order of the court and not an agreement between the parties.[153]

6.132 A related issue that arises on breach of a protection order is whether it is inappropriate to allow a person who has used violence to rely on the consent of the victim to the breach of the order as a mitigating factor in sentencing. The WA review of family violence legislation found that although consent could no longer be relied upon as a defence to a breach, consent was still being raised by way of a plea of mitigation and accepted by courts.

> Police prosecutors have reported that part of the problem is that on a plea of guilty to breach of a restraining order the respondent can plead in mitigation that the protected person invited the breach. The prosecutor, in the context of a busy court list, has no notation to that effect on his brief and, rather than set it down for a defended hearing, may feel pressured to allow sentencing to proceed on that basis. This is compounded when many magistrates take a very dim view of the respondent being charged at all in the circumstances and have demanded to know of the police whether the person protected by the restraining order has been charged.[154]

6.133 The WA review recommended that consent be removed as a mitigating factor in sentencing on conviction for breach of a protection order.[155]

Commissions' views

6.134 The Commissions are interested in ascertaining whether, as a matter of practice, consent to breach of a protection order is being raised and accepted as a mitigating factor in sentencing proceedings. The Commissions are also interested in stakeholder views on whether there should be a legislative prohibition on considering consent as a factor in sentencing for breach—or whether such prohibition would infringe on the discretion of judicial officers to take into account relevant circumstances surrounding the commission of an offence.[156]

Question 6–15 In practice: (a) are persons who breach protection orders raising consent of the victim to the breach as a mitigating factor in sentencing; and (b) are courts treating consent of a victim to a breach of a protection order as a mitigating factor in sentencing?

Question 6–16 Should state and territory family violence or sentencing legislation prohibit a court from considering the consent of a victim to breach of a protection order as a mitigating factor in sentencing?

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153 Western Australia Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008), 25.

154 Ibid, 26.

155 Ibid, Rec 4.

156 The Commissions further discuss sentencing factors in Ch 7.

Charging for breach of protection order rather than underlying offence

6.135 There will be cases where a person breaches a protection order and the only charge available to police is breach of that order because no underlying offence has been committed—for example, if a person breaches a condition of an order not to contact the victim within a certain period of time of being intoxicated. However, where the breach of a protection order also amounts to a criminal offence, one issue for this Inquiry is the extent to which police, in practice, are charging persons with breach of a protection order—an offence under family violence legislation—as opposed to any potential offence under state or territory criminal law—such as assault.

6.136 Heather Douglas asserts that where family violence matters are charged, 'it is overwhelmingly' as a charge of breaching a protection order rather than one of the established criminal offences such as assault.[157] Based on her study of 645 court files related to prosecutions for breach of protection orders under family violence legislation and held at three Magistrates Courts in Queensland, she concluded that:

> It is likely that many of the matters charged as breaches of protection orders examined in this study could have been charged as crimes of criminal assault or criminal damage among other matters … Although the criminal charge of breach of a protection order was initially developed to provide an alternative offence for those situations where it may be difficult to identify the elements and satisfy the burden of proof in relation to a more serious criminal offence, it would appear from the data in this study that the breach charge is the standard response to matters arising in the domestic violence context when an order is in place.[158]

6.137 As Douglas states, various ideological and practical ramifications are associated with charging a person for breach of a protection order as opposed to an underlying criminal offence. These include that:

- such a preference may be interpreted as trivialising or minimising the offending conduct;
- penalties for breach of a protection order are typically less than those associated with criminal offences such as assault, stalking or criminal damage;[159]
- the charge for breach may often fail to reflect the seriousness of the offending conduct; and

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157 H Douglas, 'The Criminal Law's Response to Domestic Violence: What's Going On?' (2008) 30 *Sydney Law Review* 439, 445.

158 Ibid, 448.

159 Although, as noted below, in some jurisdictions, including NSW, there is a presumption of imprisonment for breach of protection orders involving violence: *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14.

- there may be less particularisation in an accused's criminal record resulting from the recording of an offence for breach as compared with another criminal offence, such as assault.[160]

6.138 It is difficult to determine from published court statistics whether there is a trend for offences for breach of protection orders to be more typically prosecuted than applicable substantive underlying offences. To the extent that courts have published statistics in their annual reports of the number of proven offences or criminal matters lodged:

- no distinction is made as to whether such offences or matters occurred in a family violence context or not; and

- there is no indication of whether the alleged or proven criminal offence occurred in the context of a breach of an existing protection order.

6.139 For example, the Tasmanian Magistrates Court Annual Report of 2006–2007[161] indicates that there were 778 matters lodged concerning 'breach of domestic violence' orders in 2006–2007.[162] That Report also indicates, for example, that there were 2,780 matters lodged concerning 'acts intended to cause injury' and 188 matters concerning 'sexual assault and related offences', but it is unclear how many of these matters—if any—arose in a family violence context.[163]

6.140 Similarly, the Magistrates' Court of Victoria Annual Report for 2007–2008 indicates that there were 4,059 proven offences for 'breach intervention order' in 2007–2008. That Report also indicates that there were 4,205 proven offences for 'unlawful assault' for example, but it is not clear how many of these assault matters arose in the context of family-violence.

6.141 Where a person is charged and convicted for both breach of a protection order and any underlying offence, the Commissions have heard that any custodial sentences imposed are often concurrent—or partially concurrent—rather than consecutive. The Commissions also heard that where two offences are charged—such as breach of the protection order and the underlying offence—the court has flexibility to set different types of sentencing options tailored to meet the circumstances of the case.[164]

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160 H Douglas, 'The Criminal Law's Response to Domestic Violence: What's Going On?' (2008) 30 *Sydney Law Review* 439, 448–449.

161 This is the most recent annual report available on the website of the Magistrates Court of Tasmania at <www.magistratescourt.tas.gov.au/publications/annual_reports> at 19 February 2010.

162 Magistrates Court Tasmania, *Annual Report 2006–2007* (2007), 37.

163 Ibid, 37.

164 G Zdenkowski, *Consultation*, Sydney, 6 November 2009.

Commissions' views

6.142 The Commissions are interested in ascertaining the extent to which charges for breach of protection orders are being laid as an alternative to charges for any applicable underlying offence, in circumstances where it would be possible for the police to lay both charges. If this is an issue in practice, the Commissions are interested to hear suggestions for reforms. Is this an area appropriately targeted by non-legal measures such as police training, police codes of practice, and prosecutorial guidelines, or is there also scope for legislative redress? For example, to address the concern that there is usually less particularisation in an accused's criminal record resulting from the recording of an offence for breach of a protection order compared with another criminal offence—such as assault—would it be useful for legislation to address the specificity of information that should be captured on a criminal record in relation to an offence of breaching a protection order?

6.143 Proper data capture is essential to the formulation and development of policy. This complements the key strategy of building the evidence base recommended in *Time for Action*.[165] The Commissions consider that it would be beneficial for state and territory courts to capture separately statistical data about criminal matters lodged or criminal offences proven in their jurisdictions that arise in a family-violence related context.

Question 6–17 In practice, where breach of a protection order also amounts to another criminal offence to what extent are police in each state and territory charging persons with breach of a protection order, as opposed to any applicable offence under state or territory criminal law?

Question 6–18 If there is a practice of police preferring to lay charges for breach of a protection order, as opposed to any applicable underlying criminal offence, how can this practice best be addressed to ensure victims' experiences of family violence are not underrated?

Proposal 6–16 State and territory courts, in recording and maintaining statistics about criminal matters lodged or criminal offences proven in their jurisdiction should ensure that such statistics capture separately criminal matters or offences that occur in a family-violence related context.

165 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), [1.5], [2.4], [3.4], [4.5], [5.4], [6.3].

Penalties and sentencing for breach of protection orders

6.144 The maximum penalties for breach of a protection order vary significantly across state and territory jurisdictions.[166] The table below sets out the maximum penalties in each jurisdiction.

Jurisdiction	Maximum Penalty
NSW	Imprisonment for two years or 50 penalty units ($50,000) or both (s 14 of NSW Act)
Victoria	Imprisonment for two years or 240 penalty units ($27,220.80) or both (ss 123 and 27 of Victorian Act)
Queensland	Imprisonment for one year or 40 penalty units ($40,000) for first offence, and imprisonment for two years for third and subsequent offences within a period of three years (s 80 of Qld Act)
WA	Imprisonment for two years and fine of $6,000 or both (s 61 WA Act)
SA	Imprisonment for two years—but if breach of 'intervention order' under s 13 (order to undertake intervention program)—maximum penalty is $1,250 (s 31 of SA Act)
Tasmania	Tiered penalties: imprisonment for one year or fine of 20 penalty units ($2,400) for first offence to imprisonment for five years for fourth or subsequent offence (s 35 of Tas Act)
ACT	Imprisonment for 5 years or 500 penalty units ($50,000)or both (s 90 of ACT Act)
Northern Territory	Imprisonment for 2 years or 400 penalty units($44,000) or both (ss 121, 122 of NT Act)

6.145 As stated by the AGS, there are, however, some difficulties in making straightforward comparisons concerning the different maximum penalties because of reasons including the following:

> —while the applicable fine in one jurisdiction may be lower than in others, the maximum term of imprisonment in that jurisdiction may be higher than in some others; …

166 The Australian Government Solicitor highlighted maximum penalties on breach of a protection order as one of the areas of family violence legislation in respect of which there is significant variation across the jurisdictions: Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), 14.

> —some, but not all, jurisdictions have a tiered penalty system for first and subsequent breaches.[167]

6.146 Under the Model Domestic Violence Laws, breach of a protection order was made a summary offence which attracted a maximum penalty of:

- $24,000 or imprisonment for one year for a first offence; and
- imprisonment for two years for a second offence.[168]

6.147 In 2008 the Victorian Sentencing Advisory Council recommended that imprisonment for two years should be the maximum penalty for a breach of protection orders—as well as breach of police-issued family violence safety notices and stalking intervention orders.[169]

6.148 Whatever the maximum penalty for breach of protection orders, a key issue is how such breaches are treated in sentencing. For example, the WA review of family violence legislation noted a concern that breaches of protection orders are being treated leniently.[170] It noted that despite legislative amendments to increase penalties for breaches, in some cases actual penalties imposed are low and do not reflect the gravity of the breach and its consequences:

> Offenders are being charged more by the Police however court sentencing is very lenient with offenders usually given small fines as can be seen by our tracking and monitoring of court outcomes at our local court.
>
> Some of the penalties given to respondents for breaching were so insignificant that they did not act as a deterrent and made women feel like the order or the seriousness of the situation had been trivialised. ie. $100 fine—'a speeding ticket costs more than that'.[171]

6.149 Similarly, in respect of sentencing for breach of protection orders in Queensland, Douglas has stated that 'penalties are often inappropriate and generally very low for breach matters':[172]

> In 40 per cent of cases no conviction was recorded. … The study showed that 42 per cent of matters resulted in fines. In most of the matters where fines were ordered, the fines were less than $500. … Fines are inappropriate in the context of breach matters as there are potential problems associated with this form of penalty in the context of domestic violence. Considering the frequently ongoing connections between the victim and the defendant in the

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167 Ibid, 28.
168 Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999), s 64.
169 Sentencing Advisory Council (Victoria), *Breaching Intervention Orders Report* (2008), Rec 1.
170 Western Australia Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008), 23.
171 Ibid, 26 (citations omitted).
172 H Douglas, 'The Criminal Law's Response to Domestic Violence: What's Going On?' (2008) 30 *Sydney Law Review* 439, 464.

> domestic violence context there is a risk that it will actually be the victim of the breach who will pay the fine from the family income. Alternatively, there is a risk that the fine will be paid from money that should be paid as child support.[173]

6.150 The NSW family violence legislation provides that a person who breaches a protection order must be sentenced to a term of imprisonment if the act constituting the offence was an act of violence against a person, unless the court orders otherwise.[174] Where the court determines not to impose a sentence of imprisonment it must give its reasons for doing so.[175]

6.151 The Northern Territory family violence legislation contains a number of provisions regulating the sentencing of protection orders which are said to apply despite the *Sentencing Act* (NT).[176] Those provisions include that where an adult breaches a protection order the court must record a conviction and sentence the person to imprisonment for at least seven days if the person has previously been found guilty of contravening a protection order. However, this requirement does not apply if:

- the offence does not result in harm being caused to a protected person; and
- the court is satisfied it is not appropriate to record a conviction and sentence the person under the subsection in the particular circumstances of the offence.

6.152 The Northern Territory family violence legislation also provides that if the person sentenced to serve a term of imprisonment for breaching a protection order is already serving another term of imprisonment for another offence, the court must direct the term of imprisonment to start from the end of the other term of imprisonment.[177]

6.153 The Victorian sentencing legislation makes it clear that the sentencing option of home detention is not available where an offender has breached a protection order—whether that order was made in Victoria or in another state or territory.[178]

Commissions' views

6.154 The Commissions are interested in hearing stakeholder views about whether:

- the lack of consistency of maximum penalties for breach of protection orders across the jurisdictions is problematic in practice;

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173 Ibid, 464 (citations omitted).
174 This directive does not apply if the person convicted was under 18 years of age at the time of the alleged offence.
175 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14.
176 *Domestic and Family Violence Act 2007* (NT) s 121.
177 Ibid.
178 *Sentencing Act 1991* (Vic) s 18ZV.

- it is desirable that there be consistent maximum penalties across the jurisdictions for breach of protection orders, and if so, what the maximum penalty should be;

- in practice, there are concerns about the sentences that courts impose on offenders for breaching protection orders—in terms of both the level of penalty and the type of sanction imposed; and

- it is desirable for jurisdictions to adopt provisions which direct courts to adopt a particular approach on the sentencing for breach of a protection order—for example such as the provision in NSW—which requires a court to sentence offenders to imprisonment for breach of protection orders involving acts of violence.

6.155 In Chapter 7 the Commissions make a proposal directed to the provision of guidance to judicial officers when sentencing offenders for offences related to family violence.[179] For example, there appears to be merit in providing courts with guidelines about the particular repercussions of imposing fines on offenders for family-violence related offences. As noted in Chapter 7, there are particular issues which arise on sentencing for breach of protection orders which could be addressed in a model Bench Book.

6.156 The Commissions are also interested in hearing stakeholder views about what type of non-financial sanctions are appropriate to impose on offenders for breach of protection orders where the breach does not involve violence or involves comparatively low levels of violence. The Commissions have heard that a typical non-violent breach may involve a husband—prohibited by a protection order from going within 100 metres of the victim's residence—turning up, drunk, on the doorstep, asking to see his child. Would it be appropriate in such circumstances, for example, to impose a bond which mandated an intervention program such as an alcohol program?

Question 6–19 Should there be consistency of maximum penalties for breach of protection orders across the jurisdictions? If so, why, and what should the maximum penalty be?

Question 6–20 In practice, what issues or concerns arise about the sentences actually imposed on offenders for breach of protection orders?

179 See Proposal 7–3.

Question 6–21 Should state and territory family violence legislation contain provisions which direct courts to adopt a particular approach on sentencing for breach of a protection order—for example, a provision such as that in s 14(4) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), which requires courts to sentence offenders to imprisonment for breach of protection orders involving violence, unless they otherwise order and give their reasons for doing so?

Question 6–22 What types of non-financial sanctions are appropriate to be imposed for breach of protection orders where the breach does not involve violence or involves comparatively low levels of violence?

7. Recognising Family Violence in Criminal Law

Contents

Introduction

7.1 One theme that has emerged in this Inquiry is the lack of recognition of family violence in the criminal law. While some state and territory family violence laws have in recent years extended the definition of family violence and the family members who may avail themselves of the protection order regime, there is an issue about whether the boundaries of criminal redress can also be expanded, and whether such expansion is desirable.

7.2 This chapter elaborates on the discussion in Chapter 5 concerning the proper boundaries of criminal redress for family violence. It considers whether there should be an expanded role for the criminal law in recognising family violence as an offence, in sentencing, or as a defence to homicide.

7.3 The Commissions consider these issues in light of the direction in the Terms of Reference to consider what, if any, improvements can be made to the current criminal law framework to protect victims of family violence. As noted in Chapter 4, this Inquiry presents the Commissions with a unique opportunity to explore ways in which legal frameworks can be improved in order to better assist victims of family violence—even where no issues may arise from the practical interaction of family violence laws with the criminal law. In the Commissions' views, a broad interpretation of the Terms

of Reference calls for an assessment of how well the criminal justice system deals with family violence.

7.4 However, as noted in Chapter 1, there is a more general issue about whether escalating a penal response to family violence is the best or only way for society to mark its condemnation of what is clearly abhorrent behaviour. The Commissions have heard that sometimes a blunt penal response can escalate violent behaviour. The discussion in this chapter is to be read within a context that acknowledges the limited range of criminal justice responses to the endemic problem of family violence, and therefore the benefits of promoting a multi-pronged and integrated response, which focuses on prevention, as well as punishment.

Family violence as an offence

Case study

'Some of the women I have assisted have experienced years of violence, including rapes, which have been reduced to one charge of common assault. There is no way a just sentence for her suffering and trauma, and the harm done to society by his actions, can be applied to a single charge of common assault no matter how sensitive and insightful the magistrate is'.

One woman experienced a full year of social isolation, food deprivation, constant sexual assault and severe physical violence. The police pressed one charge of common assault and one charge of actual bodily harm in respect of injuries they were able to photograph. At court the police prosecutor accepted a plea bargain and dropped one of the charges without consulting the woman who was present in court ready to appear and give evidence. The offender admitted to a third party that he had been assaulting his wife but the evidence was not used because it did not relate to a specific incident of assault. The offender received a good behaviour bond.[1]

7.5 The above case study is set out by way of background for a discussion about how family violence can be recognised in the criminal law. This includes: the arguments for and against introducing a specific offence of family violence; separate aggravated offences—such as assault—occurring within a family violence context; as well as the treatment of family violence in sentencing.[2]

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

2 The interaction of protection orders and sentencing, and sentencing for breach of protection orders are discussed in Ch 6.

7.6 Lawyers representing victims of family violence informed the Commissions about the frequency with which victims who have suffered ongoing and repeated assaults are only able to prove one or two of those assaults to the required standard of proof. There may be evidence of other assaults and violence, which may be inadmissible or otherwise problematic—for example:

- a victim is able to describe incidents, but without times and dates;
- injuries observed by third parties that are explained away at the time by a frightened victim;
- things heard through the wall by neighbours;
- hearsay evidence of conversations the victim had with friends and counsellors throughout the relationship; and
- evidence of child witnesses.[3]

7.7 One theme that emerged is the need for reliable and admissible evidence of ongoing and repeated assaults—and other patterns of family violence—to be introduced into court to reflect the criminality of the violence suffered by a victim. One way of doing this is to lay representative charges, and rely on a course of conduct in sentencing—an option that is discussed separately below.

7.8 Criminal law deals best with incident-focused behaviour rather than patterns of controlling non-physical behaviour. The relative absence of a concept of 'family violence' in criminal law means that the criminal law—unlike the civil law—typically responds only to parts of the overall pattern of family violence. This may limit the role the criminal law can play in addressing family violence, and may distort the handling of family violence within the criminal system.

7.9 Commentators have argued that the limited focus of the criminal law means that it fails to recognise in family violence cases both 'the patterns of power and control' and the 'full measure of injury that these patterns inflict'.[4] This has a number of consequences. In particular, it means that the criminal law does not adequately punish the harm done. This may be attributed to a number of reasons, including the fact that family violence may occur over a long period of time; is typically under-reported and under-enforced, and may occur in non-physical forms. As a result, it may be difficult to prove each particular incident of family violence. This effect flows on to other legal

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

4 D Tuerkheimer, 'Recognizing and Remedying the Harm to Battering: A Call to Criminalize Domestic Violence' (2003) 94 *Journal of Criminal Law & Criminology* 959, 972.

frameworks that depend on the criminal law, such as victims' compensation, with the effect that family violence victims are also typically under-compensated.[5]

7.10 Commentators argue that this distorts the ways in which the criminal law handles family violence. For example, by considering discrete incidents, the investigation and prosecution will focus on the incidents that form the basis of charges, rendering other evidence irrelevant and omitting the context that is necessary to understand those incidents.[6]

7.11 The absence of a concept of family violence in the criminal law may also fail to label correctly the distinctive nature and magnitude of family violence.[7] For example, Dr Victor Tadros has argued that family violence is a particular moral wrong, in that it erodes a 'distinctive kind of freedom that individuals ought to have'[8]—namely, their freedom not to have their options, and their capacity to assess options, arbitrarily restricted by the control of another person.[9] In his view, the distinctive nature of this wrong is not currently captured by the criminal law.

7.12 Tadros also argues that the historical and social context of family violence—in particular, the treatment of family violence as 'less serious' than other crimes—may additionally justify a distinct conception of family violence in the criminal law. In his view, such a distinct conception may encourage judicial officers to treat family violence at least as seriously as other crimes; send out a message that such behaviour is 'to be taken seriously and the proper subject of public condemnation'; and might be a way for the state to recognise previous failings to address family violence appropriately.[10]

7.13 Commentators, including Tadros, have suggested that one way of overcoming these constraints is to create a specific offence of family violence.[11] Professor Deborah Tuerkheimer advocates legislation that would require proof of a 'course of conduct' that the defendant 'knows or reasonably should know … is likely to result in substantial power or control' over the victim.[12] Professor Alafair Burke has suggested,

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5 See, eg, C Forster, 'The Failure of Criminal Injuries Compensation Schemes for Victims of Intra-Familial Abuse: The Example of Queensland' (2002) 10 *Torts Law Journal* 143; I Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview* (2010) Australian Domestic and Family Violence Clearinghouse.

6 D Tuerkheimer, 'Recognizing and Remedying the Harm to Battering: A Call to Criminalize Domestic Violence' (2003) 94 *Journal of Criminal Law & Criminology* 959, 975–998.

7 V Tadros, 'The Distinctiveness of Domestic Abuse: A Freedom Based Account' (2004) 65 *Louisiana Law Review* 989, 1003.

8 Ibid, 990.

9 Ibid, 998.

10 Ibid, 1005.

11 Ibid.

12 D Tuerkheimer, 'Recognizing and Remedying the Harm to Battering: A Call to Criminalize Domestic Violence' (2003) 94 *Journal of Criminal Law & Criminology* 959, 1019–1020.

instead, that the offence should require that the defendant engaged in the pattern of family violence with the intention of gaining power or control over the victim.[13]

7.14 In most jurisdictions with common law systems, such as Canada and New Zealand, family violence is not a specific offence. The UK Government considered, but rejected, the introduction of a specific offence of family violence in 2003:

> The Government believes that a separate offence of domestic violence would not necessarily help victims. There is a full range of charging options already. To reduce that range—common assault through to grievous bodily harm, and rape—diminishes the offence.[14]

7.15 A number of European jurisdictions do, however, have a specific offence in relation to family violence. A Council of Europe report indicates that the following countries had specific offences: Andorra, Croatia, the Czech Republic, Hungary, Iceland, Montenegro, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, and Sweden.[15] Sweden explained the introduction of its specific offence as follows:

> Its purpose is to deal with repeated male violence towards women with whom they have a close relationship. The introduction of the new offence will make it possible for the courts to substantially increase the penal value for the acts committed against the woman, when the acts are part of a process which constitutes a violation of integrity. Thus it will be possible, in a much better way than with existing legislation, to take the entire situation of the abused woman into account. The new crime does not exclude that the perpetrator at the same time can be prosecuted, for instance, for rape or other gross crimes.[16]

7.16 An offence of 'cruelty' to women was introduced in the Indian Penal Code in 1983.[17] In 2005, a research study conducted on the operation of this section concluded that, of 30 cases it had studied, no woman had succeeded on the basis of that section alone. Although many in the legal system were of the view that the section was being misused, the study concluded that victims thought the section required strengthening

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13 A Burke, 'Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization' (2006) 75 *George Washington Law Review* 552, 556.

14 Crime Reduction Centre Information Team, *Safety and Justice: The Government's Proposals on Domestic Violence* (2003) Home Office, 30.

15 Directorate General of Human Rights—Council of Europe, *Legislation in the Member States of the Council of Europe in the Field of Violence Against Women* (2007).

16 'Statement by Ms Ingegerd Sahlström, State Secretary for Equality Affairs' (Press Release, 3 March 1998).

17 *Indian Penal Code 1860* s 498A, introduced by *Criminal Law (Second Amendment) Act 1983* (India). This provision prohibits husbands, or relatives of husbands, to subject a woman to 'cruelty', with a maximum sentence of three years. 'Cruelty' is defined to include any wilful conduct likely to drive the woman to commit suicide, or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or harassment of the woman, with a view to coercing her or a related person to meet unlawful demands for property or security, or as a consequence of a failure to meet such a demand.

and non-governmental organisations considered it the only effective mechanism of redress for victims of family violence.[18]

Commissions' views

7.17 The Commissions acknowledge that the creation of an umbrella offence of 'family violence' may be fraught with difficulties—not least that associated with conceptualising the exact parameters of the offence and, in particular, whether such offence should be framed to include conduct of a non-physical nature that is captured by the definition of 'family violence' in family violence laws—such as emotional and economic abuse.[19] This raises the fundamental issue discussed in Chapter 5 of ascertaining the proper delineation of civil and criminal redress.

7.18 Criminal law is incident-oriented. Each element of an offence has to be proved beyond reasonable doubt, and there may be significant evidentiary barriers for the prosecution to overcome in proving the elements of an umbrella offence of family violence. The Commissions are, however, interested in stakeholder views about whether it is necessary and feasible to create an umbrella offence of family violence and how such an offence could be framed. For example, would it be feasible to create a two-tiered offence which captures both coercive conduct and physical violence in a family violence context?

7.19 In the Commissions' preliminary view, there may be alternative ways for the criminal law to deal better with cases of family violence, short of creating an offence of family violence but nonetheless responding to the seriousness of the conduct. These include options exercisable at the point of charging a person for an offence, as well options which emphasise family violence on sentencing. These options are discussed below.

Question 7–1 Is it necessary or feasible for state and territory criminal laws to introduce a specific offence of committing family violence? If so, how should such an offence be conceptualised? For example, would it be feasible to create a two-tiered offence which captures both coercive conduct and physical violence in a family violence context?

Aggravated offences occurring in a family violence context

7.20 An alternative to formulating an umbrella offence of family violence is to create aggravated offences that occur in a family violence context. This is the case in some

18 Centre for Social Research, *A Research Study on the Use and Misuse of Section 498A of the Indian Penal Code* (2005).

19 In Ch 5, the Commissions express reservations about creating specific offences of economic and emotional abuse in the family violence context.

jurisdictions. For example, South Australia's criminal legislation provides that it is an aggravated offence if the offender committed the offence knowing that the victim was:

- a spouse, former spouse, domestic partner or former domestic partner of the offender; or
- a child in the custody of, or who normally resides with: the offender, a spouse, former spouse, domestic partner or former domestic partner of the offender.[20]

7.21 That legislation also provides that the creation of aggravated offences does not prevent a court from taking into account, in the usual way, the circumstances of and surrounding the commission of an offence for the purpose of determining sentence. It sets out the following example to illustrate this point:

> A person is charged with a basic offence and the court finds that the offence was committed in circumstances that would have justified a charge of the offence in its aggravated form. In this case, the court may, in sentencing, take into account the circumstances of the aggravation for the purpose of determining penalty but must (of course) fix a penalty within the limits appropriate to the basic offence.[21]

7.22 In Western Australia, offences against the person are treated as aggravated if, among other things, the offender is in a 'family and domestic relationship with the victim', [22] a child was present at the time of the offence, or the conduct of the offender constituted a breach of a protection order.[23] The criminal legislation sets out higher penalties for a number of offences, including assault and causing grievous bodily harm where those offences are committed in aggravating circumstances.[24]

7.23 There is also some precedent for aggravated offences in a family violence context in European countries. For example, art 172 of the *Criminal Code* of Bosnia and Herzegovina provides that:

> **Aggravated Bodily Injury**
>
> (1) Whoever inflicts a serious bodily injury upon another person or severely impairs his health, shall be punished by imprisonment for a term between six months and five years.
>
> (2) Whoever perpetrates the criminal offence referred to in paragraph 1 of this Article against his spouse, common-law partner, or to the parent of his child

20 *Criminal Law Consolidation Act 1935* (SA) s 5AA(1)(g).
21 Ibid s 5AA.
22 'Family and domestic relationship' in s 221 has the same meaning that it has in section 4 of the *Restraining Orders Act 1997* (WA): *Criminal Code Act Compilation 1913* (WA) s 221(2).
23 *Criminal Code Act Compilation 1913* (WA) s 221.
24 Ibid s 297, eg, sets out a maximum penalty of imprisonment for 10 years for grievous bodily harm, and imprisonment for 14 years where grievous bodily harm is committed in circumstances of aggravation.

> with whom he does not share a household, shall be punished by imprisonment for a term between one and five years.[25]

Commissions' views

7.24 In the Commissions' preliminary view, the creation of aggravated offences within a family violence context is a more feasible and practical option for the criminal law to recognise family violence than the creation of an umbrella offence of family violence—although it would not preclude the creation of such an offence.

7.25 However, the Commissions have some concerns about the approach taken in South Australia and Western Australia to offences of a violent nature committed against certain family members. The creation of a two-tiered maximum penalty scheme—depending solely on whether the victim is a family member of the offender—signals that victims of family violence suffer inherently more than victims of stranger violence. It is not without controversy to suggest that an attack by an intimate partner is more deserving of censure than an attack by a stranger.

7.26 If aggravated offences in a family violence context are to be created, the Commissions are of the preliminary view that, in order to make the offence aggravated, there needs to be more than the mere fact that an alleged offender was in a particular family relationship with the victim. To require police to charge persons with an aggravated offence and prosecutors to prosecute such offences only because the offender was in a particular family relationship with the victim would mean that such a course of action would conceivably apply in circumstances where it may not always be just and appropriate to charge the offender with an aggravated offence, such as in the case of:

- any person with a mental illness who commits an act of violence against a family member;
- a child with substance abuse issues who commits an act of violence against a sibling; or
- a woman who uses violence against her partner in a defensive manner.[26]

7.27 One option for the creation of an aggravated offence carrying a higher maximum penalty is to require not only the fact of a particular family relationship between offender and victim, but also evidence that the offence was committed as part of a pattern of controlling, coercive or dominating behaviour.[27] Evidence of the latter

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25 See Directorate General of Human Rights—Council of Europe, *Legislation in the Member States of the Council of Europe in the Field of Violence Against Women* (2007), 18.

26 Family violence as an aggravated factor in sentencing is discussed below.

27 Consideration of course of conduct on sentencing is discussed below. See also Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), Rec 14 (in the context of the definition of family violence in the civil arena).

provides justification for treating an offence as aggravating due, in part, to the inability of a victim to extract herself or himself from future violence.

7.28 An alternative approach would be to create separate offences—which may not necessarily carry higher penalties—but which emphasise the fact that an offence—such as assault or sexual assault—was committed by one family member against another family member. Creating separate offences could arguably serve as an educative measure in increasing the visibility and censure of crimes committed in a family context. However, the creation of additional offences—especially if they do not attract higher maximum penalties than their existing counterparts—may also unnecessarily clutter state and territory criminal statutory schemes.

7.29 The Commissions are interested in hearing stakeholder views in relation to these two alternative options for reform. In relation to each option, the Commissions are also interested in hearing views about the types of family relationships that should be included.

Question 7–2 Which, if either, of the following options for reform should be adopted:

(a) state and territory criminal legislation should provide that an offence is aggravated—and therefore a higher maximum penalty applies—if an offender is in a family relationship with the victim and the offence committed formed part of a pattern of controlling, coercive or dominating behaviour; or

(b) state and territory criminal legislation should be amended to include specific offences—such as assault and sexual assault—which are committed by an offender who is in a family relationship with the victim, but which do not attract a higher maximum penalty?

Question 7–3 What kind of family relationships should be included for the purposes of the offences referred to in Question 7–2?

Question 7–4 Should federal criminal legislation be amended to include specific offences committed by an offender who is in a family relationship with the victim? If so, which offences should be included and should they carry a higher maximum penalty?

Sentencing

Course of conduct

7.30 One stakeholder in this Inquiry has commented that:

> Perhaps there is space for evidence of a pattern of domestic violence to be a factor in sentencing. By this I mean that the standard assault charges be laid, but when it comes to sentencing, evidence that establishes a pattern of domestic violence would result in a premium being added to whatever sentence is assigned to the proved assault. This way there is no diminishing of the seriousness of the assault charge by putting it in a special category of 'domestic violence' but the fact that it is not a simple one-off assault is also taken into account.[28]

7.31 This raises the following issues:

- the stage at which such a pattern is proved, the manner of proof and the standard of proof;
- the extent to which a course of conduct constituting family violence is taken into account in sentencing for specific offences, such as assault or sexual assault; and
- whether any such course of conduct is limited to proven acts of a criminal nature in themselves—as opposed to unproven criminal acts or acts which are not generally criminal such as emotional or economic abuse.[29]

7.32 Most state and territory sentencing legislation does not expressly refer to a course of conduct as an express sentencing factor. One exception is the sentencing legislation of the ACT, which provides that a court sentencing an offender must take into account, where relevant and known :

> if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character—the course of conduct.[30]

7.33 There is also reference to course of conduct in the sentencing legislation of South Australia. Under that legislation, in order to assist a court to determine the sentence for an offence, a prosecutor is required to furnish the court with particulars of injury, loss or damage resulting from

> a course of conduct consisting of a series of criminal acts of the same or a similar character of which the offence for which sentence is to be imposed forms part.[31]

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

29 Emotional and economic abuse are criminal offences in Tasmania only: see *Family Violence Act 2004* (Tas) ss 8–9.

30 *Crimes (Sentencing) Act 2005* (ACT) s 33.

31 *Criminal Law (Sentencing) Act 1988* (SA) s 7(1)(b)(ii).

7.34 There is an issue about whether a court, in sentencing, can take into account conduct in respect of which an offender has not been charged. The ACT provision referred to above is expressed in the same terms as the *Crimes Act 1914* (Cth) s 16A(2)(c).[32] This is relevant because there has been case law in respect of the latter which reveals judicial disagreement about the meaning and ambit of s 16A(2)(c). In *Weininger v The Queen* Kirby J stated that the section did not allow 'uncharged criminal acts' to be taken into account in sentencing and expressed the view that the section was an attempt to express the totality principle.[33] Callinan J, however, expressed the view that the section allowed a court to consider relevant conduct,

> albeit that it might involve criminal acts which in turn might not have resulted in charged and established (by verdict or plea) facts constituting other offences.[34]

7.35 Submissions and consultations in the course of the ALRC's inquiry into the sentencing of federal offenders expressed confusion about the meaning and operation of s 16A(2)(c), and the ALRC recommended that the section be redrafted to provide greater clarity.[35]

7.36 A provision allowing a course of conduct to be taken into account is also relevant where representative charges are used—that is, where a court sentences an offender for a limited or representative number of offences on the basis that those offences are part of a wider course of conduct. Representative charges are used in relation to sexual assault cases. In *R v D*, Doyle CJ of the South Australian Court of Criminal Appeal said that the term 'representative charges' described an approach whereby:

> the court sentences an offender in respect of a relatively small number of offences, but does so on the basis that those offences were not isolated offences, but part of a course of conduct involving similar behaviour. On that basis, the scope for extending leniency is reduced. The uncharged offences that are part of the course of conduct cannot be used to increase the potential maximum punishment, which maximum remains the accumulation of the maxima attracted by the charged offences. The only way in which the uncharged offences can be used is to rely upon them to refuse to extend the leniency that might be extended if the offences for which the offender is convicted were isolated offences.[36]

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32 *Crimes Act 1914* (Cth) s 16A sets out factors a court must take into account in the sentencing of federal offenders.

33 *Weininger v The Queen* (2003) 212 CLR 629, 647. The totality principle is relevant to the sentencing of offenders for multiple offences. It ensures that an offender who is sentenced for multiple offences receives an appropriate sentence overall and not a 'crushing sentence'. See Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), [5.12]–[5.15].

34 *Weininger v The Queen* (2003) 212 CLR 629, 665.

35 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), [6.61], [6.65]–[6.66], Rec 6–1.

36 *R v D* (1997) 69 SASR 413, 419.

7.37 This approach has also been adopted by the New South Wales Court of Criminal Appeal. For example, in *R v JCW*, a case dealing with sexual abuse, the offender made an admission that the offences with which he was charged were representative of the general nature of his relationship with his daughter. Spigelman CJ said:

> I do not, however, conclude that the admission extended to any, let alone each, of the specific allegations contained in [the daughter's evidence].
>
> An admission of this general character is appropriate to be taken into account for purposes of rejecting any claim to mitigation and attendant reduction of an otherwise appropriate sentence. It is not, however, in my opinion, appropriate to be taken into account as a circumstance of aggravation, if that be permissible at all.[37]

Commissions' views

7.38 The Commissions consider that, to the maximum extent possible in criminal matters involving a course of conduct of family violence, police and prosecutors should be encouraged to pursue the option of using representative charges as a way of presenting a course of conduct to the court. The court should also, at the least, consider:

- whether the offence forms part of a series of proved or admitted criminal offences of the same or similar character; and

- where an offender has pleaded guilty to charges and has acknowledged that they are representative of criminality comprising uncharged conduct as well as the charged offences—the course of conduct comprising that criminality.

7.39 This approach to what a court is to consider is consistent with that taken in the ALRC's report on the sentencing of federal offenders (ALRC 103).[38]

7.40 The Commissions consider that there is also merit in the specific context of sentencing for family-violence related offences for a court to consider evidence that an offender engaged in a pattern of family violence against a victim—even if this includes violence of a non-physical nature against the victim—such as emotional or economic abuse, which is typically, not of itself, criminal.[39] Such evidence should be able to be taken into account for the purpose of rejecting any claim to mitigation. The Commissions are interested in hearing stakeholder views on this.

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37 *R v JCW* (2000) 112 A Crim R 466, [67]–[68].

38 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), [6.61], [6.65]–[6.66], Rec 6–1.

39 As noted in Ch 5, such abuses in the context of family violence amount to criminal offences in Tasmania.

7.41 Further, the Commissions are interested in hearing whether:

- representative charges in family-violence related offences are under-utilised as a matter of practice;
- the extent to which guilty pleas entered to a family-violence related charge are accompanied by an acknowledgement that they are representative of criminality comprising uncharged conduct as well as the charged conduct;
- courts are sentencing family-violence related offences taking course of conduct issues into account, and if so, the parameters of any course of conduct considered by the court; and
- whether the sentencing legislation of states and territories needs to be amended to allow expressly for courses of conduct to be taken into account in sentencing. Such an amendment may have repercussions beyond the sentencing of offenders for family-violence related incidents.

7.42 The answers to several of the questions posed above will be affected by the exercise of prosecutorial decisions. In difficult to prove cases prosecutors may be tempted to accept a plea to a single incident assault. Therefore, the Commissions consider that appropriate prosecutorial guidelines will need to be developed, in addition to training and education in order to encourage more frequent and appropriate use of representative charges in family violence prosecutions.

Question 7–5 In practice, are representative charges in family-violence related offences under-utilised? If so, why, and how can this best be addressed?

Question 7–6 In practice, are courts imposing sentences for family-violence related offences taking into account, where applicable, the fact that the offence formed part of a course of conduct of family violence? If so, are courts taking into account (a) uncharged criminal conduct; or (b) non-criminal family violence? Should they do so?

Question 7–7 In practice, to what extent are guilty pleas entered to a family-violence related charge accompanied by an acknowledgement that they are representative of criminality, comprising uncharged conduct as well as charged conduct?

Proposal 7–1 Commonwealth, state and territory governments, and Commonwealth, state and territory directors of public prosecution respectively, should ensure that police and prosecutors are encouraged by appropriate prosecutorial guidelines, and training and education programs, to use representative charges to the maximum extent possible in family-violence related criminal matters where the charged conduct forms part of a course of conduct.

Question 7–8 Should the sentencing legislation of states and territories be amended to allow expressly for a course of conduct to be taken into account in sentencing, to the extent that it does not already do so?

Family violence as an aggravating factor?

7.43 Aggravating factors increase the culpability of an offender and act to increase the penalty to be imposed on sentencing—but never beyond the maximum penalty for an offence. Mitigating factors decrease the culpability of an offender and act to decrease the extent to which the offender should be punished.

7.44 A more limited way of recognising family violence in sentencing is either to treat the fact that a crime was committed in the context of a family relationship as an aggravating factor in sentencing, or prevent it from being considered a mitigating factor in sentencing.

7.45 Not all sentencing legislation of the states and territories sets out aggravating or mitigating factors. Some sentencing legislation states that a court must have regard to the presence of any mitigating or aggravating factor concerning the offender,[40] or must have regard to any mitigating or aggravating factor in determining the seriousness of an offence[41] without listing examples of such factors.[42] The sentencing legislation of NSW, by comparison, sets out a list of aggravating and mitigating factors that a court must take into account.[43]

7.46 In NSW it is not an aggravating factor that the victim to an offence is a spouse, intimate partner or related to the offender. However, the sentencing legislation of NSW specifies some aggravating factors that may be relevant to the sentencing of offenders who are found guilty of crimes committed in circumstances of family violence. These include that: the crime was committed in the home of the victim or any other person; in the presence of a child; the offender had a record of previous convictions, particularly

40 For example, *Sentencing Act 1991* (Vic) s 5(2)(g); *Penalties and Sentences Act 1992* (Qld) s 9(2)(g).
41 *Sentencing Act 1995* (WA) s 6(2)(c), (d).
42 Although Ibid s 8 provides that a plea of guilty, and facilitation by the offender of criminal property confiscation in certain cases are mitigating factors.
43 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A.

those for serious personal violence offences as defined in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW); or the offender abused a position of trust or authority in relation to the victim.[44]

7.47 Case law in NSW supports the proposition that the fact that an offence is committed in the context of a family relationship is not a mitigating factor. In *Raczkowski v The Queen*, for example, the NSW Court of Criminal Appeal stated:

> The Court was invited to consider that the offences occurred in the context of a (broken down) domestic relationship … That a violent and pre-planned attack occurred in what might be classified as a domestic setting is not a matter of mitigation.[45]

7.48 Case law in NSW also indicates that the fact that an offence is committed while an offender is subject to the conditions of a protection order to protect the victim of the offence, may be treated as an aggravating factor.[46]

7.49 The Tasmanian family violence legislation specifies some aggravating factors that may be relevant to the sentencing of offenders who are found guilty of crimes committed in circumstances of family violence in addition to circumstances not involving family violence. These include the fact that the offender knew or was reckless as to whether a child was present at the time of the offence or knew that the affected person was pregnant.[47] The latter factor has particular relevance in family violence circumstances because studies have shown that pregnancy increases a woman's vulnerability to family violence.

> The 1996 [Australian Bureau of Statistics] Women's Safety Survey and the 2005 Personal Safety Survey found that pregnancy is a time when women may be vulnerable to abuse. Of those women who experienced violence by a previous partner, 701,200 had been pregnant at some time during their relationship. While 42 per cent of these women experienced violence during the pregnancy (292,100), 20 per cent experienced domestic violence for the first time while they were pregnant. In the 2005 Personal Safety Survey, 59 per cent (667,900) of women who experienced violence by a previous partner were pregnant at some time during the relationship; of these, 36 per cent (239,800) reported that violence occurred during a pregnancy and 17 per cent (112,000) experienced violence for the first time when they were pregnant.
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> In 2004 Deborah Walsh and Wendy Weeks published 'What a smile can hide: a report on the study of violence against women during pregnancy'. This survey of pregnant women at the Royal Women's Hospital in Melbourne found that 20 per cent of women experienced violence during their pregnancy. The report includes international and Australian prevalence studies and research, plus a literature review.[48]

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44 Ibid s 21A(2)(d), (ea), (eb), (k).
45 *Raczkowski v The Queen* [2008] NSWCCA 152, [46].
46 *Kennedy v The Queen* (2008) 181 A Crim R 185, [8].
47 *Family Violence Act 2004* (Tas) s 13(a).
48 Parliament of Australia—Parliamentary Library, *Domestic Violence in Australia—An Overview of the Issues* (2003, updated 2006).

7.50 The South Australian sentencing legislation specifies the following as a relevant factor, without classifying it as an aggravating (or mitigating) factor:

> if the offence was committed by an adult in circumstances where the offending conduct was seen or heard by a child (other than the victim (if any) of the offence or another offender)—those circumstances.[49]

7.51 In other jurisdictions case law indicates that family violence may be treated as an aggravating factor. For example, in *R v MPF* the court stated, with respect to the offence being committed in a 'domestic' context:

> Moreover, I think it can be seen to be aggravating both as to its potential consequences and also inasmuch as a husband (or a wife) is in a privileged position in relation to a spouse. They each know the everyday movements, the habits, the likes and dislikes, the fears and pleasures of their spouse, which might enable them not only to effect an attack more easily on their victim but also to devise the kinds of attack which could more seriously affect their spouse, not merely physically, but so as to cause mental anguish … The matter need not be examined any further, for in truth the advantages that he had, including that of surprise, justified the judge in holding that it was proper to view more seriously this attack occurring in the domestic context of this family.[50]

7.52 Some overseas jurisdictions treat the fact that the crime occurred in the context of a family relationship as an aggravating factor in sentencing. In Canada, the *Criminal Code* was amended in 1996 to provide that it is an aggravating factor if there is evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner.[51] On 3 April 2006, the Parliament of Iceland passed an amendment to art 70 of the General Penal Code with regard to family violence, as follows:

> In the event that an infraction was directed against a man, woman or child closely related to the perpetrator and their family connection is believed to have aggravated the violence of the act, this should generally be taken into account to increase the severity of the punishment.

7.53 The New Zealand sentencing legislation lists as an aggravating factor the fact that the case involved violence against, or neglect of, a child under the age of 14 years.[52]

ALRC's previous consideration of aggravating factors

7.54 In the context of discussing the range of sentencing factors relevant to the sentencing of federal offenders, ALRC 103 expressed the view that federal sentencing legislation should not distinguish between sentencing factors that aggravate a sentence,

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49 *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(ed).

50 *R v MFP* [2001] VSCA 96, [20].

51 *Criminal Code 1985* RSC c C–46 (Canada) s 718.2(a)(ii). It is also an aggravating factor if the person abused a position of trust or authority in relation to the victim: s 718.2(a)(iii).

52 *Sentencing Act 2002* (NZ) s 9A. Section 9 lists general aggravating factors, some of which may be relevant to family violence, such as an abuse of power or authority.

and those that mitigate a sentence. Professors Richard Fox and Arie Freiberg have expressed the view that it is

> artificial, misleading and possibly an error in principle to isolate certain factors and label them as always either aggravating or mitigating the circumstances of the offence and, consequently, its penalty.[53]

7.55 The relationship between mitigating and aggravating factors is complicated by the fact that the opposite of a mitigating factor is not necessarily an aggravating factor, and vice versa. For example, a plea of guilty could be a mitigating factor, but it is improper to treat a plea of not guilty as an aggravating factor. Similarly, while youth or old age may be a mitigating factor, the fact that an offender's age does not fall into either extreme is not an aggravating factor. Some factors may be either aggravating or mitigating depending on the circumstances. Other factors may serve neither to increase nor to decrease the severity of a sentence, but may guide the court in selecting an appropriate sentencing option or in specifying certain conditions tailored to the needs and circumstances of the offender. Factors that could fall into this category include the cultural background, age, and physical and mental condition of an offender.[54]

7.56 Rather than distinguishing between aggravating and mitigating factors, ALRC 103 took the approach of recommending factors that should not be treated as either aggravating or mitigating. For example, it stated that because an offender's consent is integral to effective participation in a restorative justice process or initiative, it would be improper to treat the absence of consent to participate as an aggravating factor.

Commissions' views

7.57 The Commissions consider that, in some cases, it will be appropriate for a court to consider that the fact that an offender was in a relationship with, or the parent of the victim, as an aggravating factor in sentencing. However, the Commissions have some preliminary concerns about introducing a legislative requirement that would take away a judicial officer's discretion in this regard. For example, if courts were always mandated to treat as aggravating the fact that an offence was committed in the context of a family relationship, this would conceivably apply in circumstances where it may not always be just and appropriate, such as in the case of:

- children who commit acts of violence against their parents, siblings or other family members;
- mothers suffering post-natal depression who commit acts of violence against their children; or

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53 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), [3.103].

54 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), [6.153], [6.157], [6.159].

- any person with a mental illness who commits an act of violence against a family member.

7.58 The Commissions are therefore interested in hearing stakeholder views on the appropriateness or otherwise of treating as aggravating the fact that an offence was committed in the context of a family relationship. For example, would it be appropriate to adapt the approach taken in Iceland which makes a specific link between a family relationship and an escalation of violence? If such an approach were considered appropriate, the Commissions are also interested in hearing how 'family relationship' should be construed for such purposes and, in particular, whether the definition of 'family' in family violence legislation should be adopted.

7.59 The Commissions are of the preliminary view that it would, however, be appropriate for sentencing legislation to specify expressly that the fact that an offence has been committed in the context of a family or domestic relationship should not be treated as a mitigating factor. The Commissions heard in consultation that courts have treated a family relationship as a mitigating factor on sentencing in circumstances where domestic partners or spouses have reconciled.[55] To treat such a factor as mitigating can be seen to trivialise violence committed in a domestic setting.

Question 7–9 Should the fact that an offence was committed in the context of a family relationship be an aggravating factor in sentencing? If so, to which family relationships should this apply? Is making a specific link between a family relationship and the escalation of violence an appropriate model?

Proposal 7–2 State and territory sentencing legislation should provide that the fact that an offence was committed in the context of a family relationship should not be considered a mitigating factor in sentencing.

Sentencing guidance

7.60 Another option for reform is the use of specific guidance on sentencing in the context of family violence. For example, the Sentencing Guidelines Council in the UK has published a guideline on sentencing in the context of family violence.[56] This guideline must be considered by courts pursuant to s 172 of the *Criminal Justice Act 2003* (UK) and

> makes clear that offences committed in a domestic context should be regarded as being no less serious than offences committed in a non-domestic context. Indeed,

55 Australian Domestic & Family Violence Clearinghouse, *Consultation*, Sydney, 27 January 2010.
56 Sentencing Guidelines Council, *Overarching Principles: Domestic Violence* (2006).

> because an offence has been committed in a domestic context, there are likely to be aggravating factors present that make it more serious.[57]

7.61 These aggravating factors include: an abuse of trust and power; the particular vulnerability of the victim; exposure of children to violence; where contact arrangements are exploited in order to commit an offence; a proven history of violence or threats by an offender in a domestic setting; a history of disobedience to court orders; and if the victim is forced to leave home.[58]

7.62 The guideline also provides guidance on the application of mitigating and other factors in the family violence context. For example, in relation to the factor of good character, it states that:

> one of the factors that can allow domestic violence to continue unnoticed for lengthy periods is the ability of the perpetrator to have two personae. In respect of an offence of violence in a domestic context, an offender's good character in relation to conduct outside the home should generally be of no relevance where there is a proven pattern of behaviour.[59]

7.63 The guideline also cautions against taking the expressed wishes of the victim into account in sentencing in the context of family violence. Reasons for this include:

- it is undesirable that a victim should feel responsibility for the sentence imposed;
- there is a risk that the plea for mercy made by a victim will be induced by threats made by, or by a fear of, the offender;
- the risk of such threats will be increased if it is generally believed that the severity of the sentence may be affected by the wishes of the victim.[60]

7.64 Guidance on sentencing is provided in a number of ways in Australian states and territories. For example, the Judicial Commission of NSW and the Judicial College of Victoria each produce sentencing bench books.[61] A bench book outlines what judicial officers 'may need to know, understand and do on a day-to-day basis', in the form of a practice manual.[62] Bench books are not intended to lay down or develop the

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57 Ibid, i.
58 Ibid, 4–5.
59 Ibid, 5–6.
60 Ibid, 6.
61 Judicial Commission of New South Wales, *Sentencing Bench Book* (2009) <www.judcom.nsw.gov.au/publications/benchbks/sentencing/index.html> at 21 February 2010; Judicial College of Victoria, *Victorian Sentencing Manual* (2009). For a brief overview of bench books—including those that deal with ethnic, gender and cultural issues, such as the *Aboriginal Bench Book for Western Australian Courts*: see Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), 498–500.
62 L Armytage, 'Developing Bench Books for Tribunals: Some Guidelines' (Paper presented at Sixth Annual Australasian Institute of Judicial Administration Conference, Sydney, 5 June 2003), 2.

law.[63] Bench books have an important role to play as part of a national judicial education and support program.[64]

7.65 The National Council to Reduce Violence against Women and their Children (the National Council) recommended the production of a model bench book, in consultation with jurisdictions, and as part of a national professional development program for judicial officers on family violence. This bench book would 'provide a social context analysis and case law to complement existing resources and enhance the application of the law'.[65]

7.66 Another form of guidance is through the use of 'guideline judgments' by criminal courts of appeal, as provided for in NSW, Victoria, Western Australia and South Australia.[66] As the ALRC stated in its inquiry on the sentencing of federal offenders, guideline judgments are generally delivered by an appellate court in the context of a particular case, but go further than the points raised on appeal to suggest a sentencing scale for the category of crime before the court. They may indicate how particular aggravating or mitigating factors should be reflected in a sentence or suggest how sentences are to be determined for a category of offences or type of offender.[67]

7.67 The advantages of guideline judgments are said to be that they foster consistency while retaining judicial discretion; accommodate special or exceptional cases while serving the aims of rehabilitation, denunciation and deterrence; allow a judge to respond to all the circumstances of a case; result in fewer appeals by the prosecution; and lower pressure on the executive arm of government to respond to media attention.[68] On the other hand, the potential disadvantages of guideline judgments include erosion of judicial discretion, and the possibility of greater use of imprisonment due to a new emphasis on establishing exceptional circumstances to justify departure from a guideline.[69]

7.68 Regardless of the merits of guideline judgments, it is clear that in federal criminal matters a court cannot give a guideline judgment in the nature of an advisory opinion. [70] In *Wong v The Queen*,[71] the High Court appears to have cast doubt on the constitutional validity of guideline judgments at the federal level in some other

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63 *R v Forbes* [2005] NSWCCA 337, [72]–[76].

64 Judicial education and use of bench books is further discussed in Ch 19.

65 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), 121.

66 *Crimes (Sentencing Procedure) Act 1999* (NSW), Pt 3 Div 4; *Sentencing Act 1991* (Vic); *Sentencing Act 1995* (WA) ss 143, 143A; *Criminal Law (Sentencing) Act 1988* (SA) ss 29A–29C.

67 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), [21.22].

68 R Johns, *Sentencing Law: A Review of Developments in 1998–2001* (2002) NSW Parliament, 25–26.

69 P Byrne, 'Guideline Sentencing: A Defence Perspective' (1999) 11 *Judicial Officers' Bulletin* 81, 81.

70 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357.

71 *Wong v The Queen* (2001) 207 CLR 584.

circumstances. *Wong* has created a climate of uncertainty around guideline judgments, which does not provide a firm foundation for law reform in this area.[72]

7.69 While guideline judgements at the federal level are constitutionally problematic, they remain an option at the state and territory level. Such judgements do not have to specify penalty levels. However, guideline judgements do not appear to have been used outside of NSW,[73] and no such judgment has been made in relation to family violence in NSW.[74] Research suggests that guideline judgments are now less frequently used in NSW because of the introduction of standard minimum sentencing.[75]

Commissions' views

7.70 Australian case law provides some guidance in sentencing in the context of family violence. It would be useful to have this guidance consolidated in an accessible format for the use of judicial officers who sentence family violence offenders. Such guidance would promote consistency in interpretation and application of sentencing legislation in the family violence context.

7.71 Guideline judgments present a limited solution. Other options for reform include the development of bench books in each jurisdiction which address sentencing in family violence matters. Alternatively, the Commissions endorse the recommendation of the National Council for the production of a model bench book, in consultation with jurisdictions, and as part of a national professional development program for judicial officers on family violence. This bench book would 'provide a social context analysis and case law to complement existing resources and enhance the application of the law'.[76] A model bench book could play a significant role in guiding judicial officers in sentencing in family violence matters, by drawing attention to the particular features and dynamics of family violence of which judicial officers should be aware in sentencing offenders, as well as promoting national and intra-state consistency.

7.72 There are particular issues which arise for sentencing for breach of protection orders, which could be addressed in a model bench book. As noted in Chapter 6, there appears to be merit in providing courts with guidance about the particular repercussions on victims of imposing fines on offenders for family-violence related

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72 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), [21.37]; see also [21.28]–[21.35].

73 The Full Court of the South Australian Supreme Court has considered, and rejected, one application for such a judgment: *R v Payne* [2004] SASC 160. The Western Australian Supreme Court has also rejected applications for such a judgment: *Yates v Western Australia* [2008] WASCA 144; *Herbert v The Queen* [2003] WASCA 61; *Alan Jones v The Queen* [1998] WASCA 123.

74 Supreme Court of New South Wales, *Guideline Judgments* <www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_guidelinejudg> at 1 April 2010.

75 J Anderson, 'Guideline Judgments and Standard Minimum Sentencing—An Uneasy Alliance in the Way of the Future' (Paper presented at Sentencing: Principles, Perspectives and Possibilities, Canberra, 10 February 2006).

76 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), 121, Rec 4.4.2.

offences, as well as guidance on appropriate types of non-financial sanctions to impose for breach of protection orders where the breach does not involve violence.

Proposal 7–3 The Australian Government—in conjunction with state and territory governments, the National Judicial College of Australia, the Judicial Commission of NSW, and the Judicial College of Victoria—should develop, and maintain the currency of, a model bench book on family violence, which incorporates a section on sentencing in family violence matters.

Family violence as a defence

7.73 In Chapter 4, the Commissions expressed the preliminary view that where a state or territory's criminal legislation recognises family violence as relevant to a defence to homicide—either in its own right or as part of a broader concept of self-defence—family violence should be defined broadly to include both physical and non-physical acts of violence, in the same way that it should be defined under family violence legislation. The Commissions expressed the view that the different policy objectives of the criminal law and family violence legislation are not compromised by the adoption of a common understanding of what constitutes family violence in the context of recognising family violence as relevant to a defence to homicide.

7.74 The legislation of two Australian jurisdictions specifically addresses family violence in the context of defences to homicide—Victoria in the context of an expanded defence of self-defence, and Queensland recognises family violence as a separate defence.

7.75 This chapter considers the extent to which the criminal law should recognise family violence as a concept relevant to a defence for homicide, in circumstances where a victim of family violence kills the family member who was violent towards him or her. This raises the related issue of whether current defences to homicide for victims in violent family relationships are adequate.

7.76 Each state and territory has different laws in relation to the offences of murder and manslaughter as well as different defences to those offences.[77] The most relevant defences in homicides committed in a family violence context are provocation, self-defence, and excessive self-defence. Provocation and excessive self-defence are partial defences to murder, reducing it from an offence of murder to manslaughter. Self-defence is a complete defence to criminal liability.

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77 Sentencing options for persons convicted of murder or manslaughter also differ across states and territories. Most jurisdictions have abolished mandatory life sentences for murder convictions but they remain in place in Queensland, South Australia and the Northern Territory: *Criminal Code* (Qld) s 315; *Criminal Law Consolidation Act 1935* (SA) s 11; *Criminal Code* (NT) ss 157, 161.

7.77 Numerous reports and reviews in the last few decades—both in Australia and overseas—address or touch on the issue of defences to homicide in cases involving family violence.[78] Such reviews have generally acknowledged the gendered nature of the defences of self-defence and provocation, and how these might work against victims of family violence.

7.78 For example, the 1981 New South Wales Task Force on Domestic Violence recommended 'that the definitions of unlawful homicide and defences … be amended so as to give full and proper recognition [to] the situation of the battered woman who kills her tormentor'.[79] The report concluded that the law of homicide in NSW 'did not satisfactorily deal with those situations where a woman who has for many years been the victim of domestic abuse kills the person who has abused her',[80] and that the defences of self-defence and provocation related to stereotyped male models of behaviour, without allowing adequately for typical patterns of female behaviour. The report provided the example of a woman who shoots her husband in his sleep, after enduring years of domestic assault, not being able to claim self-defence or provocation and suggested that arguably another defence of 'desperation' is required for these kinds of circumstances.[81]

7.79 Some laws have been reformed as a result of the above-mentioned reviews, but with the exception of the Queensland legislation discussed below, most reforms have not introduced a separate defence to accommodate victims of family violence.

7.80 The discussion below briefly outlines jurisdictional approaches to the defences to homicide.

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78 See, eg, Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Project No 94 (2007); Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004), see especially ch 2–4; New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants* (2001), [13]; Northern Territory Law Reform Committee, *Self Defence and Provocation* (2000), iii, 43–45; Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5, Fatal Offences Against the Person: Discussion Paper* (1998); New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide* (1997); Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, ALRC 69 (1994), [12.3]–[12.6]; Criminal Law Officers Committee, *Model Criminal Code—Chapter 2, General Principles of Criminal Responsibility: Final Report* (1992); New South Wales Task Force on Domestic Violence, *Report of New South Wales Task Force on Domestic Violence to Honourable NK Wran QC, MP Premier of New South Wales* (1981).

79 New South Wales Task Force on Domestic Violence, *Report of New South Wales Task Force on Domestic Violence to Honourable NK Wran QC, MP Premier of New South Wales* (1981), 6.

80 Ibid, 67.

81 Ibid, 68–69. The *Crimes (Homicide) Amendment Act 1982* (NSW) sch 12 amended the provision dealing with provocation in *Crimes Act 1900* (NSW) s 23 to recognise conduct of the deceased as provocative irrespective of whether it occurred immediately before the act or omissions causing death or at any previous time. More recent views about the gendered nature of provocation are touched on below.

Self-defence and excessive self-defence

Common law

7.81 The common law has long recognised that a person is justified in using some force in legitimate self-defence. It is lawful to act in self-defence, and therefore it acts as a complete defence to criminal liability, with the onus on the prosecution to negative self-defence.[82] The common law doctrine of self-defence limits the use of force to situations where it is necessary for the accused to use force, and the degree of force is not excessive in the circumstances.[83]

7.82 The common law position on excessive self-defence, stated by the High Court in *Viro v The Queen* is that self-defence which was necessary but involved the use of excessive force involving death, should lead to a verdict of either manslaughter or murder—depending on whether the accused believed that the force the accused used was reasonably proportionate to the danger which the accused believed he or she faced.[84] In other words, excessive self-defence can, in certain circumstances, act as a partial defence.

Model Criminal Code

7.83 In 1992, the Standing Committee of Attorneys-General (SCAG) Criminal Law Officers Committee published the *Model Criminal Code—Chapter 2, General Principles of Criminal Responsibility Report*. That report recommended the following legislative definition for self-defence:

> 313. Self-defence
>
> A person is not criminally responsible for an offence if the conduct constituting the offence was carried out by him or her in self-defence.
>
> 313.1 Conduct is carried out by a person in self-defence if
>
> - the person believed that the conduct was necessary
>   - to defend himself or herself or another person; or
>   - to prevent or terminate the unlawful imprisonment of himself or herself or another person; or
>   - to protect property from unlawful appropriation, destruction, damage or interference; or
>   - to prevent criminal trespass to any land or premises; or
>   - to remove from any land or premises a person who is committing criminal trespass; and

82 D Brown and others, *Brown, Farrier, Neal and Weisbrot's Criminal Laws—Material and Commentary on Criminal Law and Process in New South Wales* (4th ed, 2006), 627.

83 Ibid.

84 *Viro v The Queen* (1978) 141 CLR 88, 146–147.

> • his or her conduct was a reasonable response in the circumstances as perceived by him or her.
>
> 313.2 This section does not apply if force involving the intentional infliction of death or really serious injury is used in protection of property or in the prevention of criminal trespass or in the removal of such a trespasser.
>
> 313.3 This section does not apply if the conduct to which the person responded was lawful and that person knew that it was lawful.
>
> 313.3.1 Conduct is not lawful for the purposes of section 313.3 merely because the person carrying it out is not criminally responsible for it.[85]

7.84 This definition of self-defence imports two tests. The test as to necessity of the conduct is subjective, but the test as to the proportionality of the conduct purportedly carried out in self-defence is objective. It requires the response of the accused to be objectively proportionate to the situation that the accused subjectively believed she or he faced.

7.85 The SCAG Model Criminal Code Officers Committee (MCCOC) also discussed excessive self-defence in its 1998 discussion paper and recommended that a partial defence of this nature not be re-introduced:

> On balance, the Committee is not in favour of re-introducing excessive self-defence, particularly in the context of abolishing provocation. As a concept, excessive self-defence is inherently vague. This aspect has to date resulted in no satisfactory test being promulgated.[86]

States and territories

7.86 In 2002, NSW introduced new laws in relation to self-defence and reintroduced the defence of excessive self-defence.[87] The Attorney General stated in the Second Reading Speech of the Crimes Amendment (Self-Defence) Bill 2001 (NSW), that:

> The Bill follows the general concept of self-defence laid down by the Model Criminal Code, so that a defendant who actually believed it was necessary to do what he did to repel an attack, even if he was wrong about that perception, may seek to rely on self-defence, so long as it was a reasonable response in the circumstances as perceived by the defendant. However, the bill contains two departures from the Model Criminal Code. The first departure is the re-introduction of the law of excessive self-defence ... This was the common law position as previously stated by the High Court in *Viro* …
>
> … The second difference to the Model Criminal Code relates to self-defence in the context of defence of property ... The Model Criminal Code limits the defence of property and criminal trespass by not permitting death or really serious harm to be occasioned.

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85 Criminal Law Officers Committee, *Model Criminal Code—Chapter 2, General Principles of Criminal Responsibility: Final Report* (1992), 70.

86 Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5, Fatal Offences Against the Person: Discussion Paper* (1998), 113.

87 *Crimes Amendment (Self-Defence) Act 2001* (NSW).

> This limit has been modified under the Bill. Obviously, it is not desirable to encourage persons to defend their property with excessive force. The Model Criminal Code emphasised the need to consider the value of human life by indicating that really serious injury or death could never enliven a self-defence issue in defence of property or to prevent criminal trespass. …
>
> There can be no circumstances where it is appropriate to intentionally or recklessly take a human life in the protection of property or to prevent criminal trespass, although it may be permissible to do serious bodily harm in certain circumstances if necessary and reasonable.[88]

7.87 Legislative provisions govern self defence in NSW,[89] Victoria,[90] Queensland,[91] Western Australia,[92] South Australia,[93] Tasmania,[94] ACT,[95] and the Northern Territory.[96]

7.88 In introducing amendments to self-defence in Western Australia, Suzanne Ellery, the Minister for Child Protection stated in the Second Reading Speech of the Criminal Law Amendment (Homicide) Bill 2008 that:

> Another important change contained in this bill is that the harmful act that the person believes it is necessary to act against in self-defence will not have to be imminent. By providing that the threat need not be imminent, the defence will more readily apply to women who are the victims of domestic violence in the so called 'battered spouse' situation. It will still be necessary for persons to show that there are reasonable grounds for the person's belief that the act of self-defence was necessary and that the force used must be objectively reasonable in the circumstances the person believed to exist. It is not expected that this provision will apply to situations in which it would be reasonable for the person to take other steps, such as going to the police or escaping from the harmful situation.[97]

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88 NSW, *Parliamentary Debates*, Legislative Assembly, 19093 (B Debus–Attorney General).

89 *Crimes Act 1900* (NSW) s 418.

90 *Crimes Act 1958* (Vic) ss 9AC, 9AE. A new offence of defensive homicide is contained in *Crimes Act 1958* (Vic) s 9AD, that is, where an accused kills believing the conduct to be necessary to defend himself or herself or another from the infliction of death or serious injury but where he or she did not have reasonable grounds for that belief. This offence arose from the recommendation of the VLRC to re-introduce the defence of excessive self-defence: Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004), Rec 9.

91 *Criminal Code Act 1899* (Qld) ss 271, 272.

92 *Criminal Code Act Compilation 1913* (WA) s 248(4). These provisions follow the example of the Model Criminal Code: Western Australia, *Parliamentary Debates*, Legislative Council, 15 May 2008, 3123 (S Ellery–Minister for Child Protection).

93 *Criminal Law Consolidation Act 1935* (SA) s 15(1).

94 *Criminal Code Act 1924* (Tas) s 46.

95 *Criminal Code* (ACT) s 42.

96 *Criminal Code* (NT) s 43BD. The Northern Territory provision largely adopts the self-defence provisions from the Model Criminal Code, following the recommendation in Northern Territory Law Reform Committee, *Self Defence and Provocation* (2000), 3–4.

97 Western Australia, *Parliamentary Debates*, Legislative Council, 15 May 2008, 3123 (S Ellery–Minister for Child Protection).

7.89 In South Australia, it is also a partial defence to a charge for murder—thereby reducing the offence to manslaughter—if the accused genuinely believed the conduct to which the charge relates to be necessary and reasonable for a defensive purpose; but the conduct was not reasonably proportionate to the threat the accused genuinely believed to exist.[98] As foreshadowed above, a provision to similar effect is contained in the crimes legislation of NSW[99]—as well as that of Western Australia.[100]

Expanded self-defence to take into account family violence

7.90 As noted in Chapter 4, where family violence is alleged, s 9AH of the *Crimes Act 1958* (Vic) allows evidence of family violence[101] to be adduced in cases of murder,[102] defensive homicide[103] and manslaughter.[104] It does not operate as a separate defence in itself, but allows considerations of family violence to be relevant to self-defence.[105] Under s 9AH, where family violence is alleged, self-defence is available even if an accused person is responding to harm that is not immediate; or his or her response uses disproportionate force.

7.91 Types of evidence that can be adduced include:

- evidence about the history of the relationship between the accused person and a family member;
- the general nature and dynamics of relationships affected by family violence;
- the cumulative effect, including psychological effect, on the person or a family member of family violence; and
- social, cultural or economic factors that impact on the person or a family member who has been affected by family violence.

7.92 The Victorian model has been criticised by one lawyer as a 'breathtaking extension' of the law of self-defence:

> Taken to their logical (or, perhaps, illogical) conclusion, these new provisions suggest that a number of acts of trivial 'harassment' (whatever that term might embrace) by a

98 *Criminal Law Consolidation Act 1935* (SA) s 15(2).
99 *Crimes Act 1900* (NSW) s 421.
100 *Criminal Code Act Compilation 1913* (WA) s 248(3). The partial defence of excessive self-defence was introduced by the *Criminal Law Amendment (Homicide) Act 2008* (WA).
101 Chapter 4 discusses the definition of family violence used in *Crimes Act 1958* (Vic), as compared with that used in the *Family Violence Protection Act 2008* (Vic), and makes a proposal in this regard.
102 *Crimes Act 1958* (Vic) s 9AC.
103 Ibid s 9AD.
104 Ibid s 9AE.
105 These provisions of family violence only apply to homicide offences, so the common law test as outlined in *Zecevic v The Queen* (1987) 162 CLR 645, 661 continues to apply to all other offences where self-defence is applicable: P Priest, *Defences to Homicide* (2005) <www.vicbar.com.au/webdata/CLEFiles/Defences%20to%20Homicide.pdf> at 22 January 2010.

> family member, which do not involve actual or threatened abuse, might permit a person to use disproportionate force to kill that family member even where 'harm' is not 'immediate'.[106]

7.93 The first case in which s 9AH was applied was *DPP v Anthony Sherna*.[107] In that case, Sherna—the accused—strangled his de facto wife and led evidence of family violence, including economic and psychological abuse, inflicted upon him over a period of 18 years.[108] Justice Beach rejected an application by the prosecution to take the issue of self-defence and defence of another away from the jury, even if such pleas may have been 'weak' and 'tenuous'.[109] Sherna was found guilty of manslaughter and sentenced to 14 years' imprisonment with a non-parole period of 10 years.

Provocation

Model Criminal Code

7.94 In 1998, the MCCOC recommended that the partial defence of provocation should be abolished, and that:

> Those considerations which currently provide a basis for the partial defence should be considered for their relevance to the determination of an appropriate sentence after conviction.[110]

7.95 In considering whether or not provocation should be abolished, the MCCOC noted that:

> The balance of opinion sees provocation to operate in practice in a gender biased fashion. Although the courts have tinkered with the legal principles, formulations of the doctrine which reduce the suddenness requirement are artificial and contrary to its historical foundation. The theory underlying battered woman syndrome does not comfortably co-exist with that of provocation.
>
> The real issue in deciding whether the partial defence of provocation should be retained is one of culpability —whether the defendant should be culpable for murder, or for the lesser crime of manslaughter ... [W]hile provocation in its modern setting is designed to afford a middle ground to better reflect criminal culpability, it falls significantly short of that goal by reason of its limited focus which inescapably gears the partial defence towards male patterns of aggression and loss of self-control (its origin) at the expense of the sanctity of human life.[111]

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106 P Priest, *Defences to Homicide* (2005) <www.vicbar.com.au/webdata/CLEFiles/Defences%20to%20Homicide.pdf> at 22 January 2010, 8.

107 *Director of Public Prosecutions v Sherna* [2009] VSC 494.

108 A forensic psychologist testified that Sherna showed signs of 'battered woman syndrome' including chronic depression, low and decreasing self-esteem and learnt helplessness: I Munro, 'Anthony Sherna Jailed for Strangling Abusive Partner', *The Age*, 20 November 2009.

109 *Director of Public Prosecutions v Sherna* [2009] VSC 494.

110 Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5, Fatal Offences Against the Person: Discussion Paper* (1998), 107.

111 Ibid, 103.

States and territories

Abolition of defence

7.96 Provocation has been abolished in Western Australia,[112] Victoria,[113] and Tasmania.[114]

7.97 The Law Reform Commission of WA recommended that the defence be abolished, but only if the mandatory penalty of life imprisonment for murder was replaced with a presumptive sentence of life imprisonment.[115] It expressed the view that there was no clear justification for retaining the defence of provocation except the continued existence of mandatory life imprisonment for murder.[116]

7.98 The Tasmanian Attorney-General in the Second Reading Speech of the Criminal Code Amendment (Abolition of Defence of Provocation) Bill 2003 also stated that provocation was an anachronism 'now that the death penalty and mandatory life imprisonment have been removed'.[117] A similar statement was made by the Victorian Attorney-General in the Second Reading Speech of the Crimes (Homicide) Bill 2005:

> The courts developed the partial defence of provocation at a time when murder carried a mandatory death penalty. The partial defence is outdated now that provocation can simply be taken into account, if relevant, alongside a range of other factors in the sentencing process.[118]

7.99 A number of other reasons were advanced for the abolition of the defence by the Law Reform Commission of WA, the Victorian Law Reform Commission and the Tasmanian Attorney-General.[119] These included the following:

- The jury must take into account the personal characteristics and background of the accused when assessing the gravity of the provocation but then the jury is expected to disregard these factors for the second stage of the test in assessing

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112 *Criminal Law Amendment (Homicide) Act 2008* (WA) s 12.

113 *Crimes (Homicide) Act 2005* (Vic).

114 *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas).

115 Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Project No 94 (2007), Rec 29.

116 In Western Australia, a person who is guilty of murder must be sentenced to life imprisonment unless that sentence would be clearly unjust given the circumstances of the offence and the person; and the person is unlikely to be a threat to the safety of the community when released from imprisonment in which case the person is liable to imprisonment for 20 years: *Criminal Code Act Compilation 1913* (WA) s 279(4).

117 Tasmania, *Parliamentary Debates*, House of Assembly, 20 March 2003, 60 (J Jackson—Attorney-General and Minister for Justice and Industrial Relations).

118 Victoria, *Parliamentary Debates*, Legislative Assembly, 6 October 2005, 1349 (R Hulls—Attorney-General).

119 See also Office of the Director of Public Prosecutions (Tas), *Annual Report 2000–2001*, 6 in which the DPP also raised concerns about the defence of provocation.

the power of self-control of an ordinary person.[120] The 'correct balance between subjective and objective factors is difficult to strike'.[121]

- The defence of provocation creates two categories of intentional killing when the distinction ought to be between intentional killing and unintentional killing.[122]

- The moral basis of provocation is incompatible with contemporary community values and views on what is excusable behaviour:

> The continued existence of provocation as a separate partial defence to murder partly legitimates killings committed in anger. It suggests there are circumstances in which we, as a community, do not expect a person to control their impulses to kill or to seriously injure a person. This is of particular concern when this behaviour is in response to a person who is exercising his or her personal rights, for instance to leave a relationship or to start a new relationship with another person.[123]

- Retaining a partial defence of provocation also sends a message that the homicide victim must bear some of the blame for, his or her own death. This can be deeply distressing for friends and family of homicide victims.[124]

- Provocation is and can be adequately considered as a factor during sentencing.[125]

- The defence of provocation is gender biased and unjust. The defence fails to recognise that men kill women in very different circumstances to those where women kill men. Men are motivated to kill their partners out of jealousy, and a need for control based on threats to leave and issues of infidelity whilst women kill their partners because of a history of family violence.[126] Further:

> The 'suddenness element of the defence is more reflective of male patterns of aggressive behaviour. The defence was not designed for women and it is argued that it is not an appropriate defence for those who fall into the 'battered women syndrome.'[127]

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120 Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Project No 94 (2007), 207.
121 Ibid, 209.
122 Ibid, 218.
123 Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004), 56.
124 Ibid.
125 Tasmania, *Parliamentary Debates*, House of Assembly, 20 March 2003, 60 (J Jackson—Attorney-General and Minister for Justice and Industrial Relations).
126 Victorian Law Reform Commission, *Defences to Homicide: Final Report*, (2004) 29.
127 Tasmania, *Parliamentary Debates*, House of Assembly, 20 March 2003, 60 (J Jackson—Attorney-General and Minister for Justice and Industrial Relations). See also Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Project No 94 (2007), 214, 216 which refer to provocation being based on male behaviour and the gender inequality in the application of the defence to women who kill long term abusive partners.

- The defence of provocation can be subject to abuse.[128]

Retention of defence

7.100 Provocation remains a defence in NSW, the ACT, the Northern Territory and Queensland.

7.101 In NSW, provocation is available as a partial defence to murder.[129] In 1997, the NSWLRC recommended that the defence of provocation be retained.[130] It expressed the view that there are circumstances in which a person's mental state is impaired by a loss of self control, thereby reducing the culpability of a person who kills; and not warranting that person being labelled a 'murderer':

> A conviction of manslaughter ensures a greater likelihood that the community will understand and accept a reduced sentence which reflects a lesser degree of culpability.[131]

7.102 The NSWLRC considered the application of the defence of provocation in family violence circumstances. It acknowledged that concern is sometimes expressed that the defence of provocation is used inappropriately to excuse offenders who kill their partners because of sexual jealousy or possessiveness:

> [T]here may be a risk that a particular accused will seek to rely on the defence of provocation to excuse an act of violence which was in fact premeditated and was committed in the context of a history of violence and domestic abuse. However, that risk hardly justifies abolishing the defence. To do so would exclude other, deserving cases from the reduction of murder to manslaughter by way of the defence of provocation and, in effect, would be to throw the baby out with the bathwater.[132]

7.103 The NSWLRC made a number of recommendations to reform the defence of provocation, none of which has been adopted. In particular, it recommended the abolition of the 'ordinary person' test with the result that:

> women whose power to exercise self-control has been impaired by reason of a long history of abuse are not excluded from the defence through the imposition of some objective standard which does not take that factor into account in determining "ordinary" powers of self-control. Under our reformulation, all factors which may affect a woman's power of self-control, including a long history of being abused, are to be considered by the jury in arriving at their verdict.[133]

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128 Tasmania, *Parliamentary Debates*, House of Assembly, 20 March 2003, 60 (J Jackson—Attorney-General and Minister for Justice and Industrial Relations).

129 *Crimes Act 1900* (NSW) s 23.

130 New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide* (1997), Rec 1.

131 Ibid, [2.24].

132 Ibid, [2.37].

133 Ibid, [2.144].

7.104 The NSWLRC also recommended that legislative amendments make it clear that the defence of provocation may apply to provocative conduct occurring outside the accused's presence.[134] It noted that this approach ensures

> that the defence of provocation is not automatically excluded from cases where a woman kills her partner following incidents of abuse by that partner which are not witnessed personally by the woman, such as sexual and physical assaults on her children.[135]

7.105 Provocation is a partial defence in the ACT[136] and the Northern Territory;[137] and in each case the conduct of the deceased provoking the offender may have occurred immediately before the act or omission causing death or at any previous time.

7.106 In 2000, the Law Reform Committee of the Northern Territory recommended that the defence of provocation should be amended to abolish the requirement for the accused to have 'acted on the sudden and before there was time for his passion to cool'.[138] In 2006, the Northern Territory introduced a new provision dealing with the defence of provocation.[139] The revised provision, currently in force, imposes an objective test as to whether the provocation was sufficient to have induced an ordinary person to have so far lost self control as to have formed an intent to kill or cause serious harm to the deceased.[140] A person's gender, cultural background or ethnicity is not relevant to applying this test of assessing the power of self-control of a person. In the Second Reading Speech of the Criminal Reform Amendment Bill (No 2) 2006 the Attorney-General noted that the revised defence would address family violence issues:

> The revised provision also removes the requirement for the defendant to have acted 'on the sudden and before there was a time for his passion to cool'. This requirement has to date made the defence unavailable in cases where there has been a history of serious abuse inflicted on the defendant, which ultimately leads them into attacking their abuser. This is the situation in what is commonly referred to as 'battered women' cases.
>
> The bill also clarifies that the defence is available in circumstances where the provocation is directed at someone other than the accused, for example towards children of the defendant. The government considers that this revised provision will reflect the best law on this defence.[141]

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134 Ibid, [2.91].

135 Ibid, [2.144] (citation omitted).

136 *Crimes Act 1900* (ACT) s 13. In the ACT, a person who is guilty of committing murder is liable to imprisonment for life but a court may impose a sentence for a stated term: *Crimes (Sentencing) Act 2005* (ACT) s 32(1); *Crimes Act 1900* (ACT) s 12.

137 *Criminal Code* (NT) s 158. In the Northern Territory, a person who is guilty of murder is liable to a mandatory term of imprisonment for life: s 157. A person who is guilty of manslaughter is liable to imprisonment for life but this penalty is not mandatory: s 161.

138 Northern Territory Law Reform Committee, *Self Defence and Provocation* (2000), 47.

139 *Criminal Reform Amendment Act (No 2) 2006* (NT) ss 8, 17.

140 *Criminal Code* (NT) s 158(2).

141 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 31 August 2006, 3021 (P Toyne—Minister for Justice and Attorney-General).

7.107 In Queensland, the defence of provocation is limited to circumstances in which the accused kills 'in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool'.[142]

Overseas

7.108 On 8 December 2009 the defence of provocation was repealed in New Zealand. This followed two reports of the New Zealand Law Commission (NZLC) which recommended abolition of the partial defence—one published in 2001,[143] and the other published in 2007.[144] In the latter report, the NZLC specifically considered the effect of the defence of provocation on battered defendants. It concluded that:

> For the majority of battered defendants, self defence will tactically offer a preferable alternative to provocation, because it results in an acquittal. … [P]rovocation is not benefiting battered defendants sufficiently to warrant its retention, and our review of case law confirms this.[145]

7.109 In contrast, the defence of provocation is available in England and Wales.[146] In 2006, the Law Commission reviewed the defence of provocation and recommended that there be legislative reform to include circumstances in which the defendant acted in response to 'fear of serious violence towards the defendant or another'.[147] The Law Commission considered that this reform would be sufficient to meet the criticisms that the defence of provocation 'makes no provision for fear of serious violence to reduce murder to manslaughter'[148] and that it permits the reduction of the offence from murder to manslaughter in cases 'where the provoked murder may have been little more than a reflection of the continuing cultural acceptability of men's use of violence in anger.'[149]

Separate defence of family violence

Queensland

7.110 As discussed in Chapter 4, the *Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Act 2010* (Qld) amends the *Criminal Code* (Qld) to insert a new s 304B which introduces a new partial defence to murder of

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142 *Criminal Code Act 1899* (Qld) s 304. A person who kills in these circumstances is guilty of manslaughter only.

143 New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants* (2001).

144 New Zealand Law Commission, *The Partial Defence of Provocation*, Report 98 (2007). This report identified a number of fundamental flaws with the defence of provocation including that it was a defence biased in favour of heterosexual men: 48–49.

145 Ibid, 58.

146 *Homicide Act 1957* (UK) s 3.

147 The Law Commission, *Murder, Manslaughter and Infanticide*, Report No 304 (2006), 78.

148 Ibid, 91.

149 Ibid. The defence of provocation is also available in Ireland, and in 2009, the Law Reform Commission of Ireland accepted that the defence was unsatisfactory and made a number of recommendations concerning its reform: Law Reform Commission (Ireland), *Defences in Criminal Law* (2009), [7.23]–[7.35].

'killing in an abusive domestic relationship'. The defence will only apply where the person killed had committed 'serious domestic violence' against the accused. In the Second Reading Speech the Attorney-General Cameron Dick stated:

> The defence will be the first of its kind in the country and will operate to provide legal protection for victims in this category of offending.[150]

7.111 Significantly, the Act provides that references to 'an act of domestic violence in a domestic relationship' are to be interpreted in the same way as that state's family violence legislation—the *Domestic and Family Violence Protection Act 1989* (Qld).[151] Therefore, in Queensland 'domestic violence' has the same meaning under civil and criminal legislation. The distinguishing factor in the criminal legislation is the requirement for family violence to be 'serious' in order for the defence to be applicable. The Attorney-General stated in the Second Reading Speech that:

> The use of the term 'serious' within the provision in relation to the level of domestic violence is used as a matter of emphasis to place the nature of the domestic violence in the Supreme Court murder trial in context. … All domestic violence must be condemned not only by government but in all our communities and in our homes. However, the use of the term 'serious' in the bill acts to create an appropriate threshold for the application of this partial defence to a charge of murder.[152]

7.112 Section 304B provides that murder will be reduced to manslaughter if the deceased has committed acts of serious domestic violence against the person in the course of an abusive domestic relationship, and the accused reasonably believes that it is necessary to do the act or make the omission causing death, in order to preserve the accused from death or grievous bodily harm. This defence only applies to murder, and applies only to the victim of family violence and not other family members.[153]

7.113 The Explanatory Notes to the Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Bill 2009 (Qld) state:

> Contemporary research on the actions of victims of abuse who kill their abusers … demonstrates they are usually motivated by fear, desperation and a belief that there is no other viable way of escaping the danger. The option of leaving the relationship is often seen as an unrealistic option; research indicates that persons who suffer violence may perceive a lack of alternatives. The history of abuse in the relationship can allow a person who has suffered violence to read cues and note changes in the abuser's behaviour which signal the onset of escalating violence.

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150 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 November 2009, 3669 (C Dick—Attorney-General and Minister for Industrial Relations), 3770.

151 *Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Act 2010* (Qld) s 3.

152 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 November 2009, 3669 (C Dick—Attorney-General and Minister for Industrial Relations), 3670.

153 As noted above, in Queensland, a mandatory life sentence applies if a person is convicted of murder, unlike in several other jurisdictions where there is discretion in sentencing for murder.

> Decisive action for self-preservation can then be taken before the abuser is in a position to physically overpower them; that action carried out with no loss of self-control and without a deficiency in cognitive processes.
>
> The use of violence against the abuser may be reasonable under the circumstances as the person who has suffered prolonged abuse perceives them to be, but to an ordinary person may be judged as unnecessary or excessive. Even though there may be a history of extensive abuse, because the immediate threat may be modest (viewed in isolation) the hyper vigilance typical of a battered person may result in a killing that is not proportionate to the threat.
>
> The research suggests in some cases the effectiveness of existing defences such as provocation or self-defence are limited for people in this category of offending because of the way in which it has been identified that they kill. It is these limitations that section 304B intends to address.[154]

7.114 The change to the law was made following an independent report commissioned by the Queensland Government[155] after a recommendation made by the Queensland Law Reform Commission that:

> Consideration should be given, as a matter of priority, to the development of a separate defence for battered persons which reflects the best current knowledge about the effects of a seriously abusive relationship on a battered person, ensuring that the defence is available to an adult or a child and is not gender-specific.[156]

7.115 The independent report noted that it did not define 'serious' for the purpose of 'serious violence', but stated that:

> Seriousness is a matter of degree and we believe that such matters are ordinarily best [left] to the judgment of juries. We do, however, suggest the inclusion of a provision making it clear that seriousness is to be assessed by reference to the pattern of violence rather than to the nature of any particular acts making up the pattern.[157]

7.116 The independent report recommended that the defence should be available not only to the victims of seriously abusive relationships but also to family members of the victim who are or have been parties to the domestic relationship in which the abuse has occurred and who act in defence of the victim.[158] This recommendation was not adopted in the Act.

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154 Explanatory Notes, Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Bill (Qld) 2009, 2.

155 G Mackenzie and E Colvin, *Homicide in Abusive Relationships: A Report on Defences, prepared for the Attorney-General and Minister for Industrial Relations* (2009), which recommended that the defence should be framed as a separate defence, applicable only where homicide occurs in the context of an abusive relationship, rather than as general amendment to the law of self-defence: [1.3.2.4].

156 Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation* Report No 64 (2008), Rec 21–4.

157 G Mackenzie and E Colvin, *Homicide in Abusive Relationships: A Report on Defences, prepared for the Attorney-General and Minister for Industrial Relations* (2009), [4.18].

158 Ibid, [1.32.3].

Western Australia

7.117 Relevantly, the Law Reform Commission of Western Australia in its 2007 Report, *Review of the Law of Homicide*, concluded that, rather than introduce a separate defence for victims of family violence, 'it is preferable to amend the law so that it better accommodates the experiences of victims of domestic violence who kill'.[159]

New Zealand

7.118 The NZLC, in its 2001 report, *Some Criminal Defences with Particular Reference to Battered Defendants*, did not support the introduction of a specific defence for victims of family violence who kill or assault their abusers, because it was of the view that the availability of self-defence was adequate. The NZLC recognised that there may be some difficulties for battered persons demonstrating that their conduct was in self-defence, but was of the view that these could be addressed by reforming the provisions relating to self-defence.[160]

Commissions' views

7.119 Many Australian jurisdictions have given substantial consideration to recognising family violence in the context of defences to homicide. A number of important statutory reforms have resulted from this, with a view to better accommodating the experiences of family violence victims who kill. These reforms include:

- reforms to the defence of self-defence—including removal of the requirement for the threat to be imminent (Western Australia);
- reforms to the defence of provocation—including the removal for the requirement for the defendant to have 'acted on the sudden and before there was a time for his passion to cool' (Northern Territory), and removal of the requirement for the provocative conduct of the deceased to have occurred immediately prior to the act or omission causing death (for example, NSW);
- abolition of the defence of provocation in part because of its unsuitability for female victims of family violence (Victoria, Western Australia, Tasmania);
- expanding self-defence to take family violence into account, including express provision for the leading of evidence about family violence (Victoria); and
- creating a new defence of family violence (Queensland).

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159 Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Project No 94 (2007), 289.

160 New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants* (2001), 29–30.

7.120 The Commissions are interested in stakeholder views on whether current defences to homicide for victims in violent family relationships are adequate in each Australian state and territory jurisdiction.

7.121 In the Commissions' preliminary view it is essential for the criminal law to recognise family violence as relevant to a defence to homicide, and that provisions—along the lines of s 9AH of the *Crimes Act 1958* (Vic)—should allow defendants to lead evidence of family violence in the context of a defence to homicide.

7.122 The Commissions support the development of a consistent or harmonious approach by the states and territories to the recognition of family violence as a defence to homicide but do not propose a prescriptive approach as to how each jurisdiction should ensure the recognition of family violence as a defence to homicide. State and territory criminal legislation should provide defences to homicide which accommodate the experiences of family violence victims who kill, recognising the dynamics and features of family violence. This can be achieved by introducing a separate defence of family violence—the Queensland model—or by expanding self-defence to take family violence into account expressly, or by ensuring that any existing defences of provocation and self-defence are otherwise reformed in a way which accommodate the experiences of family violence victims who kill. The Commissions are interested in stakeholder views on how the criminal law can best recognise family violence as relevant to a defence to homicide, and whether there are any problems with current models.

7.123 The Commissions note, for example, that the recommendations of the NSWLRC in 1997 concerning provocation, which would have assisted victims of family violence from availing themselves of this defence, have not been implemented. This is of some concern given that NSW, unlike Victoria, does not give explicit recognition to family violence in the context of self-defence; nor does it have a separate defence of family violence. These matters are relevant factors to be considered in ensuring that defences to homicide in NSW accommodate the experiences of family violence victims who kill.

Question 7–10 Are current defences to homicide for victims in violent family relationships adequate in each Australian state and territory?

Proposal 7–4 State and territory criminal legislation should provide defences to homicide which accommodate the experiences of family violence victims who kill, recognising the dynamics and features of family violence.

Proposal 7–5 State and territory criminal legislation should expressly allow defendants to lead evidence about family violence in the context of a defence to homicide. Section 9AH of the *Crimes Act 1958* (Vic) is an instructive model in this regard.

Question 7–11 How can the criminal law best recognise family violence as relevant to a defence to homicide? For example, should family violence be expressly accommodated within an expanded concept of self-defence or should jurisdictions introduce a separate defence of family violence? What problems or issues arise from current models which recognise family violence as relevant to a defence to homicide?

8. Family Violence Legislation and Parenting Orders

Introduction

8.1 Dealing with family violence is increasingly being recognised as a part of the 'core business' of the federal family courts.[1] An evaluation of the 2006 family law reforms by the Australian Institute of Family Studies (AIFS) reported on a longitudinal study of separated parents, in which nearly two-thirds of the mothers and just over half the fathers indicated that their partner had either emotionally or physically abused them. Half of all clients participating in the survey had experienced controlling behaviour on the part of the other party. The majority of parents who reported having experienced physical hurt before or during separation, indicated that their children had seen or heard some of the violence or abuse.[2]

8.2 The Terms of Reference for this Inquiry direct the Commissions to consider the interaction in practice of state and territory family violence laws with the *Family Law Act 1975* (Cth).[3] A key area where this interaction occurs is in the making of parenting orders that include conditions for contact (broadly referred to in this chapter as parenting orders), which is the focus of this chapter. In particular, interacting laws and practices can:

- enhance or impede courts' awareness and consideration of relevant orders made in another jurisdiction;
- result in courts making conflicting orders; and
- lead to a gap in protection for victims of violence, where neither court takes on responsibility for ensuring that protective conditions are made and enforced.

8.3 In canvassing options for reform, the Commissions draw on major reviews of the operation of div 11 of the *Family Law Act* by Kearney McKenzie & Associates (the Kearney McKenzie Report)[4] and the letter of advice from the Family Law Council to the Attorney-General dated 16 November 2004 (the 2004 Family Law Council advice).[5]

8.4 The effectiveness of *Family Law Act* proceedings in dealing with allegations of family violence—beyond specific issues arising in the context of interaction with state and territory proceedings relating to family violence—is outside the scope of this Inquiry. There is particular controversy about the criterion of determining a child's best interest in relation to a parent's facilitation and encouragement of a close and continuing relationship between the child and the other parent—the so-called 'friendly

1 'Federal family courts' is used to refer to the Family Court of Australia (Family Court) and the Federal Magistrates Court. 'Family courts' also includes the Family Court of Western Australia.
2 Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009), 28.
3 The Terms of Reference are set out at the front of this Consultation Paper.
4 Kearney McKenzie & Associates, *Review of Division 11* (1998).
5 Family Law Council, *Review of Division 11—Family Violence* (2004).

parent' requirement—in s 60CC of the Act. Also contentious is the obligation in s 117AB for courts to make a costs order against a party who knowingly makes a false allegation in the proceedings, including an allegation of family violence. These issues were considered in two 2009 reviews of the federal family law system: Professor Richard Chisholm's review of the practices and procedures of the federal family courts in cases where family violence is alleged (the Chisholm Review) and the 2009 Family Law Council's advice on the intersection of family violence and family law issues (the 2009 Family Law Council advice), the findings of which are discussed later in this chapter.[6]

8.5 Effective interaction between family law proceedings and family violence protection orders also depends on the quality of evidence of family violence provided in proceedings for protection orders. This issue is considered in Chapter 10.

The federal family courts

8.6 The interaction between orders made by the federal family courts and those made under state and territory family violence legislation is the focus of the following three chapters of this Consultation Paper.[7] To inform this discussion, it is useful to set out some of the key features of the Family Court of Australia (Family Court) and the Federal Magistrates Court, including relevant practices and procedures in relation to allegations of family violence. An extensive discussion of these matters is included in the Chisholm Review.[8]

Family Court of Australia

8.7 The Family Court was established as a superior court of record by the *Family Law Act*. Procedural arrangements are principally set out in the *Family Law Rules 2004* (Cth).

8.8 Before commencing proceedings in the Family Court, parties must obtain a certificate under s 60I of the *Family Law Act* from a family dispute resolution (FDR) practitioner, or come within one of the exceptions to the FDR requirement. There is an exception if the Court is satisfied that there are reasonable grounds to believe there has been, or is, a risk of child abuse or family violence. Where parties rely on this exception, they must satisfy the Court that they have received information from a family counsellor or FDR practitioner about services and options available in cases of abuse and violence. Family violence also operates as an exception to the requirement in

6 R Chisholm, *Family Courts Violence Review* (2009); Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009).

7 Part C considers the interaction between the federal family courts and child protection laws.

8 R Chisholm, *Family Courts Violence Review* (2009), apps 3, 4.

the *Family Law Act* that parties seeking parenting orders must attend family counselling to discuss the issues in dispute.[9]

8.9 A Family Court proceeding is begun by filing an Initiating Application (Family Law) and, where relevant, a Notice of Child Abuse or Family Violence (Form 4). A parenting case is listed before a Registrar for a procedural hearing attended by all parties. The Registrar assesses the case and makes recommendations about its future conduct, including whether the parties should be referred to the Child Responsive Program. This program is described in detail in the Chisholm Review.[10] The principal aim of the program is to direct parents to focus on the needs of their children when determining parenting arrangements. A family consultant—a social scientist or psychologist appointed under the Act—is assigned to a case for its duration.[11] One task of the family consultant is to screen for family violence. Where significant concerns are identified, the consultant may take protective action including, where the violence relates to children, notifying relevant child protection authorities. The consultant prepares a written report of the main issues affecting the family, which is made available to the parents and their legal representatives. A copy is also placed on the court file. Parties to parenting proceedings must also complete a parenting questionnaire, which includes questions about family violence and child abuse, alcohol and drug use and current parenting arrangements.

8.10 An independent children's lawyer may be appointed to represent the best interests of the children to the proceedings on the application of any of the parties, an organisation concerned with the child's welfare, or on the initiative of the Court.

8.11 The *Family Law Rules* set out requirements for judicial officers hearing parenting proceedings designed to facilitate a 'less adversarial' trial.[12] The judicial officer is required to be an active participant in hearings for parenting proceedings, including determining the evidence that may be adduced, the witnesses that may be called and subpoenas that may be issued.[13] At any point in the trial, the court may refer parties to FDR or family counselling. On the first day of the hearing, the judge may order the preparation of a family report. Where allegations of family violence have been raised this may include an assessment of the harm that may occur if orders are made or not made, and whether the safety of the child and the parent alleging the family violence or abuse can be secured if there is contact with the person against whom allegations have been made.

8.12 Family Court orders may be made on an interim basis prior to hearings for final orders. In some circumstances, this may be done without notice to the other parties to

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9 *Family Law Act 1975* (Cth) s 65F.
10 R Chisholm, *Family Courts Violence Review* (2009), 224–226.
11 *Family Law Act 1975* (Cth) s 11F.
12 The definition of 'parenting proceedings' is set out in the following section of this chapter.
13 *Family Law Rules 2004* (Cth) ch 16.

the proceedings, including where there are family violence and child abuse concerns.[14] Interim hearings must not be longer than two hours in duration, and parties and witnesses can submit only one affidavit.[15]

8.13 Parties may also apply for consent orders at various stages of the Family Court proceedings. This may take place before or during the proceedings.

Federal Magistrates Court

8.14 The Federal Magistrates Court was established under the *Federal Magistrates Act 1999* (Cth) with the objective of encouraging the quicker and more informal resolution of disputes.[16] Family law decisions made by Federal Magistrates can be appealed to the Family Court. The Federal Magistrates Court now deals with the majority of family law matters.[17]

8.15 A key aim of the Federal Magistrates Court is to operate without undue formality. The *Federal Magistrates Court Rules 2001* (Cth) are designed to enable the Court to operate as informally as possible, using streamlined processes and encouraging the use of dispute resolution procedures.[18] The *Federal Magistrates Court Rules* adopt some of the rules in the *Family Law Rules*.[19] The Federal Magistrates Court also has the discretion to apply the *Family Law Rules* to fill any gap that might be left in the *Federal Magistrates Court Rules*.[20]

8.16 In addition to the Initiating Application (Family Law), parties in Federal Magistrates Court proceedings are required to file an affidavit stating the facts on which their application relies.[21] The FDR requirements that operate in the Family Court also apply to parties commencing proceedings in the Federal Magistrates Court. At the time a party files an Initiating Application, he or she also must file a s 60I certificate, unless an exception applies. A Registrar is responsible for assessing a claim for an exception. As with Family Court proceedings, an independent children's lawyer may be appointed to represent the best interests of children in the proceedings.

8.17 The Federal Magistrates Court does not have an equivalent of the Family Court's 'less adversarial trial' and Child Responsive Program. In the Federal Magistrates Court, meetings with court-appointed family consultants take the form of Child Dispute Conferences.[22] The Rules do not provide further direction about the process of referral or the form that meetings may take. The Federal Magistrates Court

14 Ibid r 5.12.
15 Ibid r 5.09.
16 See *Federal Magistrates Act 1999* (Cth) s 3.
17 R Chisholm, *Family Courts Violence Review* (2009), 53.
18 *Federal Magistrates Court Rules 2001* (Cth) r 1.03.
19 Ibid sch 3.
20 Ibid r 1.05(2).
21 Ibid r 4.05.
22 See R Chisholm, *Family Courts Violence Review* (2009), 261.

may also appoint family consultants, including for the purpose of preparing a Family Report for proceedings. Under the *Federal Magistrates Court Rules*, a party may only apply for a Family Report once he or she has applied for final orders.[23] In determining whether to order a Family Report, the Court may take into account allegations of family violence or child abuse.[24]

8.18 Consent orders are also available in Federal Magistrates Court proceedings. The Rules do not distinguish between consent orders sought before or during proceedings.[25]

Cooperation between the federal family courts

8.19 There are a number of aspects of cooperation between the Family Court and the Federal Magistrates Court. The courts operate a single registry, in which all proceedings before the two courts are commenced. Further, the Initiating Application provides for parties to elect the court in which the application is filed.

8.20 On 29 January 2010, the Chief Justice of the Family Court and the Chief Federal Magistrate published a protocol on the division of work between the courts. Under that protocol, if there are serious allegations of child sexual or physical abuse, or 'serious controlling family violence warranting the attention of a superior court', an application for final orders should ordinarily be filed in the Family Court.[26]

8.21 In May 2009, the Australian Government announced that the Family Court and the Federal Magistrates Court should be merged into one Family Court of Australia,[27] as recommended in a report in 2008.[28]

Parenting orders, protection orders and family violence

8.22 Under pt VII of the *Family Law Act*, federal family courts are empowered to make orders dealing with the treatment of children in *Family Law Act* proceedings. This includes making parenting orders.

8.23 A parenting order is an order made by a family court that deals with any aspect of parental responsibility for a child. This may include matters such as the persons with whom a child is to live, the time a child is to spend with other persons, the allocation of parental responsibility for a child, the communication a child is to have with another person or other persons, and other aspects of the care, welfare or development of the

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23 *Federal Magistrates Court Rules 2001* (Cth) r 23.01A.

24 Ibid r 23.01A(2).

25 See R Chisholm, *Family Courts Violence Review* (2009), 270.

26 Family Court of Australia, *Protocol for the Division of Work between the Family Court of Australia and the Federal Magistrates Court as at 29/01/2010* (2010) <www.familycourt.gov.au> at 22 February 2010.

27 R McClelland (Attorney-General), *Rudd Government to Reform Federal Courts* (2009) <www.attorneygeneral.gov.au> at 22 February 2010.

28 D Semple and Australian Government Attorney-General's Department, *Future Governance Options for Federal Family Law Courts in Australia—Striking the Right Balance* (2008).

child. Family courts may also make orders relating to the financial maintenance of a child. Of particular relevance in this chapter are orders dealing with the time that a child is to spend with a person, or with the communication that a child is to have with a person, which collectively may be termed orders for 'contact' with a child.[29]

Family violence and protection orders as relevant considerations

8.24 The *Family Law Act* 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'.[30] 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.[31]

8.25 Section 60CC also sets out a lengthy list of 'additional considerations'. These include, for example, any views expressed by the child, the nature of the relationship between relevant persons and the child; the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent (referred to as the 'friendly parent' provision); and, if the child is Indigenous, the child's right to enjoy his or her Indigenous culture.

8.26 Two of the additional considerations have particular relevance in the context of allegations of family violence:[32]

- any family violence involving the child or a member of the child's family;[33] 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.[34]

8.27 The *Family Law Act* includes a presumption that it is in the best interests of a child for the child's parents to have equal shared parental responsibility for the child.[35] In interim proceedings, the presumption applies unless the court considers that it would not be appropriate in the circumstances.[36] The presumption may be rebutted by evidence that it would not be in the best interests of the child for the child's parents to

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29 See, eg, A Dickey, *Family Law* (5th ed, 2007).
30 *Family Law Act 1975* (Cth) ss 60CA, 65AA.
31 Ibid s 60CC(2).
32 The definition of 'family violence' in the *Family Law Act* is discussed in Ch 4.
33 *Family Law Act 1975* (Cth) s 60CC(3)(j).
34 Ibid s 60CC(3)(k).
35 Ibid ss 61DA(1), 61DA(2).
36 Ibid s 61DA(3).

have equal shared parental responsibility for the child.[37] The presumption does not apply if there are reasonable grounds for believing that a parent has engaged in child abuse or family violence. Where the presumption applies, the court must then consider whether the child spending equal time with each of the parents would be reasonably practicable and in the best interests of the child. If so, the court must consider making an order to provide for the child to spend equal time with each of the parents.[38]

Limited practical impact of family violence allegations

8.28 Questions have been raised, however, about the impact, if any, of allegations of family violence on the ultimate conditions of parenting orders. In a 2007 report, Lawrie Moloney and colleagues at AIFS reported that allegations of spousal violence or parental child abuse did appear to influence court orders where they were accompanied by evidence of a strong probative weight. Without such evidence, however, allegations did not seem to have much effect on outcomes in the family courts.[39] The report also indicated that there was often very little supporting detail about allegations of family violence or corroborative evidence, with the consequence that courts were dealing with issues of family violence 'in the context of widespread factual uncertainty'.[40]

8.29 A 2009 AIFS report confirmed the limited influence of family violence concerns on the conditions of parenting orders. It reported, for example, that families where violence had occurred were no less likely to have shared care-time arrangements than those where violence had not occurred. Similarly, families where safety concerns were reported were no less likely to have shared care-time arrangements than families without safety concerns. Approximately 18% of fathers and 16% of mothers who reported equal-time arrangements had concerns about their own safety or the safety of the child in the other person's care.[41] These arrangements were reached by a variety of means, with or without court involvement.

8.30 A number of reasons have been advanced for the limited impact of family violence concerns on the terms of parenting orders. For example, a party may choose not to raise issues of family violence in family court proceedings for fear of further angering the party to whom the allegation relates or making the situation worse for themselves or their children. Parties may also be discouraged from raising allegations of family violence because of concerns that this will make them 'unfriendly parents' or lead to an adverse costs order.[42] In other situations, a party may report a history of family violence but still want the child to spend unsupervised time with the other partner.

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37 Ibid s 61DA(4).
38 Ibid s 65DAA.
39 L Moloney and others, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-reform Exploratory Study* (2007) Australian Institute of Family Studies.
40 Ibid, 277.
41 Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009), 166.
42 *Family Law Act 1975* (Cth) ss 60CC(3)(c), 117AB, respectively.

8.31 Secondly, there may be little supportive evidence to prove allegations of family violence that are brought before the federal family courts. The fact that a protection order has been made may be of limited evidentiary value, given that a parent may consent to the making of orders without admissions and that, even in contested cases, the brevity of family violence proceedings may not allow for a comprehensive evaluation of the allegations. Evidentiary issues relating to family violence in *Family Law Act* proceedings are considered in Chapter 10.

8.32 Finally, judicial officers in family courts may be reluctant to terminate parental contact in all but the most extreme situations. Dr Anthony Dickey QC has noted that there is currently a strong assumption that contact with a parent is in the interests of a child. If a court believes that a child may be harmed in some way by having contact with a parent, it will usually impose conditions or restrictions on the exercise of contact (such as appropriate supervision) rather than to deny contact altogether.[43] As stated by the Full Family Court in *Re W*, the 'termination of a worthwhile relationship between the parent and child ought in most cases be the course of last resort'.[44]

The inconsistency problem

8.33 Protection orders and parenting orders may contain inconsistent conditions where a federal family court was not made aware of, or failed to consider, state and territory protection orders. Even where a protection order is considered, a court may issue inconsistent parenting orders because it does not accept the order as evidence of violence, or places a higher priority on a child's interest in having contact with both parents. The Kearney McKenzie Report termed the situation of conflicting orders the 'inconsistency problem'.[45] Inconsistency can also arise where a state or territory court making a protection order is unaware of a pre-existing parenting order.

8.34 Sometimes orders will be directly inconsistent. For example, a protection order may prohibit a man from coming within a specified distance of a woman's home, while a parenting order provides for him to collect and drop off the children from the home. At other times, orders will be inconsistent in practice—while they are not directly contradictory, it is difficult or impossible in practice to comply fully with both. For example, a parenting order may allow a parent to have contact with a child but a protection order prohibits that parent from contacting the person with whom the child lives, making it difficult to arrange contact.[46] The potential for inconsistency may be heightened by the increasing inclusion of children as the subject of protection orders.[47]

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43 A Dickey, *Family Law* (5th ed, 2007), 335.

44 *Re W* [2004] FLC 93–130, [19].

45 Kearney McKenzie & Associates, *Review of Division 11* (1998), 7.

46 See Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), [6.2.2].

47 For example, under s 38(2) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), a court that makes a protection order must include as a protected person in the order any child with whom that person has a domestic relationship.

8.35 In 1995, pt VII div 11 of the *Family Law Act* was introduced to deal with inconsistent conditions in orders. The division generally provides that conditions permitting contact under parenting orders prevail over non-contact requirements under state and territory family violence legislation and makes provision for family courts to issue a declaration of inconsistency.[48] It also sets out procedures that family courts must comply with when issuing parenting orders that are inconsistent with pre-existing protection orders, and mechanisms for state and territory courts to vary or revoke such parenting orders. The division was substantially amended in the 2006 reforms to the *Family Law Act* to deal with concerns raised in the Kearney McKenzie Report and in a 2004 letter of advice from the Family Law Council.[49] Division 11 is discussed in detail below.

8.36 In practice, inconsistency is often avoided through standard conditions in protection orders issued under state and territory family violence legislation excluding court-ordered contact from the scope of prohibited conduct.

Awareness of pre-existing orders

8.37 The following discussion considers legislative and procedural strategies to make courts aware of potentially inconsistent orders that have been issued by another court. First, the avenues through which family courts hearing proceedings for parenting orders are made aware of relevant family violence protection orders are considered. Secondly, the avenues through which state and territory courts hearing proceedings for protection orders are made aware of relevant parenting orders are discussed. Both sections focus on: the obligations on parties to inform the courts of any such orders; whether there should be an obligation on courts to ask for such information; and information sought in application forms.

Parenting proceedings under the *Family Law Act*

Legislative framework

8.38 Under s 60CF(1) of the *Family Law Act*, if a party to parenting proceedings is aware that a family violence order applies to the 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 family violence order that applies to the child or a member of the child's family may inform the court of the order.[50] Failure to inform the court of the orders does not invalidate any order.

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48 *Family Law Act 1975* (Cth) s 68Q. Section 109 of the *Australian Constitution* provides for Commonwealth legislation to take precedence over inconsistent legislation in a state or territory when the Commonwealth and state and territory legislation purport to cover the same field. The constitutional framework is discussed in Ch 2.

49 Family Law Council, *Review of Division 11—Family Violence* (2004).

50 *Family Law Act 1975* (Cth) s 60CF(2).

8.39 Rule 2.05 of the *Family Law Rules* specifies that a party must file a copy of any family violence order when a case starts or as soon as practicable after the order is made.[51] 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. Pursuant to sch 3, the *Federal Magistrates Court Rules* apply r 2.05 of the *Family Law Rules* to proceedings in the Federal Magistrates Court.

8.40 Legislative provisions also set up pathways for federal family courts to be informed about family violence, whether or not a protection order is in place. These include a certificate by a FDR practitioner under s 60I of the *Family Law Act* that the matter is unsuitable for dispute resolution on the basis of family violence. An allegation of family violence also may be raised by the filing of a Notice of Child Abuse or Family Violence (Form 4). Pursuant to s 60K of the Act, once this form 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.[52]

8.41 However, other provisions of the *Family Law Act* may impede the extent to which the court is informed about any history or risk of family violence. In particular, concerns have been raised about:

- s 60CC(3)(c)—the 'friendly parent' provision; and
- s 117AB—which requires a court to make costs orders against a party who knowingly makes false allegations or statements in *Family Law Act* proceedings.

8.42 The dilemmas that these provisions potentially create for victims of family violence are illustrated where family violence proceedings are operating concurrently with child protection matters and parenting disputes. One participant in the ALRC's Family Violence Online Forum provided an illustration of this dilemma:

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

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51 The *Family Law Rules 2004* (Cth) apply to the Family Court pursuant to s 38 of the *Family Law Act 1975* (Cth).

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

> At the Family or Federal Magistrates Court, the mother explains why she is seeking that the father have no contact or supervised contact with the children. She says she was advised by [the child protection department] to restrict contact. [The child protection department] however have not provided any written evidence of this advice, except to advise the court that they have no reason to be involved where the mother is acting protectively.
>
> The mother is then left in court by herself, without [the child protection department] providing support to the mother's position. The mother then has to explain why she is acting as an 'unfriendly parent' (as per the *Family Law Act*) by not facilitating contact.
>
> … In one jurisdiction—the Magistrates Court—she is doing the right thing acting protectively while in the Family Court jurisdiction it can sometimes be used against her as 'not facilitating contact' by the other party unless the department makes a representation in that matter which is not always the case.[53]

8.43 The Chisholm Review and the 2009 Family Law Council advice both recommended changes to the manner in which the federal family courts deal with allegations of family violence, including reform of the 'friendly parent' provision and the requirement for costs orders.

8.44 The Chisholm Review expressed the view that the 'friendly parent' provision may have the consequence of discouraging some parents from disclosing violence to the court and, consequently, that the *Family Law Act* should recognise that there are some circumstances where parents need to take action to protect their children. This may require making serious allegations of violence.[54] The Chisholm Review further recommended that the costs order provision in s 117AB of the *Family Law Act* should be repealed. The Review suggested that consideration should instead be given to amending the general costs provision in s 117 of the Act to direct a court to have regard to whether any person knowingly gave false evidence in the proceedings.[55]

8.45 The 2009 Family Law Council advice recommended that the Australian Government Attorney-General should consider clarifying the 'friendly parent' provision, either through legislative amendment or targeted public education. The Council raised particular concerns that the public perception of this provision could impede the disclosure of family violence in cases where a vulnerable parent's allegations of family violence are not able to be corroborated by reliable evidence.[56] The Family Law Council made a similar recommendation in relation to the s 117AB costs order provision—that is, that the Attorney-General should clarify the intention of

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53 *Comment on ALRC Family Violence Online Forum: Women's Legal Service Providers*. Specific issues relating to the interaction between child protection laws and the *Family Law Act* are dealt with in Ch 14.

54 R Chisholm, *Family Courts Violence Review* (2009), [3.2], Rec 3.5.

55 Ibid, [3.4], Rec 3.2.

56 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), [10.1], Rec 13.

the provision. The Council noted that 'there is no evidence that the section has achieved its purpose in relation to false allegations of family violence'.[57]

Application forms

8.46 Court application forms will generally be the first place for a party to raise allegations of family violence and give information about any relevant protection orders. The Initiating Application for proceedings in the Family Court, Federal Magistrates Court and Family Court of Western Australia requests information about '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' concerning any of the parties or children listed in the application.[58] The form also requires details of any ongoing cases of such a nature. This would include relevant protection orders obtained under state or territory family violence laws.

8.47 As noted above, a related document is the Notice of Child Abuse or Family Violence (Form 4), which may be filed by parties raising allegations of family violence, or a risk of family violence, in proceedings in the family courts. Section 60K of the *Family Law Act* establishes Form 4 as the principal means of triggering procedural obligations on family courts to accommodate allegations of family violence and child abuse.[59] The form includes the definition of 'family violence', as set out in s 4(1) of the *Family Law Act*, and space for a party to describe acts or omissions that are alleged to comprise family violence, or any risk of family violence. Below this section is a space to identify the family court proceedings to which the allegations are relevant.[60] However, there is no designated space on the form for a party to list any relevant protection orders which have been obtained.

8.48 The 2009 Family Law Council advice recommended that the federal family courts consider revising Form 4, including making it more user-friendly.[61] In comparison, the Chisholm Review recommended that the form should be replaced by a completely new approach to raising allegations of family violence in federal family courts—namely, through a targeted identification and risk assessment process.[62]

Information-sharing protocols and procedures

8.49 The family courts do not have any formal or defined access to the orders or files of proceedings in courts exercising state jurisdiction.[63] As noted in a 2007 review of

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57 Ibid, [8.2.3], Rec 11.

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

59 Strategies for informing family courts about allegations of child abuse are discussed in Ch 14.

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

61 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.

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

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

the South Australian family violence laws undertaken by Maurine Pyke QC (the Pyke Review), 'the potential for confusion, lack of certainty and detrimental impact upon appropriate interventions including Police intervention are readily apparent'.[64]

8.50 One example where a family court may not be made aware of protection orders is where a person against whom an order was made has misunderstood the nature of the order. This may be especially likely where a party is unrepresented, or the order is made *ex parte*. A party may also deliberately omit reference to such an order in the belief it might prejudice his or her application.[65]

8.51 The Kearney McKenzie Report recommended that consideration should be given to establishing a central database 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.[66] A similar option for reform was set out in the Pyke Review, which suggested that a database of the state courts 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*;
- 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.[67]

8.52 The Australian Government has committed to working with the states and territories to establish a national scheme for the registration of protection orders.[68] Details have not yet been released about how such a national scheme would operate, including whether it would include a central database of protection and parenting orders.

Commissions' views

8.53 ***Legislative framework***. The main concerns that have been raised in the context of informing federal family courts about allegations of family violence relate to the 'friendly parent' provision and the requirement for costs orders in the event of false allegations or statements. As noted above, extensive reforms to these provisions have been recommended in two reviews of the federal family courts which are under

64 Ibid.
65 See Ibid, 135.
66 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.
67 M Pyke, *South Australian Domestic Violence Laws: Discussion and Options for Reform* (2007), 137.
68 Australian Government, *The National Plan to Reduce Violence against Women—Immediate Government Actions* (2009).

consideration by the Australian Government.[69] The Commissions endorse the recommendations for reform of the 'friendly parent' provision and costs orders requirement set out in these reports.

8.54 However, in the event that the recommendations of the Chisholm Review and the Family Law Council are not taken up by the Australian Government, then consideration should be given to other practices that may ensure that parents who have sought protection orders are not disadvantaged in family law proceedings. For example, state and territory child protection laws should be amended to impose a requirement on child protection agencies that advise parents to seek a protection order for child welfare purposes to provide written advice to this effect to ensure that a family court does not construe the parent's action as 'unfriendly'.

8.55 ***Application forms***. In the Commissions' view, the forms filed by parties for parenting proceedings in family courts should inform the court of any existing protection orders or pending proceedings for such orders. This is particularly important in interim proceedings for parenting orders where the court has a limited opportunity to obtain additional evidence from the parties.

8.56 The Commissions are concerned about the lack of prominence given to protection orders, and pending proceedings for protection orders, in the Initiating Application in the family courts. This form uses the one question to deal with court orders in relation to 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, intra- and inter-state protection orders, and family court orders. In the Commissions' view, it would be beneficial for the matters currently listed in Part F of the Initiating Application to be separated out into discrete questions. Such an approach may highlight more clearly to parties the need to include information about relevant protection orders. This may, however, make the application form lengthier and more cumbersome.

8.57 The Notice of Child Abuse or Family Violence (Form 4) does not include a designated space for parties to note existing protection orders. In the event that Form 4 is retained by the federal family courts, this could be included. However, if a separate question seeking information about protection orders were included in the Initiating Application, 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.

8.58 ***Information-sharing protocols and procedures***. The Australian Government has committed to the development of a national scheme for the registration of domestic and family violence orders, which may encompass a central protection order database.

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69 R Chisholm, *Family Courts Violence Review* (2009), [3.2], [3.4]; 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), Recs 11, 13.

In the Commissions' view, this initiative has the potential to improve significantly courts' awareness of potentially inconsistent orders. For this outcome to be achieved, it will be important to consider the information that should be included on the database (that is, whether all state and territory protection orders and *Family Law Act* parenting orders are to be included) and the entities that should have access to the information. The national protection order database is discussed in Chapter 10, including the entities which should have access to information on the database.

Proposal 8–1 State and territory child protection laws should be amended to require a child protection agency that advises a parent to seek a protection order under state or territory family violence legislation for the purpose of protecting the child to provide written advice to this effect to ensure that a federal family court does not construe the parent's action as a failure to 'facilitate, and encourage, a close and continuing relationship between the child and the other parent' pursuant to s 60CC(3)(c) of the *Family Law Act 1975* (Cth).

Proposal 8–2 Application forms for initiating proceedings in the federal family courts and the Family Court of Western Australia should clearly seek information about existing protection orders obtained under state and territory family violence legislation or pending proceedings for such orders.

Protection order proceedings under family violence laws

Legislative framework

8.59 With the exception of the ACT, the family violence legislation in each of the states and territories includes provisions for the court to gain access to information about parenting orders.[70] 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, or for a variation of, a protection order, to inform the court of any relevant parenting order, or any pending application for a parenting order, of which the person is aware.[71] In comparison, the Victorian family violence legislation places an obligation on a court that decides to make a protection order to enquire as to whether a parenting order or a child protection order is in force in relation to any child of the protected person.[72]

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70 *Domestic Violence and Protection Orders Act 2008* (ACT) s 31, does include a requirement for courts to consider any relevant family law contact order of which they are aware.

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

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

8.60 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 contact order. A note to s 18—which deals with who may apply for certain non-emergency orders—states that if a form is approved under the *Court Procedures Act 2004* (ACT) for an application under this section, the form must be used.[73]

8.61 A separate issue relates to police-issued protection orders.[74] Under the Northern Territory family violence legislation, a police officer who is considering making a police 'domestic violence order' must make 'reasonable enquiries' about the existence or otherwise of any relevant parenting orders in force, or pending applications for such orders.[75] If asked by an officer, a person must inform the officer of any such parenting orders or applications. The ACT *Domestic Violence and Protection Orders Act* specifies that, in applications for emergency orders, a police officer must tell the judicial officer about any relevant parenting order, or any pending application for such an order, of which the police officer is aware.[76] The Act does not specify mechanisms for making police officers aware of any such orders. In the context of police applications for protection orders, the Kearney McKenzie Report commented on the reluctance of police to take into account family law issues. The consultants noted that often police 'have not been informed of the provisions, still less trained to use them, and would not regard applying for a variation as part of their role'.[77] These concerns are equally relevant in the context of police-issued protection orders.

Application forms

8.62 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.[78] However, some forms—for example that of 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 any information about family court orders or pending proceedings for such orders. This information is sought, however, 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.[79]

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73 As noted below, however, the application for a 'domestic violence' order in the Magistrates Court of the ACT does not request information about existing family court orders. The application only seeks information about pending and finalised proceedings.

74 See Ch 5.

75 *Domestic and Family Violence Act 2007* (NT) s 90(2)(a)(i), (ii).

76 *Domestic Violence and Protection Orders Act 2008* (ACT) s 70.

77 Kearney McKenzie & Associates, *Review of Division 11* (1998), 20.

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

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

Commissions' views

Legislative framework

8.63 Legislation governing proceedings for the making of protection orders should provide mechanisms for ensuring that state and territory courts are made aware of existing family law orders. This information is central to ensuring that proceedings for protection orders are conducted on an informed basis. In particular, the Commissions are concerned that in the ACT, parties are not expressly required to provide information about family law orders under the *Domestic Violence and Protection Orders Act*, nor is such information expressly sought in the application for a 'domestic violence' order.

8.64 The most common approach in state and territory family violence legislation is to impose a legally enforceable obligation on parties to inform the court about pre-existing orders. However, there may be situations where relying on representations of parties to the proceedings is inadequate—for example, where a person against whom an order has been made has misunderstood the nature of the order. This may be especially problematic where a party is unrepresented, or where an order was made *ex parte*. Particular difficulties may also be encountered by applicants from culturally and linguistically diverse backgrounds and other vulnerable groups, such as persons with a disability.

8.65 Accordingly, the Commissions are interested in stakeholder views on extending the Victorian model to other states and territories—that is, placing an obligation on the court to ask for the required information. This could either replace, or operate in addition to, any obligation on parties to inform the court about any protection orders of which they are aware.

8.66 In Chapter 5, the Commissions raise concerns about the operative period of some police-issued protection orders, and propose that these should only apply for a limited period of time.[80] If this proposal proceeds to a recommendation, and is implemented, the short duration of such an order would largely dispel the need for police issuing the order to ascertain whether any parenting orders are in existence, or whether proceedings for such orders are pending. However, if state and territory governments retain police-issued protection orders that operate for significantly long time periods, then there should be ways to obtain information about parenting orders. The Commissions are interested in further information about how such an obligation may operate in practice. For example, what steps must a police officer take in order to make 'reasonable enquiries' about the existence or otherwise of relevant parenting orders, pursuant to the NT family violence laws? Is this a useful model to apply more broadly to police-issued protection orders?

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80 Proposal 5–4. For example, police-issued protection orders in Tasmania operate for a 12-month period.

Application forms

8.67 Application forms for protection orders should ask—clearly and specifically—about the existence of parenting orders or pending proceedings for such orders.[81] An instructive model may be Queensland's Protection Order Application, which asks whether a court has made any other orders involving the victim and the person who has allegedly used violence, or if there are other proceedings that are yet to be decided in another court involving these people. 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; and family court orders.

Proposal 8–3 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. This could be achieved by:

(a) imposing a legally enforceable obligation on parties to proceedings for a protection order to inform the court about any such parenting orders or proceedings;

(b) requiring courts making protection orders to inquire as to any such parenting orders or proceedings; or

(c) both of the above.

Question 8–1 In practice, what steps does a police officer who issues a protection order have to take in order to make 'reasonable enquiries' about the existence or otherwise of a 'family law order', pursuant to the *Domestic and Family Violence Act 2007* (NT)? Should this requirement apply to police who issue protection orders in other states and territories?

Proposal 8–4 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.

81 Similarly, application forms should elicit information about any criminal proceedings or child protection proceedings. The interaction between the *Family Law Act* and criminal law is not within the Terms of Reference for this Inquiry.

Consideration of pre-existing orders

Parenting proceedings under the *Family Law Act*

Legislative framework

8.68 This section considers the legislative framework that guides a federal family court's decision making about parenting orders. Issues about the use in family law proceedings of protection orders and evidence given in protection order proceedings are discussed in Chapter 10.

8.69 As noted above, one of the primary considerations in determining what is in a child's best interests—the paramount consideration in making parenting orders—is 'the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence'.[82] Additional considerations in making this determination include: any family violence involving the child or a member of the child's family;[83] and any family violence order that applies to the child or a member of the child's family.[84] However, as noted above, under the last of these considerations, a court is only permitted to consider a final or contested order.

8.70 The Explanatory Memorandum for the 2006 amendments to the *Family Law Act* explained the intention of limiting what 'family violence orders' a court can consider in determining a child's best interests as follows:

> Paragraph 60CC(3)(k) modifies the existing paragraph 68F(2)(j) which directs a court to consider any family violence order that applies to the child or a member of the child's family. New paragraph 60CC(3)(k) provides that this only includes a final or contested family violence order. The intention of this subsection is to ensure that the court does not take account of uncontested or interim family violence orders. This should address a perception that violence allegations are taken into account without proven foundation in some family law proceedings.[85]

8.71 Family violence and protection orders are also listed as independent factors that courts must consider when making orders under pt VII, including parenting orders:

> **60CG Court to consider risk of family violence**
>
> (1) In considering what order to make, the court must, to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration, ensure that the order:
>
> (a) is consistent with any family violence order; and
>
> (b) does not expose a person to an unacceptable risk of family violence.

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82 *Family Law Act 1975* (Cth) s 60CC.
83 Ibid s 60CC(3)(j).
84 Ibid s 60CC(3)(k).
85 Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth), [67].

> (2) For the purposes of paragraph (1)(b), the court may include in the order any safeguards that it considers necessary for the safety of those affected by the order.

8.72 The *Best Practice Principles for Use in Parenting Disputes When Family Violence or Abuse is Alleged* (Best Practice Principles), issued by the Family Court, gives guidance to judicial officers in federal family courts in the drafting of parenting orders. The Best Practice Principles direct judicial officers to a number of factors relevant to the effect of exposure to family violence on children and the circumstances in which a child should have no contact with a parent who has used, or exposed the child to, family violence. These factors include, for example:

- the effect of the family violence or abuse, or the unacceptable risk of family violence or abuse, on the child and on the parent with whom the child is living;
- whether or not the motivation of the parent seeking a parenting order is a desire to promote the best interests of the child or a means of continuing a process of family violence against, or intimidation or harassment of, the other parent;
- whether a parent seeking an order to spend time with a child who has been found to have used family violence acknowledges and accepts responsibility for that violence, and is participating in any program to address the contributing factors towards his or her use of family violence; and
- the potential detriment to the child arising from the court ordering that the child have limited or no contact with the parent against whom findings have been made.[86]

8.73 Where a family court accepts that a parent has used family violence or abuse, or that there is an unacceptable risk of that parent using family violence or abuse, it may still make orders for a child to spend time with that parent. In this situation, the Best Practice Principles suggest consideration of the following matters:

- whether there is a need for supervision and, if so, the conditions of such supervision;
- any conditions, such as seeking advice or treatment, with which the parent should comply;
- whether the court should exercise its s 68B powers to make or extend a protective injunction in favour of the child or the parent with whom the child lives; and

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86 Family Court of Australia, *Best Practice Principles for Use in Parenting Disputes When Family Violence or Abuse is Alleged* (2009), 9.

- whether any parenting order or injunction is inconsistent with a family violence order and the extent of any inconsistency.[87]

8.74 The Chisholm Review recommended extensive revisions to the manner in which federal family courts consider allegations of family violence. The Review considered the current test for the best interests of a child to be problematic. It raised particular concerns about highlighting as 'primary considerations' the benefits of parental involvement and the protection of children against violence and abuse in s 60CC of the Act. Instead, the Review recommended that family courts should consider a range of factors, similar to those presently included in s 60CC(3) of the *Family Law Act*. This was on the basis that parents, advisers and courts should be encouraged to consider the arrangements which would be best for a child in each case, rather than starting with an assumption that a particular outcome is likely to be best in a particular category of case.[88]

8.75 Notably, the factors proposed by the Chisholm Review do not expressly include family violence or protection orders. Instead, family violence is encompassed within a broader requirement for the court to consider a child's safety and wellbeing, which would also cover other matters that might threaten a child's safety, such as mental illness or substance abuse. The factors recommended by the Chisholm Review for consideration also include no express mention of family violence orders. The Review justified the exclusion of family violence orders on the basis that

> the law should do everything possible to enable the court to know about current family violence orders, so it can avoid making orders that inadvertently clash with them. Otherwise, what is important is that the court should learn about the *factual circumstances* that might suggest a risk to the child or other person, regardless of what was the basis of a previous family violence order.[89]

Commissions' views

8.76 An ongoing challenge in the interaction between family violence protection orders and conditions for contact under parenting orders is the evidentiary weight which protection orders—as distinct from family violence *per se*—should be accorded in parenting proceedings. The *Family Law Act* currently involves a compromise position, whereby all protection orders must be notified to family courts, but only final and contested orders are independently taken into account in determining what parenting orders would be in a child's best interest. The distinction fails to recognise the many reasons why orders may be made with consent that are not associated with a lack of evidence to support the protection order—for example, so as not to prejudice criminal proceedings. For reasons more fully discussed in Chapter 10, the Commissions consider that the distinction between considering final and contested

87 Ibid, 11.
88 R Chisholm, *Family Courts Violence Review* (2009), 131–132.
89 Ibid, 140 (emphasis in original).

protection orders on the one hand, and interim and uncontested orders on the other, is arbitrary and unnecessary.

8.77 The Commissions have considered two options for reform in this area. First, that consideration of protection orders should be removed altogether and, instead, reliance placed on a general criterion of family violence or, as recommended in the Chisholm Review, a child's safety and wellbeing. In determining such a criterion, a family court would be permitted—but not required—to consider any protection order (including interim and consent orders) and the allegations of family violence that substantiated the order. The evidentiary weight to be accorded to the order would be determined on a case-by-case basis. A potential disadvantage of this first option, however, may be to decrease the visibility of family violence as a factor in making parenting orders.

8.78 An alternative approach involves including as a criterion for determining a child's best interests, 'any family violence, including evidence of such violence in any protection order proceeding'. This would remove the distinction between final and contested orders, and interim and consent orders. While maintaining a similar policy approach, such a criterion may highlight more clearly the probative weight that courts making parenting orders can draw from evidence of violence adduced in protection order proceedings.

8.79 In Chapter 10, the Commissions raise a number of questions and options for reform directed to improving the quality of evidence supporting protection orders and the manner in which such evidence is given.

Proposal 8–5 The 'additional consideration' in s 60CC(3)(k) of the *Family Law Act 1975* (Cth), which directs a court to consider only final or contested protection orders when determining the best interests of a child in making a parenting order, should be:

(a) repealed, and reliance placed instead on the general criterion of family violence contained in s 60CC(3)(j);

OR

(b) amended to provide that any family violence, including evidence of such violence given in any protection order proceeding—including proceedings in which final or interim protection orders are made either by consent or after a contested hearing—is an additional consideration when determining the best interests of a child.

Additional issues with family law interim proceedings and consent orders

8.80 Additional issues are raised when interim proceedings for parenting orders are brought in the federal family courts or where parenting orders are made with the consent of the parties.

Interim proceedings

8.81 Section 64B(1) of the *Family Law Act* empowers a court to make interim parenting orders.[90] It is a question for the court in each case to determine whether it is appropriate to make an interim or final order.[91]

8.82 The Kearney McKenzie Report noted particular difficulties for family courts in exploring the nature of family violence that led to a protection order in proceedings for an interim order. Due to the speed with which the competing interests of a woman's safety and a child's need for contact are balanced, the court may not receive adequate information about the violence that has led to the making of the protection order. Consequently, the Report suggested, such information may be disbelieved or devalued.[92]

Consent orders

8.83 A parenting order inconsistent with a protection order may be made by a family court on the basis of the consent of the parties. Community lawyers and family violence workers have previously reported instances where women felt pressured into agreeing to contact orders that exposed them to the risk of violence.[93] The potential for consent orders to pressure women into making contact arrangements that are unsafe for them or for their children has also been raised in academic literature and in consultations in this Inquiry.[94]

8.84 Family courts have some options available to them when presented with proposed consent orders. First, the court may sanction the orders. Secondly, the court may refuse to make the orders, for example, where it is not satisfied that the orders would not be consistent with the child's best interests.[95] Pursuant to r 10.17 of the *Family Law Rules*, in proceedings before the Family Court (and the Family Court of Western Australia, which has adopted the federal *Family Law Rules*), parties must satisfy the court as to the reasons why the proposed orders should be made.[96] However,

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90 The definition of 'parenting order' in this subsection includes 'an order until further order'.
91 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [7.107].
92 Kearney McKenzie & Associates, *Review of Division 11* (1998), [3.7].
93 Ibid, 14.
94 See, eg, M Kaye, J Stubbs and J Tolmie, 'Domestic Violence and Child Contact Arrangements' (2003) 17 *Australian Journal of Family Law* 93, 101.
95 See, eg, *T and N* (2003) FLC 93–172.
96 No equivalent note is included in div 13.2 of the *Federal Magistrates Court Rules 2001* (Cth). At the time of writing, the Family Court of Western Australia had not adopted the changes to the *Family Court Rules* made in March 2009.

there is always the risk that the parties will put the arrangements in place in the absence of court orders. Finally, where the court has fears that a child may be at risk, it may refer the papers to the police, or a state or territory child protection department.[97]

8.85 The Family Court's Best Practice Principles outline eight questions for the court to consider where consent orders are proposed which provide for a child to spend time with a person against whom family violence allegations have been made:

- How serious are the allegations?
- Has there ever been involvement of the child or children (direct or indirect) in the family violence or a threat against the children?
- Are there indicators of pathological jealousy, marked possessiveness or stalking?
- Is there any reason to believe that the parent seeking to spend time with a child or children is doing so as a way of continuing to control or maintain contact with the parent with whom the child lives?
- Is the driving motive for the parent in wanting to spend time with his or her child related more to his or her feelings about the parent with whom the child or children principally live than about the child or children?
- Are there any indicators of significant mental illness or suicidal ideation in the parent with whom a child or children would be spending time?
- Is it clear that the parent with whom the child or children will principally live has agreed to the order without pressure from others and having had an open discussion with his or her lawyer about the arguments for and against the child spending time with a parent?
- Where appointed, does the Independent Children's Lawyer support the consent orders and, if not, how should the concerns of the Independent Children's Lawyer be addressed?[98]

8.86 The Best Practice Principles suggest steps that the court may take if it has concerns about the proposed consent orders, including ordering the preparation of a family report; ordering the appointment of an independent children's lawyer; requesting an interview by a family consultant; hearing further evidence; or referring one or both parents to an appropriate service and adjourning the proceedings.[99]

8.87 Rule 10.15A of the *Family Law Rules* imposes particular requirements on parties seeking to make consent orders in the Family Court where there are allegations of child abuse.[100] Pursuant to the rule, in any application for consent orders a party, or the party's lawyer, must advise the court whether there has been any allegation of child abuse, or risk of abuse, that has been raised in the proceedings. If so, the lawyer must

97 R Chisholm, *Family Courts Violence Review* (2009), 86.
98 Family Court of Australia, *Best Practice Principles for Use in Parenting Disputes When Family Violence or Abuse is Alleged* (2009), 12.
99 Ibid, pt G.
100 This rule does not apply to proceedings in the Federal Magistrates Court.

explain to the court how the order attempts to deal with the allegations. There is no requirement for parties to satisfy the court that family violence allegations have not been made, or that the orders are appropriate notwithstanding any such allegations. The Chisholm Review has suggested that consideration should be given to extending r 10.15A to the context of family violence allegations. It further suggested that the rule be adopted in the Federal Magistrates Court.[101]

8.88 Rule 10.15A does not apply where parties apply for consent orders without having commenced parenting proceedings in the Family Court. The Family Court has published an *Application for Consent Orders Kit*, which notes that, if the proposed consent orders are inconsistent with an existing protection order, the Family Court cannot make the orders unless parenting proceedings are instituted. The Kit also advises parties to seek legal advice in this situation.[102]

8.89 Unlike the *Family Court Rules*, the *Federal Magistrates Court Rules* do not distinguish between consent orders before proceedings from those sought during proceedings. The Chisholm Review reported anecdotal evidence that, in practice, officers of the Federal Magistrates Court direct parties to apply for consent orders in the Family Court where the parties seek to make consent orders without instituting parenting proceedings.[103] The Commissions have been informed that there is no procedure in the Federal Magistrates Court which would accommodate the court making consent orders without initiating proceedings.[104]

Commissions' views

8.90 The Commissions are concerned about the potential for parties in family court proceedings to consent to parenting orders that are inconsistent with existing protection orders, and which consequently expose them or their children to violence or to a risk of violence. This is especially troubling where 'consent' is obtained under pressure—for example, where it is accompanied by a history of coercive controlling violence. In the context of child welfare, r 10.15A of the *Family Law Rules* requires that cases involving allegations of child abuse are brought to the attention of the Family Court, which has options for rectifying the situation. An analogous power would be valuable in the context of family violence. It would be beneficial for such a rule to also apply in the Federal Magistrates Court.

8.91 The Commissions support the policy expressed in the Family Court *Application for Consent Orders Kit* that, if proposed consent orders are inconsistent with an existing protection order, parenting proceedings must be instituted. The Commissions are interested in stakeholder views on whether additional measures are necessary to

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101 R Chisholm, *Family Courts Violence Review* (2009), 88–89. The Review did not make a specific recommendation to this effect on the basis of insufficient information.

102 Family Court of Australia, *Application for Consent Orders Kit* <www.familycourt.gov.au> at 22 February 2010, 'Important Note', A.

103 R Chisholm, *Family Courts Violence Review* (2009), 270.

104 P Parkinson, *Correspondence*, 17 March 2010.

deal with the situation where parties in the Family Court propose consent orders that are inconsistent with a current protection order without instituting parenting proceedings—for example, should this policy be formalised in the relevant court rules? The Commissions understand that the procedures for seeking consent orders in the Federal Magistrates Court do not support parties obtaining a consent order without initiating proceedings. However, the Commissions are interested in stakeholder experiences that may indicate a need for reform in this context.

8.92 The above strategies only apply in the context of consent orders and, accordingly, will not address the concerns identified by the Kearney McKenzie Report in relation to interim proceedings. The Commissions are interested in hearing whether any additional measures are necessary to ensure that allegations of family violence are given adequate consideration in the context of interim parenting proceedings.

Proposal 8–6 Rule 10.15A of the *Family Law Rules 2004* (Cth) should apply to allegations of family violence in addition to allegations of child abuse. A substantially equivalent rule should apply to proceedings in the Federal Magistrates Court.

Question 8–2 How often do federal family courts make consent orders that are inconsistent with current protection orders without requiring parties to institute parenting proceedings? Are additional measures needed to prevent this—for example, by including a requirement in the *Family Law Rules 2004* (Cth) for parenting proceedings to be initiated where parties propose consent orders that are inconsistent with current protection orders?

Question 8–3 Are additional measures necessary to ensure that allegations of family violence in federal family courts are given adequate consideration in interim parenting proceedings? If so, what measures would be beneficial?

Protection order proceedings under family violence laws

8.93 With the exception of Victoria and South Australia, state and territory family violence legislation provides for the court to take relevant parenting orders into account in making or varying final or interim protection orders.[105] Notably, Victoria and South Australia are the two jurisdictions that specifically provide for judicial officers to make

105 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 42(3); *Domestic and Family Violence Protection Act 1989* (Qld) s 46C; *Restraining Orders Act 1997* (WA) s 12(1); *Family Violence Act 2004* (Tas) ss 14(5), 18(1)(c); *Domestic Violence and Protection Orders Act 2008* (ACT) ss 31(1), 47(1)(f), 71(1); *Domestic and Family Violence Act 2007* (NT) s 19(2).

use of their powers under s 68R of the *Family Law Act* to vary or revoke parenting orders.[106]

8.94 The Kearney McKenzie Report considered state and territory legislation enabling judicial officers to consider any relevant parenting orders in proceedings for a protection order. Most submissions to the review agreed that imposing a clear duty on parties to inform the court of a parenting order was useful. However, some concerns were raised that requiring the magistrate to consider parenting orders could be used to justify not making a protection order. The consultants expressed the view that:

> it is important to remember that State and Territory family violence proceedings are not about ensuring children have contact with both parents; they are about protecting women and children who are at risk of violence at the hands of the respondent.[107]

Commissions' views

8.95 The Commissions acknowledge concerns expressed in previous reviews about the potential for the consideration of parenting order conditions by state and territory courts to detract from the protective role of proceedings under family violence legislation. The Commissions are interested in stakeholder views on whether this continues to arise.

8.96 In the Commissions' view, *consideration* of parenting order conditions should be encouraged to the extent that it promotes consistency between protection and parenting orders. However, judicial officers should not feel obliged to defer to pre-existing parenting orders, as this has the potential to jeopardise the safety of victims of family violence.

8.97 The Commissions consider that courts should not significantly lower the standard of protection afforded by a protection order for the purpose of facilitating consistency with a parenting order. This could be set out in legislation. A similar outcome could be achieved by including such a requirement in bench books. The operation of such a reform can be illustrated by the following hypothetical case study.

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106 *Family Violence Protection Act 2008* (Vic) s 90; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 16(1).

107 Kearney McKenzie & Associates, *Review of Division 11* (1998), [2.15].

Hypothetical

A woman brings proceedings for a protection order against her former partner, with whom she has one child. Generally, the magistrate would include a condition that the father must not frequent the shopping centre close to the mother's house, on the basis of evidence that he has been harassing her in this place. However, the court is also informed of a current parenting order providing for the father to have supervised contact with the child one afternoon every second weekend. The handover point for contact is situated within this shopping centre.

Before the magistrate could make a protection order permitting the father to enter the shopping centre for the purpose of such handover, he or she must consider whether such a condition would significantly detract from the standard of protection that would otherwise apply. If so, the appropriate course of action would be to amend the parenting order in accordance with pt VII div 11 of the *Family Law Act*.

8.98 Another option for mitigating the danger to a victim's safety, where a state or territory court considers a parenting order in the course of protection order proceedings, is a provision such as s 90 of the *Family Violence Protection Act 2008* (Vic). This provision requires a Victorian court making a 'family violence intervention order' to revive, vary, discharge or suspend an inconsistent parenting order to the extent of any inconsistency. This provision, and an accompanying question, is discussed further below.

Proposal 8–7 State and territory courts hearing protection order proceedings should not significantly lower the standard of protection afforded by a protection order for the purpose of facilitating consistency with a current parenting order. This could be achieved by:

(a) a prohibition to this effect in state and territory family violence legislation; or

(b) guidance in relevant state and territory bench books.

Resolving inconsistencies

8.99 The previous section of this chapter considered strategies to reduce the likelihood of courts issuing inconsistent parenting orders and protection orders. In the following section, consideration is given to mechanisms for resolving inconsistency in

situations where conflicting orders come into existence—in particular, through the operation of pt VII div 11 of the *Family Law Act*.

8.100 In practice, inconsistencies are frequently avoided, not through div 11, but by standard conditions in state and territory protection orders excepting court-ordered contact from the scope of prohibited conduct.

Division 11 of the *Family Law Act*

8.101 The principal legislative mechanism for dealing with inconsistent orders is set out in pt VII div 11 of the *Family Law Act*. A substantially identical scheme to pt VII div 11 of the *Family Law Act* is set out in pt 5 div 10 of the *Family Court Act 1997* (WA).

8.102 The purpose of pt VII div 11 of the *Family Law Act* is stated as being:

> (a) to resolve inconsistencies between:
>
> (i) family violence orders; and
>
> (ii) certain orders, injunctions and arrangements made under this Act that provide for a child to spend time with a person or require or authorise a person to spend time with a child; and
>
> (aa) to ensure that orders, injunctions and arrangements of the kind referred to in subparagraph (a)(ii) do not expose people to family violence; and
>
> (b) to achieve the objects and principles in section 60B.[108]

8.103 'Family violence orders' are defined in the *Family Law Act* as meaning 'an order (including an interim order) made under a prescribed law of a State or Territory to protect a person from family violence'.[109] Laws prescribed under the *Family Law Regulations 1984* (Cth) correspond to those state and territory laws defined as 'family violence laws' for the purpose of this Inquiry.[110] This does not include, for example, protective bail conditions issued under state and territory criminal laws.[111]

8.104 In 2006, extensive amendments to the *Family Law Act* were enacted, including a complete redrafting of div 11. The amendments sought to make div 11 'clearer, more concise and easier to understand by the people who use and implement it, in particular, for State and Territory Magistrates making family violence orders'.[112] The explanatory memorandum noted that the amendments implement recommendations to simplify and improve the operation of the provisions in div 11 made by the Family Law Council.

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108 *Family Law Act 1975* (Cth) s 68N.
109 Ibid s 4. See discussion in Chs 5 and 6 concerning protection orders.
110 *Family Law Regulations 1984* (Cth) reg 12BB, sch 8.
111 For a case where this issue arose, see *Dunne v P* [2004] WASCA 239.
112 Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth), 149.

Obligations on federal family courts to specify and explain any inconsistency

8.105 Section 68P of the *Family Law Act* applies if a parenting order, recovery order or injunction made under that Act requires or authorises a person to spend time with a child and the order is inconsistent with an existing protection order. In accordance with this section, the court must specify in the order that it is inconsistent with an existing protection order; and explain to the parties affected the effect and consequences of the order, and the court's reasons for making an inconsistent order. As soon as practicable, and no later than 14 days after making the order, the court must provide a copy to the parties affected, the registrar or other appropriate officer of the court that last made or varied the protection order, and the Commissioner for Police and the relevant child protection officer. Failure to comply with the requirement, however, does not affect the validity of the court's order.

8.106 In any event, if the terms of an order providing for a child to spend time with a person are inconsistent with the terms of an existing protection order, the protection order is, to that extent, invalid. A court exercising jurisdiction under pt VII of the *Family Law Act* may make a declaration concerning the extent of any such inconsistency.[113]

8.107 The Kearney McKenzie Report commented on the obligation placed on judicial officers to explain certain matters to parties, including details of how the contact will take place. As noted in that report, these provisions do not eliminate or reduce the incidence of inconsistent orders made by a federal family court. Rather, they provide procedures to be followed when the court makes an inconsistent order.

> The question therefore is: do the procedures eliminate or at least substantially reduce the risk that the inconsistent order the Court has made will expose someone to violence?[114]

8.108 Although the Kearney McKenzie Report stated that it was 'clearly desirable' for people who are affected by a court order to be given the information required in accordance with this section, it went on to note that:

> This information does not, however, reduce the risk that a woman who is losing the protection of her family violence order will be exposed to violence. Information about the circumstances in which she can apply to have the contact order changed or revoked may help her avoid repeated violence. The most effective requirement in [the provisions requiring federal family courts to give information] is the requirement that the judge or registrar include details of how the contact should take place. … In cases where there is violence between the parties, detailed contact orders reduce the opportunities for harassment of one party by another, for example, by constant telephone calls to make arrangements for contact.[115]

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113 *Family Law Act 1975* (Cth) s 68Q.
114 Kearney McKenzie & Associates, *Review of Division 11* (1998), 8.
115 Ibid, 9.

Powers of state and territory courts to resolve inconsistency

8.109 Under s 68R of the *Family Law Act*, state and territory courts making or varying protection orders may revive, vary, discharge or suspend a parenting order, recovery order or injunction made under the *Family Law Act* that expressly or impliedly requires or authorises a person to spend time with a child, or an undertaking or registered parenting plan or recognisance which has similar effect. However, this power is subject to limitations. The court must also make or vary a protection order (whether or not by interim order). If the court proposes to revive, vary, discharge or suspend an order or injunction, the court must have material before it that was not before the court that made the order or injunction.[116]

8.110 Section 68R(5) sets out the 'relevant considerations' to which a state or territory court must have regard in reviving, varying, discharging or suspending a parenting order under the *Family Law Act*. These include: the purposes of the division; whether contact with both parents is in the best interests of the child concerned; and—if varying, discharging or suspending an order or injunction that, when made or granted, was inconsistent with a protection order—whether the court is satisfied that it is appropriate to do so because a person has been exposed, or is likely to be exposed, to family violence as a result of the operation of that order or injunction. These considerations differ from s 60CG (situated in the subdivision dealing with the best interests of the child), which impose obligations on courts considering what orders to make under pt VII of the Act—that is, to achieve consistency with family violence orders and avoid exposing people to the risk of family violence.

8.111 Regulation 12CC of the *Family Law Regulations* requires a state or territory court to register a copy of the court's decision to revive, vary, discharge or suspend an order, injunction or arrangement. Failure to comply with the requirement does not affect the validity of the court's decision.[117]

8.112 Prior to amendment of the *Family Law Act* in 2006, state and territory magistrates were also empowered to *make* parenting orders in the context of family violence proceedings. Reviews by the Family Law Council and Kearney McKenzie & Associates recommended that this power be removed.[118] The Kearney McKenzie Report commented on the importance of limiting the scope of the power to what is necessary for resolving inconsistencies between protection orders and existing 'contact orders':

> It should not be possible for either party to use family violence proceedings to get a contact order. This has happened. In Queensland, for example, there were several cases in the early days of [div 11]. In family violence proceedings the focus should be on protecting the woman and her children. Magistrates have the power in any case to

116 *Family Law Act 1975* (Cth) s 68R(3).
117 Ibid s 68R(6).
118 Family Law Council, *Review of Division 11—Family Violence* (2004), Rec 4; Kearney McKenzie & Associates, *Review of Division 11* (1998), 24.

make contact orders by consent in the exercise of jurisdiction under the *Family Law Act*.[119]

Interim protection orders

8.113 Additional provisions in the *Family Law Act* relate to variations of parenting orders in proceedings for interim protection orders or variations of interim protection orders. In such proceedings, any revival, variation or suspension of a parenting order, recovery order or injunction ceases to have effect when the interim order expires or 21 days after the interim order was made, whichever is the earlier.[120]

Jurisdiction

8.114 The power to revive, vary, discharge or suspend a parenting order, recovery order or injunction under s 68R of the *Family Law Act* may only be exercised by those courts that have been conferred jurisdiction under pt VII.[121] Sections 69H and 69J of that Act confer jurisdiction on the Family Court of Australia; each Family Court of a state; the Supreme Court of the Northern Territory; the Federal Magistrates Court; and, subject to certain conditions, courts of summary jurisdiction of each state and territory. Section 69N limits the power of courts of summary jurisdiction to hear defended proceedings for parenting orders, other than child maintenance orders, without the consent of all of the parties. If the parties do not consent, the court must transfer the proceedings to the Family Court of Australia or Western Australia, the Supreme Court of the Northern Territory, or the Federal Magistrates Court.

8.115 The jurisdiction to revive, vary, discharge or suspend a parenting order in Western Australia differs depending on whether the order was made under the *Family Law Act* or the *Family Court Act 1997* (WA).

8.116 Jurisdiction in relation to parenting orders made under the *Family Law Act* is limited by the *Jurisdiction of Courts of Summary Jurisdiction (Children) Proclamation 2006* (Cth), issued in accordance with s 69J of the *Family Law Act*.[122] The Proclamation provides that proceedings within the Perth metropolitan area in relation to matters arising under pt VII of the *Family Law Act*, may only be instituted in, or transferred to, the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia (Magistrates Court of Western Australia). The Proclamation does not apply to proceedings under s 68T of the *Family Law Act*— 'special provisions relating to proceedings to make an interim (or interim variation of) a family violence order'.

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119 Kearney McKenzie & Associates, *Review of Division 11* (1998), [4.9].

120 *Family Law Act 1975* (Cth) s 68T.

121 Ibid pt VII div 12.

122 As noted above, s 69J of the *Family Law Act* provides for the Governor-General to issue a proclamation to prevent proceedings under pt VII of the *Family Law Act* from being instituted in, or transferred to, a court of summary jurisdiction in a state or territory.

8.117 Principal Registrar Monaghan of the Family Court of Western Australia has queried the effect of this Proclamation on Western Australian magistrates seeking to adjust parenting orders made under the *Family Law Act*. Monaghan advised that the Proclamation could be interpreted to support three potential outcomes. First, it may mean that all magistrates sitting in the Perth metropolitan region retain power under s 68R. Secondly, it may mean that magistrates sitting in the Perth metropolitan region other than at the Magistrates Court of Western Australia retain power under s 68R only when making an interim protection order. Thirdly, it may mean that magistrates sitting in the Perth metropolitan region other than at the Magistrates Court of Western Australia have no power under s 68R.[123]

8.118 Monaghan noted that, prior to amendments to div 11 in 2006, s 68T of the *Family Law Act* set out provisions substantially equivalent to those currently in s 68R. The pre-2006 version of the *Jurisdiction of Courts of Summary Jurisdiction (Children) Proclamation* excluded from its scope the power to adjust parenting orders under s 68T. Accordingly, Monaghan commented that:

> It is quite possible that the Proclamation in 2006, although intending to remain consistent with the previous Proclamation, did not so do, by simply referring to the same section, which had been amended.[124]

8.119 In comparison, magistrates—whether within or outside the Perth metropolitan region—may adjust a parenting order made under the *Family Court Act* when hearing protection order proceedings. Section 41 of the *Family Court Act* provides that if, under another written law, a court has jurisdiction to make a protection order then the court has jurisdiction to revive, vary, discharge or suspend a parenting order. This requirement is satisfied by s 63(2) of the *Restraining Orders Act 1997* (WA), which empowers a court hearing proceedings under the *Family Court Act* or *Family Law Act* to make a protection order against a party to the proceedings or any other person who gives evidence in the proceedings.

8.120 This jurisdictional issue is made more confusing by s 65 of the *Restraining Orders Act*, which specifies that a court which does not have jurisdiction to adjust a parenting order must not make a protection order that conflicts with that parenting order.

State and territory family violence legislation

8.121 Division 11 of the *Family Law Act* is supplemented by relevant provisions in some state and territory family violence laws. The family violence legislation in Victoria and South Australia expressly refers to the power of a magistrate to vary or suspend a parenting order when making or varying a protection order. Section 16(1) of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) states:

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123 D Monaghan, 'Restraining Orders v Existing Parenting Orders' (Paper presented at Western Australian Magistrates Conference, Perth, November 2008), 6.

124 Ibid.

> An intervention order is invalid to the extent of any inconsistency with a Family Law Act order of a kind referred to in section 68R of the *Family Law Act 1975* of the Commonwealth (but the Court may resolve the inconsistency by exercising its power to revive, vary, discharge or suspend the Family Law Act order under that section).

8.122 This provision serves to bring the Commonwealth law to the attention of judicial officers but it does not change the effect of that law. Victorian legislation goes further, by requiring, where a protection order will be inconsistent with an existing *Family Law Act* order, that:

> The court must, to the extent of its powers under section 68R of the *Family Law Act*, revive, vary, discharge or suspend the *Family Law Act* order to the extent that it is inconsistent with the family violence intervention order.[125]

8.123 In comparison, in Tasmania, the *Family Violence Act 2004* (Tas) states only that final and interim protection orders 'operate subject to any Family Court order'.[126]

Options for fostering use of div 11

8.124 The mechanisms for resolving inconsistencies between parenting orders and protection orders in pt VII div 11 of the *Family Law Act* have been the subject of previous reports and reviews, including by Kearney McKenzie & Associates and the Family Law Council.[127] Many of the recommendations of these reviews were implemented through the 2006 amendments to the *Family Law Act*. However, the operation of the division still appears to favour the preservation of contact conditions set out in *Family Law Act* parenting orders, notwithstanding that victims have sought protection orders. In particular, the Commissions consider there is a need to foster a greater use of the s 68R powers by state and territory courts.

Use in family courts

8.125 In consultations, the Commissions have heard concerns about the amount of detail that family courts are required to provide under s 68P of the *Family Law Act*. The detail required includes the extent of inconsistency between a parenting order being issued by a court and an existing protection order; the effect and consequences of the order; and the court's reasons for making an inconsistent order. This raises the question whether the requirement under s 68P should be streamlined. The provision was strongly endorsed, however, in the Kearney McKenzie Report.[128]

8.126 Another possible target for reform is the power under s 68Q for a court that has jurisdiction under pt VII to issue a declaration of inconsistency. These declarations are potentially valuable in providing clarity and certainty when inconsistent orders are made.

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125 *Family Violence Protection Act 2008* (Vic) s 90.

126 *Family Violence Act 2004* (Tas) s 33.

127 Kearney McKenzie & Associates, *Review of Division 11* (1998); Family Law Council, *Review of Division 11—Family Violence* (2004).

128 Kearney McKenzie & Associates, *Review of Division 11* (1998), [4.9].

Use in state and territory courts

8.127 Previous reports have commented on how rarely state and territory courts exercise their power to modify or revoke a parenting order under the *Family Law Act* to give effect to a protection order made in family violence proceedings. The Kearney McKenzie Report, for example, advised in 1998 that in some states no one, including experienced practitioners, had ever heard of the power being used.[129] Possible reasons put forward included: lack of knowledge about the powers; lack of awareness of the existence of a parenting order; and reluctance to vary orders made by a superior court. Consultations in this Inquiry, including through the ALRC's Family Violence Online Forum, also suggested that many state and territory magistrates courts remain reluctant to use their s 68R powers.[130] The Commissions have heard anecdotally, however, that Victorian magistrates are making greater use of these powers.

8.128 One reform that could increase the visibility of the power of magistrates to vary or suspend a parenting order is to repeat that power in state and territory family violence legislation. This approach has been taken, for example, in s 16(1) of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA). A similar approach was recommended in an exploratory NSW study on family violence and child contact arrangements.[131] Alternatively, family violence legislation could *require* the use of the s 68R powers, as is the case in Victoria under s 90 of the *Family Violence Protection Act 2008* (Vic).

8.129 Judicial officers must both be aware of their powers to vary or revoke inconsistent parenting orders and confident in using those powers. The Kearney McKenzie Report commented that:

> Magistrates are wary of varying an order made by a superior court and do not want to take responsibility for varying orders. They may be suspicious of the motives of the applicant and fear opening a can of worms. In any case, applications for family violence orders are processed very quickly and magistrates have neither the time or the resources to consider children's matters in the context of an application for a family violence order.[132]

8.130 Legal practitioners may also be reluctant to advocate the use of the powers under s 68R. The Kearney McKenzie Report noted that some practitioners were concerned that seeking a variation could feed into the suspicions of some magistrates that women use protection orders as a means of frustrating contact.[133] In consultations in this Inquiry, the Commissions have heard that legal practitioners may be unwilling

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129 Ibid, 17.

130 *Comment on ALRC Family Violence Online Forum: Women's Legal Service Providers*. This issue was also noted by the Australian Government Solicitor in its 2008 report on domestic violence laws: Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), [6.2.40]–[6.2.42].

131 M Kaye, J Stubbs and J Tolmie, 'Domestic Violence and Child Contact Arrangements' (2003) 17 *Australian Journal of Family Law* 93, 100.

132 Kearney McKenzie & Associates, *Review of Division 11* (1998), 19.

133 Ibid.

to invest time in seeking a variation of parenting orders because it is likely that the variation will be overridden in a federal family court. Further, where a variation is sought in proceedings for an interim protection order, any variation will expire after 21 days.

8.131 Further, the powers under s 68R may be underused when applicants are self-represented. Without legal representation or court support, applicants for a protection order are likely to be unaware of the possibility of applying for a parenting order to be varied. Even with this knowledge, an applicant may be reluctant to do this for fear of angering the person against whom the order is being made. The Kearney McKenzie Report recommended that states and territories should produce a standard form for making an application for variation under s 68R.[134]

8.132 One approach that could be emulated in this regard is the *Information for Application for an Intervention Order*, published by the Magistrates' Court of Victoria.[135] The form provides applicants with a number of options about the conditions that they are seeking in a family violence 'intervention order', including a box to check if they would like a *Family Law Act* order to be revived, varied or suspended.

8.133 The Family Law Council has recommended that the Australian Government Attorney-General's Department should develop an information sheet about the interaction of protection orders and family law orders, which would be provided with all family violence protection orders.[136]

8.134 In Western Australia, the uncertain application of the *Jurisdiction of Courts of Summary Jurisdiction (Children) Proclamation* may be limiting the use of powers under 68R. As noted above, this Proclamation does not make clear whether magistrates courts in metropolitan Perth other than the Magistrates Court of Western Australia have the power to adjust parenting orders made under the *Family Law Act*.

Commissions' views

Practice in family courts

8.135 The Commissions are interested in stakeholder views about the operation, in practice, of the requirement in s 68P of the *Family Law Act* for family courts to provide information about the extent of inconsistency between a parenting order and a pre-existing protection order, and the effect and consequences of making the inconsistent order. In particular, are these requirements overly burdensome on family courts or

134 Ibid, 20.

135 Magistrates' Court of Victoria, *Information for Application for an Intervention Order* (2009) <www.magistratescourt.vic.gov.au> at 2 February 2010.

136 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), Rec 7.4.

overly complex for persons affected by inconsistent orders? The Commissions also seek information on how frequently the s 68Q regime for seeking declarations of inconsistency between parenting orders and protection orders is being used.

Practice in state and territory courts

8.136 The Commissions have heard anecdotal evidence about the reluctance of state and territory courts to use their power under s 68R of the *Family Law Act* to modify or revoke a parenting order in order to give effect to an inconsistent protection order. On the other hand, it has been suggested that—at least in Victoria—this power is now being used quite widely. The Commissions are seeking further views on whether state and territory courts remain hesitant to use this power and, if so, what factors are contributing to this reluctance.

8.137 Express reference to the powers under s 68R in state and territory family violence laws is likely to be a key means of highlighting the powers to judicial officers hearing protection order applications. At this stage, the Commissions are of the view that the approach adopted in the South Australian legislation—whereby the provisions dealing with protection order applications cross-refer to the s 68R powers—are adequate to achieve the desired result. However, the Commissions remain interested in views on whether courts should be *required* to make use of the full extent of their powers to revive, vary, discharge or suspend the *Family Law Act* order, as is the case in Victoria.

8.138 Legislative amendment alone may be insufficient to achieve significant change. In particular, the Commissions consider that there is an ongoing need to provide additional tools and resources to judicial officers and others about the capacity to revive, vary, discharge or suspend *Family Law Act* orders. First, the Australian Government—in conjunction with state and territory governments, the National Judicial College of Australia, the Judicial Commission of NSW and the Judicial College of Victoria—should provide judicial officers who are responsible for hearing proceedings for protection orders with training on the use of their div 11 powers. Training could include, for example, the relevant considerations to which courts should have regard when hearing an application for variation or revocation of a parenting order.[137] Secondly, training and development programs should be supplemented by the development and publication of a clear and accurate information sheet about the use of s 68R, as recommended in the Kearney McKenzie Report.

8.139 The Commissions are interested in whether there is a need for any systemic changes to enable div 11 to operate effectively. In particular, would it be desirable for matters involving inconsistent orders to be referred to a specialist court? For example, the Family Violence Court Division specialist court pilot at Heidelberg and Ballarat Magistrates Court hear matters including parenting and protection orders. The use of

137 See Proposal 8–13.

specialist courts could overcome some of the current concerns about the unwillingness of state and territory judicial officers to intervene in family law issues on the basis of a real or perceived lack of expertise. However, potential disadvantages may include, for example, delays in the system as applicants wait for proceedings to commence in specialist courts. Specialist courts are discussed further in Chapter 20.

8.140 Support should also be provided to other persons involved in seeking protection orders under state and territory family violence legislation—that is, victims of violence and legal practitioners. As regards victims, a clear option should be included in application forms for protection orders allowing an applicant to request that the court vary, suspend, or discharge a parenting order. The Commissions anticipate that such a reform would be especially useful for self-represented parties, who may otherwise not be aware that such an option is available to them.

8.141 A more complex question is the support, if any, which should be provided to legal practitioners. The Commissions are seeking further information to form the basis for any recommendations for reform in this regard. First, do participants in the system encounter reluctance on the part of lawyers to seek applications for varying or revoking parenting orders? If so, is this because of concerns that such applications will be used against a client in future parenting proceedings through the operation of the 'friendly parent' provision? In that case, the recommendations in the Chisholm Review to amend the friendly parent provisions in the *Family Law Act* may adequately deal with the issue. Alternatively, reluctance may stem from an unwillingness to invest time and resources, for example, where a variation is being sought in interim protection order proceedings which will expire after 21 days. The Commissions are interested in suggestions for reforms that could overcome any such concerns.

8.142 In Western Australia, the *Jurisdiction of Courts of Summary Jurisdiction (Children) Proclamation* may be discouraging magistrates from using their s 68R powers in protection order proceedings. The intended operation of the Proclamation is unclear. Accordingly, in the Commissions' view, the *Jurisdiction of Courts of Summary Jurisdiction (Children) Proclamation* should be reviewed with a view to clarifying its intended application to magistrates courts in Western Australia seeking to exercise their div 11 powers.

Question 8–4 Is s 68P of the *Family Law Act 1975* (Cth), which requires a family court to specify any inconsistency between a family law order and a family violence protection order, working in practice? Are any reforms necessary to improve the section's operation?

Question 8–5 Is s 68Q(2) of the *Family Law Act 1975* (Cth), which permits certain persons to apply for a declaration of inconsistency between a family law order and a family violence protection order, working in practice? How frequently is this provision used?

Question 8–6 Do state and territory courts exercise their power under s 68R of the *Family Law Act 1975* (Cth) to revive, vary, discharge or suspend a parenting order to give effect to a family violence protection order?

Proposal 8–8 Family violence legislation should refer to the powers under s 68R of the *Family Law Act 1975* (Cth) to revive, vary, discharge or suspend a parenting order to give effect to a family violence protection order by:

(a) referring to the powers—the South Australian model; or

(b) requiring the court to revive, vary, discharge or suspend an inconsistent parenting order to the extent that it is inconsistent with a family violence protection order—the Victorian model.

Question 8–7 Should proceedings for a protection order under family violence legislation, where there is an inconsistent parenting order, be referred to a specialist state and territory court?

Proposal 8–9 Application forms for protection orders under state and territory family violence legislation should include a clear option for an applicant to request a variation, suspension, or discharge of a current parenting order.

Question 8–8 Are legal practitioners reluctant to seek variation of parenting orders in state and territory courts? If so, what factors contribute to this reluctance?

Proposal 8–10 The *Jurisdiction of Courts of Summary Jurisdiction (Children) Proclamation 2006* (Cth) should be reviewed to clarify its intended application to magistrates courts in Western Australia seeking to exercise their powers under div 11 of the *Family Law Act 1975* (Cth).

Relevant considerations in modifying or revoking a parenting order

8.143 Previous reviews have identified the potential for confusion about the purposes of div 11 and the principles governing use of the powers under s 68R. Section 60CG imposes an obligation on family courts making parenting orders to achieve consistency with family violence orders and avoid exposing people to the risk of family violence. No such objective is included in div 11.

8.144 The Kearney McKenzie Report expressed the view that this objective is 'critical to achieving the purposes of Division 11' and recommended it be repeated in that

division.[138] The Family Law Council did not agree, advising that this objective applies to courts making parenting orders, where the paramount consideration is the best interests of the child. In contrast:

> Division 11 deals with situations in which contact orders are being considered in circumstances in which family violence orders are in existence or are about to be made. … [I]n such situations, while the court must have regard to the best interests of a child, such interests are *not the paramount consideration*. The case for not applying the paramountcy principle in such cases is that a child's best interests must give way to the right of other family members to be protected from violence or the threat of violence.[139]

8.145 Instead, the Family Law Council recommended that the considerations to which a court must have regard in varying a parenting order should be amended to include the following:

> In exercising its powers under this section, a court must have regard to the need to protect all family members from family violence and the threat of family violence and, subject to that, to the child's right to contact with both parents, provided such contact is not contrary to the best interests of the child.[140]

8.146 Neither suggestion was taken up in the 2006 redraft of div 11. However, a note to s 68R(5) was inserted cross-referring to the principles set out in ss 60CB–60CG for determining a child's best interests.

Commissions' views

8.147 The Commissions are interested in stakeholder views on whether any further reforms are necessary or desirable to the considerations to which a court must have regard in varying a parenting order. In particular, should the *Family Law Act* be amended to direct state and territory courts varying parenting orders to give priority to the protection of family members against violence and the threat of family violence over a child's interest in having contact with both parents?

Question 8–9 Should the *Family Law Act 1975* (Cth) be amended to direct state and territory courts varying parenting orders to give priority to the protection of family members against violence and the threat of family violence over a child's interest in having contact with both parents?

A power for state and territory courts to make parenting orders?

8.148 The 2006 amendments to the *Family Law Act* repealed the power of state and territory judicial officers to *make* parenting orders, on the basis of recommendations of

138 Kearney McKenzie & Associates, *Review of Division 11* (1998), 23.
139 Family Law Council, *Review of Division 11—Family Violence* (2004), 7 (emphasis in original).
140 Ibid.

the Kearney McKenzie Report and the Family Law Council. Consequently, new parenting orders can only be issued in state and territory protection order proceedings with consent and on an interim basis. In this Inquiry, some stakeholders have expressed the view that this power should be reinstated, on the basis that it enables state and territory courts to deal comprehensively with protection order proceedings involving children. The Commissions are interested in further stakeholder views on this issue.

Question 8–10 Should s 68R of the *Family Law Act 1975* (Cth) be amended to empower state and territory courts to make parenting orders in those circumstances in which they can revive, vary, discharge or suspend such orders?

Interim protection orders

8.149 Under s 68T of the *Family Law Act*, if, in proceedings to make an interim family violence protection order, the court revives, varies or suspends an order, injunction or arrangement under s 68R, that revival, variation or suspension ceases to have effect at the earlier of: the time that the interim order stops being in force; and the end of the period of 21 days starting when the interim order was made. The Kearney McKenzie Report recommended that this period be extended to 90 days on the basis that 21 days is insufficient time in which to obtain new orders from a court exercising family law jurisdiction:

> When a magistrate varies etc a contact order in proceedings for an interim family violence order, the maximum period the variation etc can have effect is 21 days. In most States and Territories, an interim family violence order may last considerably longer than this. The power to make a variation etc from which no appeal lies is the one power s 68T gives to magistrates that they do not already have. It is very important. In the circumstances where it is likely to be used, where contact or contact handover is an occasion of violence by one parent against another, it can be used to provide a circuit breaker in the violence. It gives the victim a breathing space from the violence. It does not have to be used to deny contact altogether; in appropriate cases, the variation might be new pick up and delivery arrangements. What it should do, but does not, is give the parties time to go to the Family Court to get new orders. How long this takes varies from jurisdiction to jurisdiction, but is in the range of two to three months. The consultants acknowledge that three months is a long time to bind someone by an order that cannot be appealed from. Nevertheless, the magistrate should have the power to make the variation for a period that is long enough to enable the parties to go to the Family Court.[141]

8.150 The Family Law Council did not agree with this recommendation on the basis that a 90 day period during which no contact would occur, and which is not subject to appeal or scrutiny by a court exercising family law jurisdiction, could not be justified. The Council further suggested that—in circumstances where a magistrates court has varied or suspended a contact order when making an interim protection order—a court

141 Kearney McKenzie & Associates, *Review of Division 11* (1998), 24.

would be unlikely to make a finding that a parenting order has been breached if a parent withheld contact beyond the 21 day period while an application to vary or discharge is awaiting hearing.[142]

Commissions' views

8.151 The Commissions are interested whether, as a matter of practice, 21 days is insufficient time for an applicant for an interim family violence protection order to seek new orders in a family court. If so, then the Commissions are of the preliminary view that variations to, or suspensions of, parenting orders sought in interim protection order proceedings should remain in force for the minimum practical timeframe within which new family court orders can be obtained.

8.152 A possible option for reform would be to set out in legislation the policy position set out in the Family Law Council's advice—that is, it should be a defence to breach of a parenting order where a parent withholds contact beyond 21 days while a variation or suspension of a parenting order made by a state or territory court is awaiting hearing in a family court.

Question 8–11 Do applicants for interim protection orders who seek variation of a parenting order have practical difficulties in obtaining new orders from a court exercising family law jurisdiction within 21 days? If so, what would be a realistic time within which such orders could be obtained?

Question 8–12 Should there be a defence to a breach of a parenting order where a parent withholds contact beyond 21 days due to family violence concerns while a variation or suspension of a parenting order made by a state or territory court is awaiting hearing in a federal family court or the Family Court of Western Australia?

Cooperative responses

8.153 Cooperative responses may provide another avenue for resolution of inconsistent protection orders and parenting orders. This is illustrated by a protocol adopted in Tasmania in response to police concerns about victim safety where protection orders operate alongside family court orders. A protocol was 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 to 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

142 Family Law Council, *Review of Division 11—Family Violence* (2004), [41]–[45].

suspension. A review of the *Family Violence Act 2004* (Tas) by Urbis recommended that the effectiveness of this protocol be evaluated over time.[143] No such evaluation appears to have taken place.

Commissions' views

8.154 The protocol adopted in Tasmania has the potential to improve significantly the safety of victims of violence and their children. This is particularly pertinent in a jurisdiction such as Tasmania, where police-issued protection orders remain in force for a lengthy period of time (12 months).[144] However, this model may indicate the potential for cooperative responses to play a broader role where there are coexisting family violence protection orders and parenting orders. A necessary first step is an evaluation of the effectiveness of the protocol in Tasmania. If this evaluation is positive, other states and territories should whether similar cooperative responses could contribute to their framework for issuing protection orders. The practicality of translating the Tasmanian model may depend, among other factors, on the size of the jurisdiction involved. However, in larger jurisdictions, cooperative responses still may be feasible, for example, where they are implemented within discrete geographic areas.

Proposal 8–11 The Tasmanian Government should undertake an evaluation of the protocol negotiated between the Magistrates Court of Tasmania and the Tasmanian Registry of the Family Court in relation to coexisting family violence protection orders and parenting orders. On the basis of this evaluation, other states and territories should consider whether adopting cooperative models would be an effective strategy to deal with coexisting orders.

A gap in protection?

8.155 The previous section of this chapter considered strategies for minimising and resolving inconsistency between parenting and protection orders, including through the provisions of div 11 of the *Family Law Act*. However, consistency is not an end in and of itself. Orders may be consistent but still expose parents and their children to violence at the time of contact. This has been recognised as a particular problem in the context of standard exceptions to the prohibitions in protection orders for court ordered contact. As discussed below, interaction issues may also arise where no existing protection order is in place at the time of parenting proceedings under the *Family Law Act*, and where protection orders are sought in state and territory courts in the absence of a parenting order.

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

144 Police-issued protection orders are discussed in Ch 5 where the Commissions propose that the period of operation of such orders be limited.

Subjecting protection orders to parenting orders

8.156 As a matter of practice, many state and territory judicial officers avoid inconsistency between parenting orders and state and territory protection orders by making protection orders subject to any contact ordered by a court. As stated by the Family Law Council:

> On a practical level, inconsistency between family violence orders and contact orders is most often avoided, not through the operation of Division 11, but through the practice of making any contact ordered under the *Family Law Act* an exception to prohibitions contained in a family violence order.[145]

8.157 Where court-ordered contact with children is a standard exception, unless the applicant crosses it out (and the magistrate agrees), the exception will apply as a matter of course. The Kearney McKenzie Report noted the gap that this leaves in the framework for protecting women and their children from family violence:

> Local courts may quite properly avoid making contact orders in the context of an application for a family violence order; instead they 'refer the issue' to the Family Court by excepting contact ordered by the Family Court from the prohibitions in the family violence order. In effect, local courts hand over the responsibility for ensuring contact does not expose women and children [to violence] to the Family Court. However, as any subsequent Family Court contact order cannot be inconsistent with a family violence order that includes the exception, the protection offered by Division 11 … [does] not apply. This leaves a gap in protection.[146]

8.158 The Report accepted that transferring responsibility for deciding on how contact should take place to family courts may be an appropriate response, commenting that:

> It was almost universally agreed in consultations that the Family Court is the appropriate court to deal with issues involving children. The Family Court has the expertise and the resources to do this. However, if the Family Court is satisfied that whatever order it makes is not going to be inconsistent with the family violence order and does not consider the violence issue, the outcome may well be that woman and children are left unprotected. This is particularly so at the interim stage because the Court does not have a lot of information. It is not enough merely to eliminate inconsistency; contact orders must not expose people to violence.[147]

Options for reform

8.159 Commentators have suggested several approaches for dealing with the potential gap in protection identified above. The Kearney McKenzie Report recommended that, in such cases, the court exercising family law jurisdiction should look comprehensively at the issue of violence, whether or not a parenting order would be inconsistent with the protection order.[148] The 2004 Family Law Council advice endorsed this

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145 Family Law Council, *Review of Division 11—Family Violence* (2004), 7.

146 Kearney McKenzie & Associates, *Review of Division 11* (1998), 21–22. The Family Law Council agreed with this conclusion: Family Law Council, *Review of Division 11—Family Violence* (2004), 8.

147 Kearney McKenzie & Associates, *Review of Division 11* (1998), 16.

148 Ibid, 26.

recommendation. The Council suggested that a court exercising jurisdiction under the *Family Law Act* is already required to consider the risk of violence in determining a child's best interests. Reform may simply require a greater awareness of this responsibility.[149]

8.160 More radically, Miranda Kaye and colleagues have suggested that consideration be given to changing the *Family Law Act* to include a presumption that, once the court has made a finding of violence, it should not make an order giving residence or unsupervised contact to a party who has used violence against a child of the family or the other party to the proceedings unless it is positively satisfied that the child will be safe.[150] This would be consistent with the New Zealand approach—that is, once a court is satisfied that a party to the proceedings has used violence against the child or the other party to the proceedings, then it must not make an order allowing the violent party contact, other than supervised contact, unless it is satisfied of the child's safety.[151]

Commissions' views

8.161 Previous sections of this chapter have discussed strategies to improve the manner in which family courts consider allegations of violence and existing family violence orders. Improving judicial consideration of family violence in family law proceedings has also been the subject of 2009 reports by Professor Chisholm and the Family Law Council, the recommendations of which have been discussed above.[152] Reforms to the family law system on the basis of these reports should assist in addressing concerns about inadequate protection for victims of family violence in circumstances where protection orders include an exception for court-ordered contact. In particular, these reforms, if implemented, will ensure that a family court that makes a contact order involving a victim of family violence must satisfy itself that the victim and any children will not be exposed to an unacceptable risk of violence.

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149 Family Law Council, *Review of Division 11—Family Violence* (2004).

150 M Kaye, J Stubbs and J Tolmie, 'Domestic Violence and Child Contact Arrangements' (2003) 17 *Australian Journal of Family Law* 93, 132.

151 *Care of Children Act 2004* (NZ) s 60.

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

8.162 Another reform that may be beneficial would be a clear option for applicants for protection orders to indicate their preference that the court-ordered contact exception should not apply. Several applications for protection orders already provide this option. For example, the Tasmanian application form for a protection order provides for applicants to ask the court to impose a condition prohibiting respondents from approaching them. Applicants can choose whether to include an exception 'for the purpose of contact with the children named above as agreed or as ordered by a court of competent jurisdiction'.[153] In Victoria, applicants can tick a box requesting that a *Family Law Act* order be revived, varied or suspended.[154] A federal family court would still be able to issue a parenting order that is inconsistent with the protection order, but this would trigger the process set out in div 11.

8.163 Another option would involve the removal of court-ordered contact as a standard exception from the scope of conduct prohibited in a protection order. The Commissions are interested in stakeholder views on any such policy, including whether there are situations that have not been considered by the Commissions where an exception for court-ordered contact is necessary or desirable.

Proposal 8–12 Application forms for family violence protection orders should include an option for applicants to indicate their preference that there should be no exception in the protection order for contact required or authorised by a parenting order.

Question 8–13 Should contact required or authorised by a parenting order be removed from the standard exceptions to prohibited conduct under state and territory protection orders?

No existing protection order

8.164 Concerns have been raised about the potential for existing parenting orders under the *Family Law Act* to limit an applicant's capacity to commence proceedings for a family violence protection order in a state or territory court. For example, in their study on family violence and child contact arrangements, Kaye and colleagues reported the experience of a study participant who applied for a protection order for herself and her children:

> The Local Court decided not to deal with the matter because [the victim's] ex-partner had started proceedings in the Family Court. The magistrate commented that the 'Family Court was looking into it now' and that her interim Family Court orders for

153 Magistrates Court of Tasmania, *Application for a Family Violence Order* <www.magistratescourt.tas.gov.au/divisions/family_violence/forms> at 29 March 2010.

154 Magistrates' Court of Victoria, *Information for Application for an Intervention Order* (2009) <www.magistratescourt.vic.gov.au> at 2 February 2010.

> supervised contact 'covered the situation'. … The magistrate went on to comment that, in any event, he 'couldn't overrule the Family Court'.[155]

8.165 Similar practices were reported by some members of the ALRC Family Violence Online Forum, with one participant stating:

> In some cases, we find that magistrates are unwilling to act in relation to [protection orders] where there is an overlapping family law matter, possibly because there is a perception that everything will be dealt with under the family law jurisdiction. This results in a mechanism specifically designed to protect the safety of women being made unavailable to women at a time when they are at an increased risk of family violence.[156]

Commissions' views

8.166 The Commissions are concerned about the possibility that victims of violence are being denied protection under state and territory family violence laws because of existing *Family Law Act* parenting orders, or the fact that family law proceedings are on foot.

8.167 There is no legislative basis for a state or territory court to decline to make a protection order simply because proceedings have commenced for parenting orders in a family court. As such, the most effective initiative is likely to involve judicial education and training. The Commissions propose that the Australian Government—in conjunction with state and territory governments, the National Judicial College of Australia, the Judicial Commission of NSW and the Judicial College of Victoria—should provide training to judicial officers in state and territory courts about the interaction between their powers and responsibilities under family violence legislation and the *Family Law Act*. This should include guidance on handling proceedings for protection orders in the case of ongoing or pending *Family Law Act* proceedings.[157]

No existing parenting order

Imposition of parenting orders by state and territory magistrates

8.168 Issues may arise where a party seeks to obtain a protection order under state and territory family violence legislation where children are involved but no parenting order is in place. In particular, stakeholders have told the Commissions about situations where judicial officers require an applicant to negotiate parenting plans as part of the process of making orders, often in circumstances where an applicant's legal advisers are ill-prepared or inexperienced in family law.

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155 M Kaye, J Stubbs and J Tolmie, 'Domestic Violence and Child Contact Arrangements' (2003) 17 *Australian Journal of Family Law* 93, 98. See also Kearney McKenzie & Associates, *Review of Division 11* (1998), 15.

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

157 Proposal 8–13.

8.169 A participant in the ALRC's Family Violence Online Forum summarised the problems as follows:

> 1. There is usually not enough time (as we are assisting a number of clients at the same time) to get proper instructions and give complete advice to clients who are usually distraught. It is not the right forum to take instructions.
> 2. Clients feel pressured to agree to something, leading to highly inappropriate and/unsafe orders and plans being agreed to. … This can happen with clients who may be unrepresented in regional courts.
> 3. Clients usually come to our service a few days after someone else has prepared a parenting plan at the Magistrates Court to seek to have those parenting plans amended.[158]

8.170 However, other applicants for protection orders may want a state or territory court to make parenting orders at the same time, considering this to be a timely and cost-effective alternative to seeking orders in the family court.[159]

Other possible inconsistencies

8.171 The conditions of protection orders may conflict with responsibilities under the *Family Law Act* other than those pursuant to 'an order, injunction or undertaking' (which would enliven div 11). A key example is an obligation to exercise parental responsibility.

8.172 Parental responsibility is defined by s 61B to mean 'all the duties, powers, responsibilities and authority which, by law, parents have in relation to children'. Each parent of a child who is under 18 has parental responsibility for the child.[160] This position may be changed expressly in a parenting order made by the court, or to the extent that it is necessary to give effect to such an order. The definition of 'court' in this section extends only to federal family courts—there is no legislative provision for parental responsibility to be displaced by a protection order in a state or territory court.

8.173 Under s 61D, when making a parenting order, federal family courts must apply a presumption that it is in the best interests of the child for his or her parents to have 'equal shared parental responsibility'. This presumption does not apply if there are reasonable grounds to believe that a parent of the child has engaged in family violence or child abuse.[161]

8.174 The potential for conflict between the obligation of parental responsibility and family violence protection orders was considered by the District Court of Queensland in *Dowse v Gorringe*.[162] In that case, McGill DCJ considered whether the former

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158 *Comment on ALRC Family Violence Online Forum: Women's Legal Service Providers*.
159 Ibid. As noted above, these orders can only be made on an interim basis and with consent of the parties.
160 *Family Law Act 1975* (Cth) s 61C.
161 Ibid s 61DA.
162 *Dowse v Gorringe* [2004] QDC 477.

husband had breached a condition to be 'of good behaviour' under a temporary protection order by going to the home of his former spouse and four children of their relationship. This was at the time that he would normally see the children, and the reason for his visit was to collect two of the children who had refused on that day to see him. There were no existing court orders under the *Family Law Act*.

8.175 At first instance, the magistrate held that the mere fact of the husband's attendance at that address amounted to a failure to be of good behaviour towards the wife. McGill DCJ rejected that notion and commented:

> There was no order depriving him of parental responsibility in relation to those children, and on the face of it he was entitled to exercise it under the authority of the *Family Law Act*. How he went about that of course might be modified by the requirements of a protection order, but the mere fact that he sought some contact with his sons could not in itself amount to a breach of that order.[163]

8.176 A significant factor in McGill DCJ's ruling was the fact that the protection order in place did not expressly prohibit the husband from going to the wife's house. However, had there been a direct inconsistency between a requirement for exercising parental responsibility and the conditions of a protection order, parental responsibility may still have taken precedence. McGill DCJ noted that, in the event of conflict between the operation of parental responsibility under the *Family Law Act* and the making of a protection order under the *Domestic and Family Violence Protection Act 1989* (Qld), 'the Commonwealth legislation of course has priority'.[164]

8.177 Accordingly, a party who has sought a protection order in the absence of a parenting order could be in a more difficult position than that which applies if parenting orders were in place:

> If there had been parenting orders in place which altered, or limited the parental responsibility of the parties in these matters the District Court judge may have still reached the same conclusions in relation to the domestic violence (unless there were parenting orders which completely removed or seriously limited the parental responsibility of the appellants in each case), however the parties in each case may have had more scope to take the matter back to a court exercising jurisdiction under the *Family Law Act 1975* for a breach of the orders.[165]

8.178 A related question arises where protective conditions are set out in laws other than state and territory family violence laws—for example, as a protective condition of bail. This issue was raised in *Dunne v P*.[166] The respondent in this case had successfully appealed against a finding in the Court of Petty Sessions for breach of a restraining order and breach of a bail undertaking not to initiate contact with his wife.

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163 Ibid, [15].
164 Ibid, [14].
165 D Foley, 'Interaction and Conflict between Family Law Act 1975 and Domestic and Family Violence Protection Act 1989 (Qld), in Light of D v G and Bottoms v Rogers' (2007) 28 *Queensland Lawyer* 27, 34.
166 *Dunne v P* [2004] WASCA 239.

On appeal to the Supreme Court of Western Australia, Malcolm CJ noted that the provisions of the *Bail Act 1982* (WA) dealing with protective bail conditions had not been prescribed for the purposes of reg 12BB of the *Family Law Regulations* and, accordingly, were not encompassed by pt VII div 11 of the *Family Law Act*. Under s 109 of the *Australian Constitution*, a state law or court order will be overridden, to the extent of any proper exercise of the jurisdiction of a federal court which is inconsistent with the state law or court order. However, Malcolm CJ noted the statement in *P v P* that:

> A law of the Commonwealth conferring jurisdiction upon a federal court in general terms will, in the absence of a clear legislative intent to the contrary, ordinarily be construed as not intended to confer jurisdiction to make an order authorising or requiring the doing of an act which is specifically prohibited and rendered criminal by the ordinary criminal law of the State or Territory in which the act would be done.[167]

8.179 Malcolm CJ expressed the view that there is nothing in pt VII of the *Family Law Act* to indicate that the powers to confer a parenting order are to be exercised other than in conformity with the general law of the state, including the *Bail Act*.

Commissions' views

Imposition of parenting orders by state and territory magistrates

8.180 Reforms to pt VII of the *Family Law Act* in 2006 included removal of the power for state and territory courts to make new parenting orders in the course of protection order proceedings. Accordingly, pursuant to s 68N of that Act, courts of summary jurisdiction can only make parenting orders with the consent of the parties. A key reason for repeal of the power of state and territory courts to make new parenting orders was the limited time and expertise of magistrates courts to perform this role. These barriers are compounded where a party's legal representative is ill-prepared to make arguments about parenting order conditions, or inexperienced in family law.

8.181 One option for reform would be to completely remove the power for magistrates courts to make parenting orders, regardless of the consent of the parties. However, the Commissions are not convinced that such a step is necessary or desirable. Participants in the ALRC's Family Violence Online Forum noted that orders for contact can sometimes be a useful stopgap at the time that a state or territory court issues a protection order. In the Commissions' view, more effective change would result from a better understanding by state and territory judicial officers of the extent and limitations of their *Family Law Act* powers. In particular, the Commissions propose a role for further training and development programs in this regard.

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167 *P v P* (1994) 181 CLR 583, 602.

Other possible inconsistencies

8.182 The Commissions are interested in hearing further views on the potential for inconsistencies between rights and responsibilities under the *Family Law Act* and state and territory family violence laws other than those covered by pt VII div 11 of the *Family Law Act*. In particular, is there a need to expand the division's operation to encompass a broader range of potential inconsistencies? As the law currently stands, there is the potential for victims of violence to be in a worse position where, for example, a party's contact with his or her child is determined by reference to obligations of parental responsibility in s 61B of the *Family Law Act*.

8.183 Division 11 could also be expanded to cover inconsistencies between protective bail conditions and parenting orders under the *Family Law Act*. A potential advantage of extending the operation of div 11 to protective bail conditions could be, for example, enlivening the requirements in s 68Q for courts to make declarations of inconsistency. Division 11 could also clarify in legislative form which requirements should take precedence where protective bail conditions conflict with parenting orders.

Proposal 8–13 The Australian Government—in conjunction with state and territory governments, the National Judicial College of Australia, the Judicial Commission of NSW and the Judicial College of Victoria—should provide ongoing training and development for judicial officers in state and territory courts who hear proceedings for protection orders on the exercise of their powers under the *Family Law Act 1975* (Cth).

Question 8–14 Should the provisions for resolving inconsistent orders under pt VII div 11 of the *Family Law Act 1975* (Cth) be expanded to include inconsistencies resulting from:

(a) a party's rights or responsibilities under the *Family Law Act* other than those pursuant to an order, injunction or undertaking, such as those deriving from the concept of parental responsibility; and/or

(b) laws other than family violence laws prescribed in reg 12BB of the *Family Law Regulations 1984* (Cth), such as protective bail conditions?

9. Family Violence Legislation and the *Family Law Act:* Other *Family Law Act* Orders

Introduction

9.1 In Chapter 8, the Commissions consider the interaction between protection orders under state and territory family violence legislation and parenting orders made under the *Family Law Act 1975* (Cth). This chapter considers a number of different issues that arise from the interaction between protection orders and orders that may be made under the *Family Law Act* other than parenting orders.

9.2 First, this chapter examines the sections of the *Family Law Act* that allow a family court to grant an injunction for the personal protection of a victim of family violence, and considers how such injunctions interact with the similar jurisdiction of state and territory courts to make protection orders. Secondly, the chapter considers ways in which family violence is relevant to financial proceedings under the *Family Law Act*—such as proceedings relating to property and spousal maintenance—and how conditions in protection orders regarding the use of property relate to final property settlements by a family court. Finally, the Commissions consider the relationship between protection orders under state and territory family violence legislation and family law disputes about the relocation of a family member or the recovery of a child.

Protection orders and injunctive relief

9.3 This section examines the interaction between protection orders made under state and territory family violence legislation and injunctions granted under the *Family Law Act*. The section considers three particular issues:

- the general preference of victims of family violence to seek protection orders under state and territory family violence legislation rather than *Family Law Act* injunctions, and ways in which *Family Law Act* injunctions may be reformed to promote their use;
- the potential for inconsistencies between protection orders under state and territory family violence legislation and *Family Law Act* injunctions; and
- the appropriateness of the injunction to relieve a party to a marriage from 'any obligation to perform marital services or render conjugal rights' currently available under the *Family Law Act.*

Injunctions available under the *Family Law Act*

9.4 An injunction is a kind of order made by a court that requires a person to do, or refrain from doing, a particular act. Courts exercising jurisdiction under the *Family Law Act*—that is, the Family Court, Federal Magistrates Court and local state and territory magistrates courts[1]—can grant injunctions for a variety of purposes. The power to grant injunctions is contained in two separate sections of the *Family Law Act 1975* (Cth)—one in relation to the courts' child welfare jurisdiction, and the other in the courts' jurisdiction in relation to matrimonial causes.

Injunctions to protect the welfare of a child

9.5 Section 68B of the *Family Law Act* permits a court to grant an injunction to protect the welfare of a child. The injunction may be:

- for the personal protection of the child, the child's parent, a person with a parenting order in respect of the child, or a person who has parental responsibility for the child;[2] or
- to restrain a person from entering or remaining in the place of residence, employment or education or other specified area of the child, the child's parent, a person with a parenting order in respect of the child, or a person who has parental responsibility for the child.[3]

1 *Family Law Act 1975* (Cth) ss 39–41.
2 Ibid s 68B(1)(a)–(b).
3 Ibid s 68B(1)(c)–(d).

9.6 If, during an application under pt VII of the *Family Law Act*, there is an allegation of child abuse or family violence, or the risk of such conduct, the court must consider whether a s 68B injunction should be granted.[4]

Injunctions to protect a party to a marriage

9.7 Section 114 of the *Family Law Act* permits a court to grant an injunction in circumstances arising out of the marital relationship, either in separate proceedings or in family law proceedings already before the court.[5] An injunction may be granted:

- for the personal protection of a party to the marriage;
- to restrain a party to the marriage from entering or remaining in the matrimonial home or the other party's residence or place of work;
- for the protection of the marital relationship;
- in relation to the property of a party to the marriage; or
- in relation to the use or occupancy of the matrimonial home.[6]

9.8 A victim of family violence is most likely to seek an injunction for personal protection. The *Family Law Act* does not define 'personal protection', but courts have interpreted the term to include protection from physical harm as well as protection of a person's wellbeing and freedom from interference and harassment.[7] A victim of family violence may also seek an order to exclude a person from particular places.

9.9 In addition, s 114(2) permits a court to make an order 'relieving a party to a marriage from any obligation to perform marital services or render conjugal rights'.

9.10 In relation to both ss 68B and 114 injunctions, the court has a broad discretion to grant an injunction 'in any case in which it appears to the court to be just or convenient to do so' and upon such terms and conditions as the court considers appropriate.[8]

9.11 *Family Law Act* injunctions protect a limited range of people. Section 114 injunctions are only available to protect people who are, or have been, married. A s 68B injunction can protect a child, the child's parent, a person with parental responsibility for the child or a person with a parenting order in respect of the child. Because the constitutional foundation of the *Family Law Act* lies in the

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4 Ibid s 60K(4).
5 Ibid s 114(3).
6 Ibid s 114(1). Courts exercising jurisdiction under the *Family Law Act* have a more limited power to issue an injunction in de facto financial proceedings, in that the injunction is confined to the use or occupancy of the parties' property or residence.
7 *In the Marriage of Kemsley* (1984) 10 Fam LR 125, 130.
8 *Family Law Act 1975* (Cth) ss 68B(2), (3); 114(3).

Commonwealth's power with respect to marriage, divorce and matrimonial causes, *Family Law Act* injunctions are not available to protect childless unmarried couples, childless same sex couples, siblings or other family members.[9]

Enforcement

9.12 If a *Family Law Act* injunction is breached, it is up to the person protected by the injunction to file an application to seek an order from the court regarding the contravention.[10] The application must be accompanied by an affidavit setting out the facts, and a filing fee paid.[11] A similar process is required regarding allegations of contempt.[12]

9.13 Sections 68C and 114AA provide an automatic power of arrest where a person breaches an injunction for personal protection. A police officer may arrest a person if the officer believes on reasonable grounds that the person has breached the injunction by causing, or threatening to cause, bodily harm to the person protected by the injunction, or has harassed, molested or stalked that person.[13] There is no power of arrest in relation to injunctions for matters other than personal protection.

9.14 Once arrested, the person must be brought before the court that granted the injunction, or another court having jurisdiction under the Act, by close of business of the day following the arrest (as long as it is not a weekend or public holiday). The police officer making the arrest must take all reasonable steps to ensure that the person who obtained the injunction is aware of both the arrest and the court hearing in relation to the breach of the injunction.[14]

9.15 If a person makes an application to seek an order from the court regarding the contravention, the court will hear the application within the strict time period. However, if an application is not made in time, the person arrested must be released.[15]

Consequences of contravention

9.16 The *Family Law Act* attaches different consequences to a failure to comply with an injunction that affects a child, and one that does not.

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9 R Alexander, 'Family Violence' in Springvale Legal Centre (ed) *Lawyers Practice Manual Victoria* (2009) 208–1, [2.8.313]. The constitutional framework is set out in Ch 2.

10 *Family Law Rules 2004* (Cth) r 21.02.

11 Ibid.

12 Ibid.

13 *Family Law Act 1975* (Cth) ss 68C(1); 114AA(1).

14 Ibid s 114AA(3). Section 68C(3) applies this section to breaches of injunctions granted under s 68B.

15 Ibid s 144AA(4).

Contravention of an injunction that affects a child

9.17 Division 13A of pt VII of the *Family Law Act* applies when a person fails to comply with a s 68B injunction, or a s 114 injunction in so far as it is for the protection of a child.[16]

9.18 Where a person contravenes an order affecting a child without reasonable excuse,[17] the court may make a variety of orders depending on the seriousness of the contravention, including:

- a new parenting order, compensation order or order requiring the person to attend a post-separation parenting program, for less serious contraventions;[18] or
- a bond, compensation, community service order, fine or a sentence of imprisonment for a maximum term of 12 months for more serious contraventions.[19]

Contravention of an injunction that is not for the protection of a child

9.19 A court may impose a range of sanctions on a person who, without reasonable excuse,[20] contravenes a s 114 injunction that is not for the protection of a child, including the imposition of a bond, fine or term of imprisonment.[21] A term of imprisonment may only be imposed if the contravention was intentional or fraudulent[22] and is limited to a maximum of 12 months.[23] Alternative sentencing options, such as a community service order, are also available.[24]

Contempt

9.20 Where a contempt of court does not constitute a contravention of an order, or does constitute a contravention and 'involves a flagrant challenge to the authority of the court', the court may punish the contempt by imposing a sentence of imprisonment or a fine or both.[25]

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16 Ibid s 4(1), definition of 'order under this Act affecting children'.

17 A person may have a reasonable excuse for contravening an order that affects a child if he or she did not understand the obligations imposed or if he or she believed on reasonable grounds that actions were necessary to protect the health or safety of a person: Ibid s 70NAE(2), (4), (5), (6), (7).

18 Ibid s 70NEB.

19 Ibid ss 70NFB; 70NFG.

20 A person may have a reasonable excuse for contravening a s 114 injunction if he or she did not understand the obligations imposed and the court is satisfied that the person 'ought to be excused': Ibid s 112AC.

21 Ibid s 112AD.

22 Ibid s 112AD(2A).

23 Ibid s 112AE.

24 Ibid s 112AG.

25 Ibid s 112AP.

Use of *Family Law Act* injunctions in practice

9.21 Many more victims of family violence seek protection orders under state and territory family violence legislation than seek *Family Law Act* injunctions.[26] Dr Renata Alexander has noted that since the introduction of state and territory legislation aimed specifically at family violence, the number of family violence injunctions sought in the Family Court has fallen dramatically.[27]

9.22 Associate Professor Lisa Young and Federal Magistrate Geoff Monahan have identified two reasons why victims of family violence generally seek protection orders rather than *Family Law Act* injunctions—first, the cost and complexity of the application proceedings, and secondly, the inadequacy of enforcement mechanisms under the *Family Law Act*.[28]

9.23 Participants in the ALRC Family Violence Online Forum suggested similar reasons why victims of family violence generally preferred to seek a protection order under state and territory family violence legislation. One participant stated that:

> I would generally advise clients to seek the protection of an AVO [Apprehended Violence Order] over and above family law restraining orders. In NSW they come with the threat of a criminal charge for contravening an AVO and this often has the desired effect in reducing or stopping the offending behaviour. The process of going to the Family Court for contravention of orders is longer and more expensive and does not have the implications for the person breaching that an AVO does.[29]

9.24 A principal point of difference is that breach of a protection order under state or territory family violence legislation is a criminal offence. This point was made by another participant, who considered that the injunctions available under the *Family Law Act* were not backed up by adequate enforcement:

> In our practice we do not really seek protection within the family law jurisdiction because any protection orders obtained have no teeth in that enforcement mechanisms are quite weak or difficult to navigate.[30]

Cost and complexity of proceedings

9.25 The processes for seeking a protection order under state and territory family violence legislation are generally quicker and cheaper than an application for an injunction under the *Family Law Act.*

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26 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [16.8].
27 R Alexander, *Domestic Violence in Australia: The Legal Response* (3rd ed, 2002), 64.
28 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [16.8].
29 *Comment on ALRC Family Violence Online Forum: Women's Legal Service Providers*.
30 Ibid.

9.26 For example, in Victoria, a person seeking a protection order under the *Family Violence Protection Act 2008* (Vic) will usually complete an *Information Form for Application for Intervention Order*, setting out the background and the orders sought.[31] The form is then given to a registrar who prepares an application and warrant (for urgent matters where there is immediate concern for the person's safety, or a criminal offence is involved) or application and summons (if the matter is not urgent) and lists the hearing before a magistrate. There is no filing fee for the application.[32]

9.27 It is also possible for the Victorian police to apply for a protection order for a victim of family violence. The *Code of Practice for the Investigation of Family Violence*, issued by Victoria Police, requires police to make an application for a protection order wherever the safety, welfare or property of a family member appears to be endangered by another.[33]

9.28 In contrast, the process to obtain a *Family Law Act* injunction is more complex and time consuming. To apply for an injunction under the *Family Law Act,* an applicant must file an Initiating Application either in the Family Court, the Federal Magistrates Court or a state or territory magistrates court. Where an application for an injunction is urgent, interim or interlocutory orders—rather than final orders—are usually sought. In such cases, the application must be accompanied by an affidavit setting out the details of the marriage or relationship, any children and the facts relied on for the injunction.[34] The applicant must pay a filing fee, unless the fee is waived by the court in specific circumstances. The applicant may also need to file a Notice of Child Abuse or Family Violence (Form 4) setting out the alleged family violence or risk of family violence.[35]

9.29 The respondent must be given notice of the hearing by being served a copy of the application and affidavit. Police do not assist in serving documents in relation to *Family Law Act* injunctions because they are classified as a civil matter. Accordingly, the applicant will generally need to use a commercial process server to effect service.[36] In contrast, state and territory family violence legislation permits or requires police to

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31 R Alexander, 'Family Violence' in Springvale Legal Centre (ed) *Lawyers Practice Manual Victoria* (2009) 208–1, [2.8.602], app C.

32 Ibid, [2.8.602].

33 Victoria Police, *Code of Practice for the Investigation of Family Violence* (2005), [5.3.2]. Not all state and territory family violence legislation provides a role for police in making an application for a protection order: see, eg, *Domestic Violence and Protection Orders Act 2008* (ACT). The role of police in assisting persons to apply for a protection order under state and territory family violence legislation is discussed in Ch 5.

34 R Alexander, 'Family Violence' in Springvale Legal Centre (ed) *Lawyers Practice Manual Victoria* (2009) 208–1, [2.8.802].

35 Family Court of Australia, *Form 4—Notice of Child Abuse or Family Violence* <www.familylawcourts.gov.au> at 9 February 2010. See also R Alexander, 'Family Violence' in Springvale Legal Centre (ed) *Lawyers Practice Manual Victoria* (2009) 208–1, [2.8.802]. Form 4 is discussed in detail in Ch 8.

36 R Alexander, 'Family Violence' in Springvale Legal Centre (ed) *Lawyers Practice Manual Victoria* (2009) 208–1, [2.8.803].

serve applications for a protection order on a respondent in certain circumstances, or protocols are in place to ensure that police can serve applications.[37]

Enforcement

9.30 Breach of a protection order under state or territory family violence legislation is a criminal offence, attracting a police response and invoking the criminal justice system.[38] In contrast, breach of a *Family Law Act* injunction must be followed up by the person protected by the injunction as a private matter under the *Family Law Act*.

9.31 While injunctions for personal protection attach an automatic power of arrest and allow for police involvement, it has been suggested that state and territory police are reluctant to exercise their power of arrest under the *Family Law Act,* or do not always understand their role in this regard.[39]

9.32 In the report, *Equality Before the Law* (ALRC 69), the ALRC reiterated a recommendation it made in an earlier inquiry into contempt that a wilful breach of an order for personal protection should be a criminal offence.[40] The ALRC considered that making breach a criminal offence had several advantages:

> It helps to reinforce the message that the violence is not merely a civil matter between the parties; it brings police into the matter; and it relieves the woman from having to instigate proceedings against the man, a matter which may be both financially and emotionally costly. It also brings the Family Court proceedings in line with State and Territory restraining order proceedings which police may initiate.[41]

Other differences

9.33 Other advantages of state and territory protection orders over *Family Law Act* injunctions include:

- protection orders can protect a wider range of family members, such as siblings, extended family and other members of a household;

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37 See eg, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 55, 77, 90; *Domestic Violence and Protection Orders Act 2008* (ACT) s 81.

38 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14; *Family Violence Protection Act 2008* (Vic) s 123; *Domestic and Family Violence Protection Act 1989* (Qld) s 80; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 31; *Restraining Orders Act 1997* (WA) s 61; *Family Violence Act 2004* (Tas) s 35; *Domestic Violence and Protection Orders Act 2008* (ACT) s 90; *Domestic and Family Violence Act 2007* (NT) s 120. The consequences of contravening a protection order under state and territory family violence legislation, including offence provisions and maximum penalties, are discussed in Ch 6.

39 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [16.18]; R Alexander, *Domestic Violence in Australia: The Legal Response* (3rd ed, 2002), 72.

40 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, ALRC 69 (1994), Rec 9.12; Australian Law Reform Commission, *Contempt*, ALRC 35 (1987), [671].

41 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, ALRC 69 (1994), [9.75].

- a wider range of people can initiate proceedings for a protection order, including the police;

- state and territory family violence Acts specify a wide range of conditions or prohibitions that can be included in a protection order;[42] and

- police are more familiar with procedures under state and territory family violence legislation.[43]

9.34 An injunction under the *Family Law Act* may be the preferred option where there are other family law proceedings on foot, or where the applicant for the injunction also seeks a parenting order.[44] *Family Law Act* injunctions also have the advantage of being enforceable throughout Australia, rather than just in a particular state or territory. In contrast, before a protection order made in one jurisdiction will be enforced in another state or territory, state and territory family violence legislation will generally require that the order is registered and recognised in that state or territory.[45]

Commissions' views

9.35 The Commissions recognise that one reason why *Family Law Act* injunctions are not sought as often as protection orders under state and territory family violence legislation is the limited jurisdiction of federal family courts—not every victim of family violence is married, or has a child. In contrast, a victim of family violence with standing to seek an injunction for personal protection under the *Family Law Act* would almost certainly also be able to seek a protection order under state or territory family violence legislation.

9.36 Despite this, the Commissions consider that *Family Law Act* injunctions perform an important role in the *Family Law Act*, and should continue to be available to provide protection to victims of family violence who fall within the jurisdiction of the family courts, particularly where other family law proceedings are anticipated or on foot. It is desirable that victims of family violence are able to resolve their personal protection, parenting and property issues in the one court, thereby minimising victims' exposure to multiple proceedings in different jurisdictions, and avoiding personal and financial costs associated with reiterating the same facts before different courts. Therefore, the Commissions consider that reforms should make *Family Law Act* injunctions more accessible and effective.

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42 Conditions that may be imposed by a protection order under state and territory family violence legislation are discussed in Ch 6.

43 These, and a number of other advantages of using protection orders under state and territory family violence legislation, are listed in R Alexander, 'Family Violence' in Springvale Legal Centre (ed) *Lawyers Practice Manual Victoria* (2009) 208–1, [2.8.317].

44 Ibid, [2.8.318].

45 The registration and recognition of interstate protection orders under state and territory family violence legislation is discussed in the context of the national protection order database in Ch 10.

9.37 The Commissions consider that there are two areas in which the operation of *Family Law Act* injunctions may be improved.

Procedural issues

9.38 Some benefits of the procedures for seeking a protection order under state or territory family violence legislation—as opposed to a *Family Law Act* injunction—are the assistance of the police and court registries in bringing and making the application. However, the involvement of the police may not be appropriate in all family law matters, for example, where an application is brought for an injunction for personal protection as well as in relation to the property of a party to the marriage or the use of the matrimonial home.

9.39 The Commissions are interested in hearing about ways in which the procedures for obtaining a *Family Law Act* injunction may be improved so that they are less complex and more effective. This may include removing filing fees, or permitting an application for an injunction for personal protection without an affidavit.

9.40 The Commissions are aware that s 114 injunctions may be sought for purposes other than the personal protection of a victim of family violence. The Commissions are therefore interested in whether there should be different procedures depending on whether a person is seeking an injunction for personal protection from family violence or an injunction that does not relate to family violence, for example, regarding the use of property.

Enforcement

9.41 The Commissions' preliminary view is that the contravention of a *Family Law Act* injunction for personal protection should be a criminal offence, consistent with the position regarding breach of protection orders under state or territory legislation. Importantly, this would clearly remove the onus from the victim of the violence to bring the application for contravention of the injunction. It would relieve the victim of having to undertake costly family law proceedings to enforce the injunction and reinforce the message that family violence is not a private matter, but a criminal offence of public concern.

9.42 Concerns have been expressed that police are currently reluctant to exercise the power of arrest attached to *Family Law Act* injunctions for personal protection, in part because family law matters are characterised as private, civil proceedings. Making breach of a *Family Law Act* injunction for personal protection a criminal offence will provide a clear basis for the police to act in the face of actual or threatened violence or harassment.

Question 9–1 In order to improve the accessibility of injunctions for personal protection under the *Family Law Act 1975* (Cth) to victims of family violence, should the *Family Law Act* provide separate procedures in relation to injunctions for personal protection and other family law injunctions available under s 114 of the Act? If so, what procedures would be appropriate?

Proposal 9–1 The *Family Law Act 1975* (Cth) should be amended to provide that a wilful breach of an injunction for personal protection under ss 68B and 114 is a criminal offence, as recommended by the ALRC in *Equality Before the Law* (ALRC 69).

Interaction with protection orders

9.43 Injunctions granted under ss 68B and 114 of the *Family Law Act* may operate alongside protection orders made under state and territory family violence legislation. This gives rise to the potential for inconsistencies between orders. This section outlines the rules contained in the *Family Law Act* to avoid and address such inconsistencies.

9.44 Section 114AB of the *Family Law Act* provides that, if a person has sought, or is seeking, a protection order under prescribed state or territory family violence laws,[46] he or she is not entitled to seek, in addition, an injunction under the *Family Law Act*, unless the protection order proceedings have lapsed, been discontinued or dismissed, or the orders are no longer in force.[47]

9.45 Conversely, there is no bar to a person who is seeking, or has obtained, a *Family Law Act* injunction to apply for a protection order under state or territory family violence legislation. Neither is there a formal prohibition on one party seeking a *Family Law Act* injunction even though a related party has already obtained a protection order under state or territory family violence legislation. The effect is that 'the prohibition under s 114AB only extends to the same party using both procedures and then only when the State or Territory procedure has been used first'.[48]

9.46 Orders obtained in different jurisdictions may be inconsistent. As a general principle of constitutional law, orders made under the federal *Family Law Act* prevail over an inconsistent order made under a state or territory law.[49] The *Family Law Act*

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46 *Family Law Regulations 1984* (Cth) reg 19 prescribes the following laws for the purpose of s 114AB: *Crimes (Domestic and Personal Violence) Act 2007* (NSW); *Family Violence Protection Act 2008* (Vic); *Domestic and Family Violence Protection Act 1989* (Qld); *Peace and Good Behaviour Act 1982* (Qld); *Restraining Orders Act 1997* (WA) pts 1–6; *Domestic Violence Act 1994* (SA); *Family Violence Act 2004* (Tas); *Justices Act 1959* (Tas) pt XA; *Domestic Violence and Protection Orders Act 2008* (ACT); *Domestic and Family Violence Act 2007* (NT); *Domestic Violence Act 1995* (NI).

47 *Family Law Act 1975* (Cth) s 114AB(2).

48 R Alexander, *Domestic Violence in Australia: The Legal Response* (3rd ed, 2002), 63.

49 *Australian Constitution* s 109. The constitutional framework is discussed in Ch 2.

contains specific provisions to deal with such inconsistencies, discussed below, which differ depending on whether the injunction expressly or impliedly requires or authorises a person to spend time with a child, or does not involve a child.

Injunctions that relate to a child

Making a protection order that is inconsistent with a current Family Law Act injunction

9.47 A person who is seeking, or who has obtained, a *Family Law Act* injunction may also seek a protection order under state or territory family violence legislation. The *Family Law Act* provides that a protection order made under state or territory family violence legislation that is inconsistent with a *Family Law Act* injunction that expressly or impliedly requires or authorises a person to spend time with a child, is invalid to the extent of the inconsistency.[50]

9.48 Pursuant to s 68R of the *Family Law Act,* a court with jurisdiction under pt VII of the *Family Law Act* may revive, vary, discharge or suspend an injunction made under ss 68B or 114 to the extent that that it expressly or impliedly requires or authorises a person to spend time with a child.[51] A court may only do so if it also makes or varies a protection order under state or territory family violence legislation and there is material before the court that was not before the court that made that original *Family Law Act* injunction.[52] If, when the original ss 68B or 114 injunction was granted, it was inconsistent with an existing protection order, the court must be satisfied that it is appropriate to revive, vary, discharge or suspend the injunction because the person has been exposed, or is likely to be exposed, to family violence as a result of the operation of that injunction.[53]

9.49 Some state and territory family violence legislation directs a court, when making a protection order, to consider the terms of any *Family Law Act* injunctions in relation to the proceedings.[54]

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50 *Family Law Act 1975* (Cth) s 68Q(1).

51 Ibid s 68R(1)(c). Courts with jurisdiction under pt VII of the *Family Law Act* include: the Family Court of Australia, each Family Court of a state, the Supreme Court of the Northern Territory, the Federal Magistrates Court, and, subject to some conditions, courts of summary jurisdiction of each state and territory: *Family Law Act 1975* (Cth) ss 69H and 69J.

52 *Family Law Act 1975* (Cth) s 68R(3).

53 Ibid s 68R(5)(c). The operation of s 68R in relation to parenting orders made under the *Family Law Act* is discussed in Ch 8.

54 See, eg, *Family Violence Act 2004* (Tas) s 18(1)(c); *Domestic Violence and Protection Orders Act 2008* (ACT) ss 31, 47(1)(f); 71; *Domestic and Family Violence Act 2007* (NT) s 19(2)(a).

Making a Family Law Act injunction that is inconsistent with a current protection order

9.50 The *Family Law Act* does not prohibit a party to a marriage seeking an injunction under the *Family Law Act* even though the other party to the marriage has already obtained a protection order under state or territory legislation.

9.51 Where a court grants a *Family Law Act* injunction that expressly or impliedly requires or authorises a person to spend time with a child, that is inconsistent with a protection order made under state or territory family violence legislation, it must specify that the injunction is inconsistent with the protection order and explain why. The court must also explain the terms of the injunction and consequences of breaching it to the applicant, the persons protected by the injunction and the persons to whom the injunction is directed.[55] Within 14 days of granting the injunction, the court must distribute copies to relevant bodies, including the state or territory court that issued the protection order, and the head of the police force and a child welfare officer in the relevant state or territory.[56]

Injunctions that do not relate to a child

9.52 The *Family Law Act* does not expressly deal with inconsistency between a s 114 injunction that does not relate to a child and a protection order under state or territory family violence legislation. The Australian Government Solicitor notes that:

> There is potential for such an order to conflict with a State/Territory protection order. An example might be an injunction granted under s 114 for the personal protection of a party to a marriage, where there are no children. Such an injunction might prevent one party from entering the marital home, when that person is allowed to do so under the terms of a State/Territory protection order. Neither order expressly or impliedly authorises or requires a person to have contact with a child, so s 68Q does not apply; nevertheless, the two orders are clearly inconsistent.[57]

9.53 Section 114AB provides that the injunctions available under ss 68B and 114 of the *Family Law Act* are 'not intended to exclude or limit the operation' of prescribed state or territory family violence legislation.[58] If an injunction made under ss 68B or 114 is capable of operating concurrently with the protection order, both orders can operate together. However, where orders cannot operate concurrently, principles of constitutional law require that an order made pursuant to the *Family Law Act*, as Commonwealth legislation, prevails over an order made under a state or territory law, to the extent that the orders are inconsistent.[59]

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55 *Family Law Act 1975* (Cth) s 68P(2).
56 Ibid s 68P(3).
57 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), [6.2.12].
58 *Family Law Act 1975* (Cth) s 114AB(1).
59 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), [6.2.14].

Practical issues

9.54 In her book, *Domestic Violence in Australia: The Legal Response,* Alexander noted some problems arising from the interaction between the protection order and *Family Law Act* injunction regimes. In one case, the Family Court refused to deal with an application for interim custody, a restraining order and a sole use and occupancy order following a violent incident because the applicant had already obtained a protection order. In another case, a victim of family violence had to arrange to have a state protection order withdrawn in order to obtain a *Family Law Act* injunction. In the time between withdrawing the protection order and obtaining the injunction, the victim was not protected and her husband threatened assault.[60]

9.55 As noted in Chapter 8, the Commissions have heard during the course of this Inquiry that some state and territory magistrates courts are reluctant to use their powers under s 68R of the *Family Law Act* to revive, vary, discharge or suspend parenting orders made by a family court. It may be that magistrates courts are similarly reluctant to use s 68R to revive, vary, discharge or suspend a *Family Law Act* injunction.

Commissions' views

9.56 The Commissions note that victims of family violence tend to seek protection orders under state and territory family violence legislation in preference to *Family Law Act* injunctions, primarily because protection orders can be obtained quickly and can be enforced by the police.

9.57 Improving the effectiveness of *Family Law Act* injunctions in protecting victims of family violence may lead, however, to more use of the injunction provisions and increase the potential for inconsistency between state and territory protection orders and *Family Law Act* injunctions.

9.58 Therefore, in the Commissions' view, there is a need to assess how *Family Law Act* injunctions and protection orders under state and territory family violence legislation operate in practice and consider whether any reforms are necessary to complement the protective elements of the *Family Law Act.* The Commissions seek stakeholder views on these issues.

Section 114AB

9.59 A person who has sought or obtained a protection order under state or territory legislation is not prohibited from seeking a *Family Law Act* injunction in relation to family law matters not able to be dealt with by a protection order. This is because s 114AB of the *Family Law Act* only prohibits applications for an injunction 'in respect of a matter' for which a protection order has been sought or obtained.[61]

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60 R Alexander, *Domestic Violence in Australia: The Legal Response* (3rd ed, 2002), 63.

61 *Family Law Act 1975* (Cth) s 114AB(2).

9.60 While some protection orders under state and territory family violence legislation may affect property use,[62] protection orders can only deal with property as it relates to protecting a person from family violence. The Commissions note that s 114 injunctions are available to address family law issues unrelated to family violence—such as an injunction to prevent a party to a marriage from disposing of certain property pending final orders relating to a property settlement.

9.61 In the preceding section, the Commissions ask whether the *Family Law Act* should provide for separate procedures relating to injunctions for personal protection and other family law injunctions available under s 114 of the Act.[63] Such separation may clarify, if such clarification is required, that the fact that a person has sought a protection order under state or territory family violence legislation should not preclude them from also seeking other *Family Law Act* injunctions, for example in relation to the sale of property.

9.62 There is no prohibition on a person who has, or is seeking, a *Family Law Act* injunction for personal protection (as opposed to other family law matters, for example, an injunction relating to the use of property) from also seeking a protection order from a state or territory court. This appears to be anomalous, and has the potential to result in the same matter being brought before two different courts and the making of inconsistent orders.

9.63 However, as protection orders under state and territory family violence legislation cover a broader range of people, and may be directed to family members whose experience of family violence arises outside of a marital relationship, this arrangement may be necessary to adequately protect victims of family violence. State and territory family violence legislation also lists a number of specific conditions that can form part of a protection order, including prohibiting a person from attempting to locate the victim, causing another person to engage in behaviour prohibited by the protection order, or possessing firearms or a prohibited weapon.[64]

9.64 In order to determine whether inconsistent orders arise in practice, the Commissions are interested in comment on whether there are any cases in which a person, who has obtained a *Family Law Act* injunction for personal protection, also needed to seek additional protection under state or territory family violence legislation.

9.65 The Commissions also note that precluding a person from bringing proceedings for a protection order if he or she has already sought a *Family Law Act* injunction, or vice versa, does not eliminate the potential for inconsistency between orders. This is

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62 For example, by excluding a person from a property in which he or she has a legal or equitable interest, prohibiting a person from taking personal property reasonably needed by the victim, or by terminating and replacing a tenancy agreement for the benefit of the victim.

63 Question 9–1.

64 The types of conditions that can be included in protection orders under state and territory family violence legislation are summarised in Ch 6.

because a respondent, or other person affected by the order, would still be able to seek an injunction or protection order in the alternative jurisdiction to which the initial order was made.

Question 9–2 In practice, how often does a person who has obtained an injunction under the *Family Law Act 1975* (Cth) subsequently need to seek additional protection under state or territory family violence legislation?

Question 9–3 Should a person who has sought or obtained an injunction for personal protection under the *Family Law Act 1975* (Cth) also be able to seek a protection order under state or territory family violence legislation?

Inconsistencies between Family Law Act injunctions and protection orders.

9.66 Consultations with stakeholders revealed far more concern about the potential for, and effect of, inconsistencies between parenting orders and protection orders under state and territory family violence legislation, than about inconsistencies between *Family Law Act* injunctions and protection orders. The Commissions are interested to hear whether the complexity of the provisions in the *Family Law Act* regarding the interaction between *Family Law Act* injunctions and protection orders has resulted in practical problems for courts or victims of family violence.

9.67 In Chapter 8, the Commissions consider a number of legislative and procedural strategies to address problems arising from the interaction between parenting orders and protection orders under state and territory family violence legislation, including proposals to increase courts' awareness of existing family violence orders issued by other courts and the use of s 68R of the *Family Law Act* to resolve inconsistencies between parenting orders and protection orders.[65] Because both parenting orders and s 68B injunctions are made under pt VII of the *Family Law Act,* many of these proposals would also be applicable to address any potential problems arising from the interaction between *Family Law Act* injunctions and protection orders.

9.68 The Commissions consider that the mechanism in s 68R of the *Family Law Act* is a useful way for courts to address inconsistencies with orders under the *Family Law Act* when making a protection order under state or territory legislation. However, s 68R currently only applies to injunctions that expressly or impliedly require or authorise a person to spend time with a child. In the Commissions' preliminary view, there might be merit in enacting a provision similar to s 68R to allow state and territory courts making or varying a protection order, to revive, vary, discharge or suspend a *Family Law Act* injunction for the personal protection of a party to a marriage or other

65 Proposals 8–2 to 8–5, 8–8, 8–9.

person.[66] As with the current s 68R, such power should only be exercised when there is material before the court that was not before the court that made that original *Family Law Act* injunction.[67]

9.69 Without such a provision, *Family Law Act* injunctions will prevail over a protection order made under state or territory family violence legislation to the extent of any inconsistency. Allowing a state or territory court to amend a *Family Law Act* injunction when making a protection order would address such inconsistencies and remove the need for a person to return to a federal family court to revoke an injunction before applying for a protection order under state or territory legislation.

Question 9–4 In practice, do problems arise from the provisions dealing with inconsistencies between injunctions granted under ss 68B and 114 of the *Family Law Act 1975* (Cth) and protection orders made under state and territory family violence legislation?

Proposal 9–2 The *Family Law Act 1975* (Cth) should be amended to provide that in proceedings to make or vary a protection order, a state or territory court with jurisdiction may revive, vary, discharge or suspend a *Family Law Act* injunction for the personal protection of a party to a marriage or other person.

Injunctions to relieve a party to a marriage from rendering conjugal rights

9.70 Section 114(2) of the *Family Law Act* provides a further power to grant an injunction in the context of a marriage. It permits the court to 'make an order relieving a party to a marriage from any obligation to perform marital services or render conjugal rights'.

9.71 Orders under s 114(2) are rare—the only reported case of such an order made by the Family Court was in 1978.[68] Dr Anthony Dickey QC notes that the section is 'curious' in that it revives forms of judicial separation and separation order, which were otherwise abolished by s 3(2)(c)(iv) and (vii) of the *Family Law Act*.[69] State and

66 In Ch 8, the Commissions ask whether s 68R of the *Family Law Act 1975* (Cth) should be amended to empower state and territory courts to *make* parenting orders in those circumstances in which they can revive, vary, discharge or suspend such order: Question 8–10.

67 *Family Law Act 1975* (Cth) s 68R(3).

68 *In the Marriage of Gillie* (1978) 30 FLR 565. The Family Court considered, but did not make, an order under s 114(2) in *In the Marriage of Hayne* (1994) FLC 92–512: A Dickey, 'Relief from the Performance of Marital Obligations' (1995) 69 *Australian Law Journal* 402, 402.

69 A Dickey, 'Relief from the Performance of Marital Obligations' (1995) 69 *Australian Law Journal* 402, 402.

territory family violence legislation does not expressly include comparable conditions that can be imposed in relation to protection orders.

9.72 It is strongly arguable that this section should be repealed on the basis that parties to a marriage are under no legal obligation to 'perform marital services or render conjugal rights'. As such, there is no need for the court to have a particular power to relieve a person from performing 'duties' where those duties do not exist.

9.73 While the *Family Law Act* does not define 'marital services' and 'conjugal rights', they are generally taken to include the right of married persons to cohabit and have sexual intercourse with their spouse. Under the *Matrimonial Causes Act 1959* (Cth), the court had the power to make a 'decree of restitution of conjugal rights' to enforce the marital duty of a husband and wife to live together. This remedy has been abolished.[70]

9.74 In addition, there has historically been a view that, at common law, it was not possible for a husband to rape his wife because a wife impliedly and irrevocably consented to all acts of sexual intercourse with her husband by entering into the marriage.[71] In 1991, the High Court held that there is no rule in Australia that a husband cannot be guilty of raping his wife. The majority decision of Mason CJ, Deane and Toohey JJ stated that such a notion is 'out of keeping with the view society now takes of the relationship between the parties to a marriage'.[72] Their Honours held that 'if it was ever the common law that by marriage a wife gave irrevocable consent to sexual intercourse by her husband, it is no longer the common law'.[73]

9.75 At the time that s 114(2) was enacted, three Australian states—Queensland, Western Australia and Tasmania—defined rape in a way that excluded non-consensual sexual intercourse between a man and his wife.[74] Changes to the criminal law by statute now make it clear that the fact that a person is married to the person whom they sexually assault is no defence.[75]

Commissions' views

9.76 Section 114(2) implies that there is a continuing obligation to render conjugal rights and provide marital services—obligations that no longer exist in law and which should not be assumed to form part of a marriage as a social or legal institution. The section implies a view of marriage, and particularly the role of women in marriage, that is out of keeping with modern standards of equality and autonomy in the marriage relationship.

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70 *Family Law Act 1975* (Cth) s 8(2).
71 *R v L* (1991) 174 CLR 379, 398.
72 Ibid, 390.
73 Ibid.
74 Ibid, 387.
75 See Ch 15.

9.77 Section 114(2) gives the court power to relieve a person from performing certain perceived obligations within a marriage. In the Commissions' view, this purpose is adequately served by s 114(1) alone. The need to protect a party to the marriage from unwanted sexual intercourse, or to require that a married couple not live together, can be achieved using injunctions under s 114(1) for the personal protection of a party to the marriage, or to restrain a party to the marriage from entering or remaining in the matrimonial home. More generally, the court's broad discretion to grant an injunction where it is just or convenient to do so, and upon such terms and conditions as the court considers appropriate, allows the court to tailor an injunction to the specific needs of the parties.

9.78 The Commissions therefore consider that the power to make an order relieving a party to a marriage from any obligation to perform marital services or render conjugal rights is unnecessary and inconsistent with current principles of family and criminal law, and, as such, should be repealed.

Proposal 9–3 Section 114(2) of the *Family Law Act 1975* (Cth), which permits a court to make an order relieving a party to a marriage from any obligations to perform marital services or render conjugal rights, should be repealed.

Financial proceedings under the *Family Law Act*

Family violence as a factor in property disputes

9.79 Part VIII of the *Family Law Act* deals with property and spousal maintenance orders, providing a mechanism for parties to alter property rights that would otherwise apply under common law and equity. Under s 78, a federal family court may make a declaration of the title or rights that each party to a marriage has with respect to property. Section 79 provides the court discretion to alter property rights to effect a just distribution between the parties. In practice, most parties on breakdown of a marriage invoke the wider powers of s 79.[76]

9.80 Determination of applications brought pursuant to s 79 involve four interrelated steps:

- identifying the property, liabilities and financial resources at the date of the hearing;
- identifying and assessing the *contributions* of the parties pursuant to the factors set out in s 79(4)—including, for example, financial and non-financial

76 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [12.28].

contributions that a party has made to the property of the parties to the marriage, and contributions to the welfare of the family, including in the capacity of homemaker or parent;

- identifying and assessing the *needs* of a party in accordance with any relevant matters set out in s 75(2)—including, for example, a party's age and state of health, mental and physical capacity for gainful employment, and any childcare responsibilities; and

- resolving what order is just and equitable in all the circumstances.[77]

The 'no fault' philosophy

9.81 Notably absent from any of the factors set out in ss 75(2) or 79(4) is the notion of fault. This can be traced back to a driving factor for the introduction of the 1975 Act, being the removal of fault as the basis for divorce.[78] ALRC 69 noted:

> A major aim of the [*Family Law Act*] was to remove fault as the basis of divorce. The various grounds for divorce, including adultery, desertion and cruelty, were replaced with a single 'morally neutral' ground of irretrievable breakdown of marriage, evidenced by one year's separation. The decision to eliminate fault from the ground of divorce did not necessarily require the total removal of considerations of the conduct of the partner from ancillary matters—custody, maintenance and property. However, the 'no fault' philosophy has permeated the Family Court's broader decision-making under the Act. The Court soon determined that since the conduct was not expressly mentioned in the new Act, it should be discounted unless it related directly to other provisions of the Act. This applied not only to old issues of matrimonial fault such as adultery, cruelty or desertion but to other forms of behaviour.[79]

9.82 As an application of this principle, early decisions of the federal family courts only considered conduct in property proceedings where it related directly to the financial contributions of a party, or to the creation of future needs.[80] As explained by Murray J, writing extra-judicially in 1995:

> The court must look at the existence of the contributions and needs of each party, and, not how they were caused. If a wife's loss of economic capacity is caused by being knocked over by a bus or from being beaten by her husband, her needs are assessed in the same way. The cause of the injury is by itself not an issue. Furthermore, according to these dicta, a husband is not to be punished for his conduct.[81]

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77 Ibid, [13.8].
78 See also discussion of the purposes of the *Family Law Act* in Ch 3.
79 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, ALRC 69 (1994), [9.8] (citations omitted).
80 See, eg, *In the Marriage of Soblusky* (1976) 28 FLR 81; *In the Marriage of Ferguson* (1978) 34 FLR 342; *In the Marriage of Fisher* (1990) 99 FLR 357.
81 K Murray, 'Domestic Violence and the Judicial Process' (1995) 9 *Australian Journal of Family Law* 26, 31.

9.83 Conduct has sometimes been factored into property proceedings in the context of 'negative contributions', where a party has embarked on a course of conduct designed to reduce or minimise the value or worth of matrimonial assets; or acted recklessly, negligently or wantonly with the assets, thereby reducing their value.[82] Conduct that has sustained a negative contribution finding—that is, a *deduction* from a party's contribution to the marriage—includes gambling, alcohol abuse and marijuana abuse.[83]

9.84 The 'no fault' philosophy has been criticised, including on the grounds that it discounts the relevance of family violence to property claims. In 1994, the ALRC expressed the view that:

> It is clear that twenty years after the introduction of the *Family Law Act* when the elimination of matrimonial fault from divorce is no longer controversial in the community, a more reasoned approach to issues of conduct in other parts of the *Family Law Act* should be possible. The Commission does not suggest that fault be reintroduced into divorce proceedings. Its concern is to ensure that where it is relevant in ancillary proceedings, violence is not overlooked. The court should consider the relevance and indeed significance of violence in determining the welfare of children and issues concerning contributions to property and financial need of the parties.[84]

9.85 Shortly after these remarks, judgments of the Family Court recognised family violence as a relevant factor in determining property disputes under the *Family Law Act*. The definitive test in this regard is set out in the 1997 judgment of the Full Court of the Family Court in the case *In the Marriage of Kennon* ('*Kennon*').[85]

In the Marriage of Kennon

9.86 By overruling earlier cases, *Kennon* provided clear authority that family violence is a relevant factor in determining a party's contribution under s 79 of the *Family Law Act*. As set out by Fogarty and Lindenmayer JJ (with Baker J concurring):

> where there is a course of violent conduct by one party towards the other during the marriage which is demonstrated to have had a significant adverse impact upon that party's contributions to the marriage, or, put the other way, to have made his or her contributions significantly more arduous than they ought to have been, that is a fact which a trial judge is entitled to take into account in assessing the parties' respective contributions within s 79.

9.87 Fogarty and Lindenmayer JJ acknowledged concerns about the potential for the principles to open the 'floodgates' and be 'used inappropriately as tactical weapons or for personal attacks'. Accordingly, the application of the principles was limited to 'exceptional cases':

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82 *In the Marriage of Kowaliw* [1981] FLC 91–092.

83 For example, see, respectively: *Ibbott v Ibbott and Anor* [2008] FMCAfam 38; *AP v ENP* [2002] FMCAfam 164; *Shaw v Shaw* [2009] FMCAfam 9.

84 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, ALRC 69 (1994), [9.12].

85 *In the Marriage of CK and IW Kennon* (1997) 22 Fam LR 1.

> To be relevant, it would be necessary to show that the conduct occurred during the course of the marriage and had a discernible impact upon the contributions of the other party. It is not directed to conduct which does not have that effect and of necessity it does not encompass (as in *Ferguson*) conduct related to the breakdown of the marriage (basically because it would not have had a sufficient duration for this impact to be relevant to contributions).

9.88 In summary, to satisfy the *Kennon* criteria, a party must prove, on the balance of probabilities that he or she was subject to a violent 'course of conduct' during the marriage, which had a 'significant adverse impact' upon the party's contributions or, in the alternative, which made those contributions 'significantly more arduous'.

9.89 *Kennon* has been applied by family courts in a considerable number of property disputes, predominantly on the basis that family violence made a party's contributions 'significantly more arduous' than they otherwise would have been.[86]

9.90 Existing or previous protection orders under state and territory family violence laws do not appear to have been accorded specific weight under *Kennon* or subsequent case law. Comments on the ALRC's Family Violence Online Forum suggest that parties and courts rarely take family violence or protection orders into account in property settlements. As one participant stated:

> I am not aware of any matters that have been dealt with by my [legal] service … where specific provision has been made in favour of a victim of domestic violence in either a negotiated case or a court ordered determination. I often find it difficult to advise clients in relation to the benefit of them incorporating references to domestic violence in their evidence, as often the client has to weigh up the emotional stress in having to revisit the past incidents and trauma (which may include getting psychological assessments and reports) versus the potential for an increase (often small and unquantifiable) in their entitlement of the asset pool, which in small pools may be negligible. I also find that raising the issue of domestic violence can often hamper negotiations as the perpetrator of the violence will often deny that it has occurred and the victim, in the interests of resolving the matter more expediently (or because they are financially constrained), will concede the issue.[87]

A need for reform?

9.91 Commentators, law reform bodies and others have raised strong arguments that the *Family Law Act* should be amended to recognise family violence expressly as a relevant factor in property disputes. As discussed below, legislative recognition may have a number of advantages over continued reliance on the *Kennon* precedent.

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86 S Middleton, 'Domestic Violence, Contributions and s 75(2) Considerations: An Analysis of Un-reported Property Judgments' (2001) 15 *Australian Journal of Family Law* 230. As argued by Middleton, a party raising a 'serious adverse effect' argument could be conceding that he or she made a reduced contribution.

87 *Comment on ALRC Family Violence Online Forum: Women's Legal Service Providers*. Two other participants in the Online Forum stated that they were not aware of any cases where protection orders—whether made under state and territory family violence legislation or injunctive provisions under the *Family Law Act*—had been taken into account in financial proceedings.

9.92 First, including an express consideration in the legislation may highlight to parties and their legal representatives the relevance of any family violence—and, potentially, protection orders—in determining property disputes. Since only a small proportion of financial matters are brought before the federal family courts, the impact of this amendment may be especially pertinent for negotiated settlements.

9.93 Secondly, *Kennon* may set too high a threshold for recognition of family violence, as parties alleging family violence must prove, on the balance of probabilities, that the violence had a 'discernible impact' on their capacity to contribute to the marriage, or the arduousness of making such contributions. The scope for judicial officers to draw inferences about such an impact is uncertain.[88] Under the *Kennon* criteria, family violence can only be taken into account where a party used it as a part of a course of conduct. Commentators have questioned why this is deserving of recognition but not, for example, a husband who through a single act of violence causes his wife and children to flee and terminate the relationship.[89]

9.94 Thirdly, *Kennon* focuses on the relevance of family violence to a party's contribution to the marriage. This overlooks the potential relevance of family violence to the needs assessment under s 75(2) of the *Family Law Act*. The ALRC and the Family Law Council have previously recommended that family violence be expressly included as a relevant factor in the s 75(2) needs assessment.[90]

9.95 Finally, *Kennon* is not directed towards providing compensation to victims of violence. Altobelli FM, in the 2009 matter of *Kozovska and Kozovski*, drew attention to the artificiality of a *Kennon*-type adjustment:

> Having regard to the nature of the violence suffered by the wife during a long marriage it is clear that neither 10 percent or any other figure could possibly be characterised as compensatory because no amount could compensate her for what she experienced at the hands of the husband. On a property pool of about $1.3 million, 10 percent is $130,000, an amount which almost offends one's sense of justice and equity having regard to the findings I have made. But clearly the adjustment that the Full Court contemplated in its decision in *Kennon* was not meant to be compensatory, but more in the nature of perhaps symbolic recognition of the extraordinary efforts of one spouse in persisting with contribution in the face of enormous and unjustified adversity. One cannot help but think that much greater thought needs to be given to the very rationale of a *Kennon*-type adjustment, and whether there might be a better,

88 An analysis of unreported cases in 2001, however, found that judicial officers have been prepared to make inferences in cases of longstanding and severe physical violence: S Middleton, 'Domestic Violence, Contributions and s 75(2) Considerations: An Analysis of Un-reported Property Judgments' (2001) 15 *Australian Journal of Family Law* 230 However, in recent cases, reservations have been expressed about the extent to which inferences can be drawn in *Kennon* cases: *Bingham & Bingham* [2009] FMCAfam 99; *Kucera & Kucera* [2009] FMCAfam 1032.

89 See, eg, P Nygh, 'Family Violence and Matrimonial Property' (1999) 13 *Australian Journal of Family Law* 10.

90 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, ALRC 69 (1994); Family Law Council, *Violence and the Family Law Act: Financial Remedies*, Discussion Paper (1998).

> more transparent, and fairer method for dealing with issues of conduct in the course of financial matters in the Family Law Courts.[91]

9.96 In ALRC 69, the ALRC recommended that the division of property under the *Family Law Act* should take into account the impact of family violence on past contributions and on future needs.[92] In 2001, the Family Law Council recommended to the Attorney-General that s 79 should be amended to refer expressly to the relevance of family violence. An early draft of the Family Law Amendment Bill 2002 (Cth) adopted this recommendation. However, this was not retained in the final version of the Bill.[93]

Commissions' views

9.97 The Terms of Reference for this Inquiry provide a limited lens through which the Commissions can propose reforms—that is, to resolve issues arising from the practical interaction between state and territory family violence laws and the *Family Law Act*.[94] In the context of financial proceedings under the *Family Law Act*, the principal issues of interaction arise in relation to the determination of property disputes, where one spouse has obtained a protection order against the other. This situation has received limited attention in the case law and literature. Engagement with stakeholders to date suggests that protection orders are not being considered by parties, their lawyers and the courts in financial proceedings. The Commissions seek further stakeholder feedback on whether, in practice, protection order proceedings are considered in the context of property disputes—for example, whether evidence of family violence introduced in protection order proceedings is being used for the purpose of *Kennon* adjustments.

9.98 The broader issue of how family violence *per se* should be recognised in property disputes is beyond the parameters of this Inquiry. However, the Commissions express their support of the ALRC's recommendation in ALRC 69 that the provisions of the *Family Law Act* dealing with the division of property should be amended to refer expressly to the impact of violence on past contributions and on future needs. A genuine commitment to reducing family violence must confront family violence at every turn—including in financial proceedings. Legislative recognition will provide greater confidence for victims of violence and their legal representatives who seek to raise family violence allegations in property disputes, in particular, in out-of-court settlements. It also provides an opportunity to reconsider the thresholds set by *Kennon* and subsequent case law, such as the requirement that family violence be connected to a 'course of conduct'.

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91 *Kozovska & Kozovski* [2009] FMCAfam 1014, [77].

92 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, ALRC 69 (1994), Rec 9.6.

93 See for discussion: S Middleton, 'Matrimonial Property Reform: Legislating for the "Financial Consequences" of Domestic Violence' (2005) 19 *Australian Journal of Family Law* 9.

94 The Terms of Reference are set out at the front of this Consultation Paper.

9.99 Formulating legal amendments will involve complex considerations. Beyond the matters discussed above, issues will also arise, for example, in relation to the definition of 'family violence' that should be used in this context. Under s 4 of the *Family Law Act*, family violence can be directed towards *any* member of the person's family. For the purpose of pt VIII, an argument can be made that the violence should be limited to conduct which is directed towards the other spouse.[95] The relationship between a legislative requirement to take account of family violence in *Family Law Act* property proceedings and other schemes—for example, victims' compensation—may also need to be considered.[96]

9.100 The relevance of family violence to financial proceedings under the *Family Law Act* was not considered in the 2009 reviews of family violence in the federal family courts by Professor Chisholm and the Family Law Council.[97] The Commissions' preliminary view is that the Australian Government should undertake a separate inquiry into the manner in which federal family courts deal with allegations of family violence in property proceedings, with a view to proposing models for legislative reform. Such an inquiry will provide an opportunity for detailed consideration of the above matters.

Question 9–5 Is evidence of violence given in protection order proceedings being considered in the context of property proceedings under pt VIII of the *Family Law Act 1975* (Cth)? If so, how?

Proposal 9–4 The provisions of the *Family Law Act 1975* (Cth) dealing with the distribution of property should refer expressly to the impact of violence on past contributions and on future needs, as recommended by the ALRC in *Equality Before the Law* (ALRC 69).

Proposal 9–5 The Australian Government should commission an inquiry into the treatment of family violence in property proceedings under pt VIII of the *Family Law Act 1975* (Cth). The inquiry should consider, among other issues, the manner in which family violence should be taken into account in determining a party's contribution under s 79(4) and future needs under s 75(2); the definition of family violence for the purpose of pt VIII proceedings; and interaction with other schemes—for example, victims' compensation.

95 Although, recognition should also be given to situations where family violence is exercised by other household members.

96 The interaction between victims' compensation schemes and family violence is discussed in Ch 19.

97 The relationship between these reports and this Inquiry is described in Ch 1.

Property conditions in protection orders

9.101 As discussed in Chapter 4, family violence legislation in each of the states and territories makes provision for courts to issue protection orders which prohibit a person from entering or approaching the protected person's residence. With the exception of the ACT, this legislation expressly specifies that such orders may cover a property in which the person against whom the order was made has a legal or equitable interest (exclusion orders).[98] Most family violence laws provide for a court to make orders permitting an excluded person or victim of violence to gain access to the premises for the purpose of taking personal possessions, usually by an arrangement or in the company of police.[99] For the purpose of the following discussion, these will be referred to as 'personal property directions'.

9.102 Some excluded persons, when returning to the premises for the purpose of retrieving property, may take more than that to which they are entitled. This has the potential to influence disputes or conflict with property orders made under pt VIII of the *Family Law Act*. Additional issues can arise where victims of family violence flee their home without the chance to collect their personal property and with little practical capacity to return. The issue was described as follows by the NSW Law Reform Commission (NSWLRC) in its *Apprehended Violence Orders* report:

> Sometimes the defendant denies the applicant access to the property as a means of getting the applicant to return home. This can result in the children being deprived of clothing, toys and school books. There appears to be no effective means of responding to this very real difficulty.[100]

9.103 Personal property directions can interact with property proceedings pursuant to the *Family Law Act* where they:

- influence future property proceedings under pt VIII of the *Family Law Act*—for example, where a party gains possession of property pursuant to a personal property direction and no longer needs or wants to contest ownership in the family courts;
- are directly inconsistent with existing property orders made under the *Family Law Act*; and
- are used as an indication of possessory or ownership rights by a federal family court and thereby impact on the outcome of future property proceedings under the *Family Law Act*.

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98 In addition, no such specification is set out for police-issued protection orders in Western Australia.

99 For example, a typical scenario would be for an exclusion order to include an exception permitting an excluded husband to return to the former marital home, under police escort, to collect any of his personal possessions.

100 New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report No 103 (2003), [7.88].

9.104 These interactions are discussed in more detail below, followed by proposals for reform. Provisions in family violence legislation may also interact with residential tenancy laws. The interaction between such laws is outside the Terms of Reference for this Inquiry and, therefore, will not be given further consideration.

Influencing federal family court proceedings

9.105 Depending on the property that an excluded person or victim obtains through a personal property direction, he or she may not have the need or desire to commence property proceedings in the federal family courts. The likelihood of this occurrence, and its appropriateness, will depend to some extent on the type of property to which access is gained and the ownership or possessory rights. The scope for this to occur will depend on the breadth of personal property directions which may be issued by a state or territory court in exercising jurisdiction under family violence legislation.

9.106 Most, but not all, family violence laws provide for an excluded person to gain access for the purpose of taking personal possessions. Often, this is achieved by giving a court the discretion to include additional provisions in the protection order to deal with property recovery. In Queensland, for example, a court that imposes an exclusion order must consider including in the order another condition allowing the excluded person to recover 'stated property'.[101] The *Crimes (Domestic and Personal Violence) Act 2007* (NSW) permits a court that has issued an exclusion order to make an ancillary property recovery order to enable the removal of personal property that has been left at the premises. The order may specify the 'type or types of property' to which the order relates.[102]

9.107 Family violence laws in the Northern Territory and Western Australia provide additional detail about the type of property which may be taken. An excluded person may recover 'prescribed property' pursuant to an order made under the *Restraining Orders Act 1997* (WA) including: property used to earn income; personal property of a child of the person; property that is wholly or partly the property of the excluded person that is used by or for his or her child; and property that the victim has agreed that the person can take.[103] Under the *Domestic and Family Violence Act 2007* (NT), an excluded person may retrieve personal property including 'clothes, tools of trade, personal documents and other items of personal effect'.[104] Unlike the provisions in other family violence legislation—in which recovery of property is contingent on an additional court order—where a Northern Territory court makes an exclusion order in respect of property on which the personal property of an excluded person is located, a right of recovery applies automatically.

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101 *Domestic and Family Violence Protection Act 1989* (Qld) s 25A(3). See also *Family Violence Protection Act 2008* (Vic) s 86.

102 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 37.

103 *Restraining Orders Regulations 1997* (WA) reg 13.

104 *Domestic and Family Violence Act 2007* (NT) s 85.

9.108 In South Australia and the ACT, legislative provisions only address the retrieval of property by a *victim* of violence. For example, s 12 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) provides that a protection order may require an excluded person to 'return specified personal property to a protected person', or to 'allow a protected person to recover or have access to or make use of specified personal property'.[105] No provisions relate to the recovery of property by an excluded person.[106]

9.109 The *Family Violence Act 2004* (Tas) does not expressly cover the recovery of property by either an excluded person or a victim. However, the *Justices Act 1959* (Tas), provides for a court to direct that a victim should allow an excluded person to recover possession of property or have access to property.[107]

9.110 Some family violence laws specify property that *cannot* be taken by an excluded person. In Victoria, an excluded person is not permitted to take 'the furniture or appliances in the residence that enable the normal running of the home'.[108] In Western Australia, a court may restrain an excluded person from 'obtaining and using personal property reasonably needed by the victim, even if the excluded person is the owner of, or has a right to be in possession of, the property'.[109] Similarly, the ACT legislation provides that an order that includes an exclusion condition may prohibit an excluded person from taking possession of personal property that is 'reasonably needed' by the victim or a child of the victim. Further, the order may require the excluded person to give the victim particular personal property that is in the excluded person's possession.[110]

9.111 In its report, *Apprehended Violence Orders*, the NSWLRC recommended that a court could decline to make a personal property direction if it was satisfied that title to the property is genuinely in dispute; or other more appropriate means are available for the issue to be addressed. This could include, for example, ongoing property proceedings in a federal family court.[111] No provision to this effect is included in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

Inconsistent orders

9.112 Personal property directions under state and territory family violence legislation may be inconsistent with ownership or possessory rights declared under *Family Law Act* property proceedings. In accordance with s 109 of the *Australian Constitution*,

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105 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 12(j), (k).
106 Similarly, see: *Domestic Violence and Protection Orders Act 2008* (ACT) s 48(3).
107 *Justices Act 1959* (Tas) s 106B(5A).
108 *Family Violence Protection Act 2008* (Vic) s 86(b)(i).
109 *Restraining Orders Act 1997* (WA) s 13.
110 *Domestic Violence and Protection Orders Act 2008* (ACT) s 48(3).
111 New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report No 103 (2003), [7.92]–[7.93].

when a law of a state is inconsistent with a law of the Commonwealth which is intended to cover the field, the latter shall prevail to the extent of the inconsistency.

9.113 One way to deal with inconsistency is by specifying that the personal property direction does not confer a right to take property that a person does not own or have a legal right to possess. A provision to this effect is included, for example, in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).[112]

9.114 A similar outcome is reached pursuant to s 87 of the *Family Violence Protection Act 2008* (Vic), which provides that:

> (1) The power … to include a condition relating to personal property in a family violence intervention order is subject to any order to the contrary made by the Family Court, or another court or a Tribunal with relevant jurisdiction to adjudicate in property disputes.
>
> (2) To the extent of any inconsistency between a condition relating to personal property in a family violence intervention order and an order made by the Family Court, another relevant court or a relevant Tribunal the order of the Family Court, other relevant court or relevant Tribunal prevails.

9.115 The Explanatory Memorandum advises that the purpose of s 87 is to:

> ensure that property disputes can be resolved in the appropriate jurisdiction and any condition imposed by a family violence intervention order applies in the absence of, or prior to, any determination of the property rights of the parties.[113]

9.116 The South Australian family violence legislation expressly requires courts issuing personal property directions to take into account any agreement or order for the division of property under the *Family Law Act* or *Domestic Partners Property Act 1996* (SA) of which it has been informed.[114] If it makes an order in relation to access to or use of property, the court must also consider the income, assets and liabilities of the person who has used violence and of the victim.[115]

9.117 Under s 20 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA), an applicant for a protection order must inform the court of any agreement or order for the division of property under the *Family Law Act* or the *Domestic Partners Property Act 1996* (SA), or any pending application for such an order. However, there is no specific question in relation to property orders on the application form for a protection order in the Magistrates Court of South Australia.[116]

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112 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 37(4).
113 Explanatory Memorandum, Family Violence Protection Bill 2008 (Vic).
114 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 10(2)(c).
115 Ibid s 10(2)(d).
116 Magistrates Court of South Australia, *Complaint for a Domestic Violence Restraining Order* <www.courts.sa.gov.au/lawyers/index.html> at 9 February 2010.

9.118 No other state or territory family violence legislation expressly requires an applicant for a protection order to inform the court about any property order under pt VIII of the *Family Law Act*, or pending proceedings for such an order, nor do any application forms expressly seek this information.

Future federal family court proceedings

9.119 The provisions discussed above address inconsistency between ancillary property conditions made under family violence laws and existing *Family Law Act* orders. Section 88 of the *Family Violence Protection Act 2008* (Vic) takes this one step further, addressing the potential repercussions of ancillary property conditions on any future *Family Law Act* proceedings. The provision specifies that a condition relating to personal property in a protection order does not affect any rights the protected person or excluded person may have in relation to the ownership of the property. The Explanatory Memorandum notes that this could be an issue, for example, if the court orders that an excluded person's refrigerator is to remain in the residence under an exclusion condition. In accordance with the section, the excluded person will still own the refrigerator and a federal family court will be able to take this into account in a division of property in association with divorce proceedings.[117]

9.120 Section 106B of the *Justices Act 1959* (Tas) provides that a protection order that affects possession of, or access to, premises or property does not affect any legal or equitable interest that any person holds in the premises or property.

Commissions' views

9.121 Courts making protection orders may impose personal property directions as a part of those orders in most states and territories.[118]

9.122 In the Commissions' preliminary view, most property disputes should be resolved in the federal family courts and other courts with the expertise, time and resources to address the issues comprehensively, including courts responsible for resolving property disputes under state and territory de-facto relationships legislation. Protection order proceedings should only deal with property issues to the extent necessary to give effect to the protective objectives of family violence legislation—for example, to ensure that excluded parties obtain access to personal possessions necessary for day-to-day living so as to preclude the need for any further access to the restricted premises. This is consistent with the policy stated by the NSWLRC in its *Apprehended Violence Orders* report—that is, a personal property direction

> is not designed to 'create a jurisdiction by stealth' for the Local Court to intervene in family court property disputes, but is an attempt to address a 'practical legal vacuum' which arises almost everyday and can give rise to significant hardship.[119]

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117 Explanatory Memorandum, Family Violence Protection Bill 2008 (Vic).

118 In Ch 6, the Commissions suggest options for reform of exclusion order conditions.

119 New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report No 103 (2003), [7.95].

9.123 The interactions between personal property directions and property proceedings under the *Family Law Act* are especially vexed where parties take possession of property which they do not own or have a right to possess, or wrongfully deny the other party access to property—which may be done as a part of coercive and controlling behaviour. The Commissions are interested in further feedback on the extent to which these scenarios arise in practice. This information will provide an important evidentiary basis for formulating proposals for reform.

Influencing federal family court proceedings

9.124 The availability of comprehensive personal property directions may influence property proceedings under the *Family Law Act*. In the Commissions' preliminary view, this is only appropriate in very limited circumstances. The property that a person may recover pursuant to orders should be limited to that which is necessary for daily living. At this stage, the Commissions support recovery of the types of property listed under the *Domestic and Family Violence Act 2007* (NT)—that is, clothes, tools of trade, personal documents and other personal effects. For recovery of all other property, it is preferable for parties to commence proceedings in, for example, the federal family courts. The Commissions are interested in stakeholder views about whether access to any other types of property should be available to excluded persons, for example, the personal property of a child of the excluded person—as in the *Restraining Orders Act 1997* (WA).[120]

9.125 The Commissions further consider that a court should decline to make a personal property direction if the property is 'reasonably needed' by the victim or a child of the victim. Recovery should not be allowed where title to the property is genuinely in dispute or other more appropriate means are available for the issue to be addressed—for example, if there are ongoing property proceedings in a federal family court. The workability of this provision depends upon a court having knowledge of family court proceedings. The Commissions propose that parties involved in protection order proceedings should have an obligation to inform the court of property orders made by a federal family court, or pending proceedings for such orders. This information should be sought in application forms for protection orders.

Inconsistent orders about property

9.126 Personal property directions may conflict with existing orders of a federal family court made under pt VIII of the *Family Law Act*. This is likely where a court is not informed about the existence of such orders. Accordingly, there should be clear strategies in place for courts making protection orders to obtain information about, and consider, property orders made under the *Family Law Act*. The South Australian family

120 If a personal property direction makes provision for an excluded person to recover property of his or her child, this may conflict with any order which prohibits an excluded person from recovering property that is 'reasonably needed' by a victim's child.

violence legislation, which requires applicants for a protection order to inform the court of any agreement or order for the division of property, or any pending application for such an order, may be instructive. Courts issuing personal property directions should take into account any such agreement or order, thereby avoiding the potential for inconsistency.

9.127 Family violence legislation may need to clarify the effect, if any, of inconsistent orders. The Victorian and NSW legislation include provisions to the effect that a personal property direction in a protection order is subject to any order to the contrary made by a federal family court. To the extent of any inconsistency, the order of the family court prevails.

9.128 Arguably, such a provision is rendered redundant by s 109 of the *Australian Constitution*. In the Commissions' preliminary view, legislative provisions mirroring the constitutional principle in family violence legislation could nevertheless play an important educative role.

Future federal family court proceedings

9.129 Personal property directions may have repercussions for subsequent property proceedings in a federal family court. For example, where an order provides for furniture belonging to an excluded person to remain with the victim, there is scope for this to be put forward as a victim's 'property' for the purpose of a declaration under s 78 of the *Family Law Act*. In the Commissions' view, it is inappropriate for protection order proceedings to take the place of dedicated processes for resolving property disputes, such as those set out in pt VIII of the *Family Law Act*. Accordingly, the Commissions support a clear legislative statement in the family violence laws of each state and territory that a condition relating to personal property in a protection order does not affect any rights the victim or person who has used violence may have in relation to the ownership of the property. Section 88 of the *Family Violence Protection Act 2008* (Vic) should be referred to as a model in this regard.

Question 9–6 How often are persons who have been the subject of exclusion conditions in protection orders made under family violence legislation or victims of family violence taking possession of property which they do not own or have a right to possess, or denying the other person access to property? If so, what impact does this have on any property proceedings or orders relating to property under the *Family Law Act 1975* (Cth)?

Proposal 9–6 Provisions in state and territory family violence legislation dealing with exclusion orders should:

(a) limit the types of property which a court may order an excluded person to recover to clothes, tools of trade, personal documents and other personal effects, and any other items specified by the court; and

(b) provide that any order to recover property should not include items—

  (i) which are reasonably needed by the victim or a child of the victim; or

  (ii) in which title is genuinely in dispute; and

(c) provide that an order to recover property should not be made where other more appropriate means are available for the issue to be addressed in a timely manner.

Question 9–7 Are there any types of property other than those set out in Proposal 9–6 which should, or should not, be subject to recovery by an excluded person under state and territory family violence legislation—for example, should an excluded person be able to recover property of his or her child?

Proposal 9–7 State and territory family violence legislation should require applicants for protection orders to inform courts about, and courts to consider, any agreement or order for the division of property under the *Family Law Act 1975* (Cth), or any pending application for such an order.

Proposal 9–8 Application forms for protection orders in family violence proceedings should clearly seek information about any agreement or order for the division of property under the *Family Law Act 1975* (Cth) or any pending application for such an order.

Proposal 9–9 State and territory family violence legislation should provide that personal property directions made in protection order proceedings are subject to orders made by a federal family court or another court responsible for determining property disputes. Section 87 of the *Family Violence Protection Act 2008* (Vic) should be referred to as a model in this regard.

Proposal 9–10 State and territory family violence legislation should provide that personal property directions do not affect any ownership rights. Section 88 of the *Family Violence Protection Act 2008* (Vic) should be referred to as a model in this regard.

Relocation and recovery orders

Relocation orders

9.130 The *Family Law Act* does not expressly address relocation issues—that is, the problems which arise when one parent seeks to move a long way away from the other parent, for example, because of concerns about their own safety or the safety of their children. Relocation disputes are determined in accordance with the general parenting order principles set out in pt VII of the Act, discussed in detail in Chapter 8. For the purpose of the following discussion, it is useful to reiterate some of that part's principal features.

9.131 First, and fundamentally, the object of pt VII is stated as being to ensure the best interests of children are met by:

> (a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and
>
> (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and
>
> (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
>
> (d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

9.132 In determining a child's best interests, courts are directed to have regard to two 'primary' and 13 'additional' considerations. Primary considerations are the benefit to the child of having a meaningful relationship with both of his or her parents; and the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence. Additional considerations include, for example, any final or contested protection orders; any views expressed by the child; the nature of the child's relationship with his or her parents and other persons; the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent; and the practical difficulty and expense of a child spending time with and communicating with a parent. Federal family courts must also, to the extent that it is consistent with the child's best interests, ensure that orders are consistent with any protection order.[121]

9.133 Pursuant to s 61C, each parent has 'parental responsibility' for a child under the age of 18, unless displaced by a parenting order. One effect of shared parental responsibility is a requirement for decisions about 'major long term issues' to be made jointly by the parents.[122] This includes 'changes to the child's living arrangements that

121 *Family Law Act 1975* (Cth) s 60CG.
122 Ibid s 65DAC.

make it significantly more difficult for the child to spend time with a parent'.[123] Section 61DA sets out a presumption that it is in a child's best interests for his or her parents to have 'equal shared parental responsibility'. This presumption does not apply if there are reasonable grounds to believe that a parent has engaged in child abuse or family violence.[124]

9.134 Where a court orders that a child's parents should have equal shared parental responsibility, the court must:

(a) consider whether the child spending equal time with each of the parents would be in the best interests of the child; and

(b) consider whether the child spending equal time with each of the parents is reasonably practicable; and

(c) if it is, consider making an order to provide (or including a provision in the order) for the child to spend equal time with each of the parents.[125]

9.135 If the court does not make an order for a child to spend equal time with each of his or her parents, the court must consider whether it is reasonably practicable and in the child's best interests for the child to spend 'substantial and significant time' with each of his or her parents.[126] Relevant factors in determining whether it is reasonably practicable for a child to spend equal time, or substantial and significant time, with each of the child's parents include:

(a) how far apart the parents live from each other; and

(b) the parents' current and future capacity to implement an arrangement for the child spending equal time, or substantial and significant time, with each of the parents; and

(c) the parents' current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind; and

(d) the impact that an arrangement of that kind would have on the child; and

(e) such other matters as the court considers relevant.[127]

9.136 The 2010 judgment of the High Court in *MRR v GR* may influence the determination of future relocation disputes. In that case, a mother appealed a parenting order made by the Federal Magistrates Court for the parents to have equal shared responsibility for the child and for the child to spend equal time with each of them. The orders were made on the basis that (contrary to the mother's expressed wish to return to Sydney) both parents would live in Mount Isa. The High Court held that, in the circumstances, equal time parenting was not 'reasonably practicable' under s 65DAA

123 Ibid s 4.
124 Ibid s 61DA(2).
125 Ibid s 65DAA(1).
126 Ibid s 65DAA(2).
127 Ibid s 65DAA(5).

of the *Family Law Act*. The Court's decision was influenced by the mother's lack of appropriate accommodation, limited opportunities for employment and isolation from her family. The matter was remitted to the Federal Magistrates Court for a new hearing.[128]

9.137 Stakeholders have raised significant concerns with the Commissions that, in practice, relocation orders are being refused where a parent and his or her children are at risk of exposure to family violence, illustrated by the following case study commentary:

> One woman who had two young daughters lived with her partner (their father) in a remote community in NT. She had primary responsibility for the care of the girls. She had experienced economic abuse combined with physical abuse throughout her relationship with her partner but finally had the courage to leave him. At that point he started to make threats to kill her. She moved, with their two daughters, into local domestic violence crisis accommodation. The crisis accommodation staff were so concerned for her safety that they organised a rare emergency evacuation to Darwin for her and the girls through a domestic violence legal service. The father then told the court that she had relocated the girls without his consent. In spite of the surrounding circumstances, the judge ordered the woman to return to the remote community she had been evacuated from.
>
> The clear disregard of the woman's safety to one side, there did not seem to be any concern about the appropriateness of the father's style of parenting whereby children were witnessing acts of domestic violence and whether, in the balance of things, it was appropriate to disrupt the rest of the family for the sake of access by him to the children. Women who have experienced violence are all the more in need of extended family support, which may only be available outside of the Territory. Many times they have moved to the Territory to be with the man, leaving behind all family and friend networks. The support they get from these networks feeds directly into their ability to be good parents and it may well be in the best interests of the child for relocation in circumstances of [family violence] to be viewed more sympathetically. Refusal to consent to relocation is a prime opportunity for violent partners to retain a pattern of abuse and control of their partner after the relationship has ended. Domestic violence needs to be taken into account in a more significant and central way where relocation is being contested.[129]

9.138 Some literature suggests that some victims choose not to raise allegations of family violence in relocation proceedings. A review of 50 relocation matters heard in the federal family courts from 2003–08 considered the implications of the 2006 shared parenting reforms. It reported that, in the pre-2006 cohort, in all but one case in which allegations of violence by the father towards the mother were accepted as true and relevant to the best interests of the child, the mother was given permission to relocate immediately. In three cases post-2006, where the woman wanted to relocate, a prior

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128 *MRR v GR* [2010] HCA 4.

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

history of violence was acknowledged. Two of these mothers were successful in their request to relocate.[130]

9.139 The authors extrapolated from these findings that, when the court acknowledges family violence, it will outweigh the requirement for a 'meaningful relationship with both parents'. However, they went on to discuss the small number of cases in the post-amendment sample in which allegations were raised about a past history of violence, commenting that:

> This is one of the more interesting and unexpected findings of our study. Perhaps the 'gatekeepers' are advising clients that relocations are more likely to be allowed where there is family violence, leading to these matters not getting to court, or perhaps movers who have experienced family violence are more reluctant to make such allegations in the post-2006 legislative climate.[131]

9.140 In 2006, the Family Law Council recommended to the Attorney-General that additional provisions should be inserted into the *Family Law Act* to deal specifically with relocation. The recommended provisions included that a court should consider what parenting arrangements could be made if a party were to relocate to ensure that the child maintains a meaningful relationship with both parents, to the extent consistent with the need to protect the child from physical or psychological harm. In justifying its recommended provisions, the Council commented that:

> Proposed arrangements must be consistent with the object … of protecting the child from physical or psychological harm. Council believes that it is useful to specifically refer to this object here, in light of the submissions received about some relocations being motivated by the need to escape violence and/or abuse.[132]

9.141 In its submission to that inquiry, Women's Legal Services Australia argued that family violence should be accorded a much greater weight in relocation orders:

> In our view, the guidelines should emphasise that, in cases where there has been family violence, it is likely to be in the best interests of the child for the resident parent to be able to relocate a safe distance from the perpetrator. The United States National Council of Juvenile and Family Court Judges' *Family Violence Model State Code* provides a model that could be adapted for this purpose. The Code provides for a rebuttable presumption that it is in the best interests of the child to reside with the parent who is not the perpetrator of violence in a location of that person's choice, within or outside the state.[133]

Commissions' views

9.142 Refusing to make relocation orders in situations involving family violence has serious repercussions for the safety of victims and their children. Victims in rural or

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130 P Easteal and K Harkins, 'Are We There Yet? An Analysis of Relocation Judgments in Light of Changes to the Family Law Act' (2008) 22 *Australian Journal of Family Law* 259, 269–270.

131 Ibid, 277.

132 Family Law Council, *Relocation* (2006), Rec 4.

133 Ibid, [6.42].

remote areas of Australia may not be able to be (or feel to be) safe from violence and yet remain in close enough proximity to the person who has used violence to keep child contact arrangements unchanged. For victims who have been distanced geographically from their extended family or primary support network, regaining this support could be crucial to moving forward in their lives.

9.143 In Chapter 8, the Commissions put forward a number of questions and proposals for reform directed towards improving the visibility and weight accorded to protection order proceedings in parenting proceedings generally. Recommendations to facilitate allegations of family violence being raised in the federal family courts are also set out in two 2009 reviews—the *Family Courts Violence Review* conducted by Professor Richard Chisholm and the Family Law Council advice *Improving Responses to Family Violence in the Family Law System*.[134] These reports are discussed in Chapter 1.

9.144 The Commissions are interested in stakeholder views as to whether any additional legal or practical reforms are needed to address issues related to the practical interaction of protection order proceedings and relocation disputes. For example, should there be any presumption in legislation or policy—for example, the *Best Practice Principles for Use in Parenting Disputes when Family Violence or Abuse is Alleged* issued by the Family Court[135]—that, in cases where a family court determines there has been family violence, it is likely to be in the best interests of a child to be able to relocate to a safe distance from the person who has used violence? A broader question is whether the *Family Law Act* should be amended to include provisions dealing with family violence in relocation matters over and above the provisions of the Act that apply to family violence in parenting proceedings generally.

9.145 Any additional recognition of family violence in the context of relocation disputes will need to be flexible enough to accommodate the varying severity and nature of the violence in a particular case. The Commissions seek stakeholder views on whether any legal or practical reforms in the context of relocation disputes should apply in all or only some cases of family violence. If reform is warranted in *some* cases of family violence, then a question arises as to how this should be determined.

9.146 An additional issue that may arise where a victim seeks to relocate to another state or territory is the recognition of the existing protection order in that other state or territory—currently attainable through registration of the order. Models for registering external protection orders are described in Chapter 10.

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

135 Family Court of Australia, *Best Practice Principles for Use in Parenting Disputes When Family Violence or Abuse is Alleged* (2009).

Question 9–8 In practice, what issues arise from the interaction between relocation orders and protection orders or allegations of family violence? If so, what legal or practical reforms could be introduced to address these issues? For example, should there be a presumption that, in some or all cases where a family court determines there has been family violence, it is likely to be in the best interests of a child to be able to relocate to a safe distance from the person who has used violence? If so, to which type of case should such a presumption apply?

Question 9–9 Should the *Family Law Act 1975* (Cth) be amended to include provisions dealing with family violence in relocation matters in addition to the provisions of the Act that apply to family violence in parenting proceedings?

Recovery orders

9.147 Many relocation disputes are associated with unilateral moves after separation but prior to court proceedings.[136] This may give rise to a recovery order under pt VII of the *Family Law Act* or the *Convention on the Civil Aspects of International Child Abduction* (Hague Convention) as implemented by the *Family Law (Child Abduction Convention) Regulations 1986* (Cth).

9.148 Pursuant to s 67U of the *Family Law Act*, federal family courts are empowered to make orders requiring the return of a child, typically to a parent. In deciding whether to make a recovery order, a court must regard the best interests of the child as the paramount consideration.[137] In determining the child's best interests, the court must have regard to the factors set out in ss 60CC and 60CG of the Act, which are discussed above in the context of relocation orders. It is an offence to prevent or hinder a person taking action to give effect to a recovery order.[138]

9.149 The *Hague Convention* is a multilateral treaty, which seeks to protect children from the harmful effects of abduction and retention across international boundaries by providing a procedure to bring about their prompt return. Signatories commit to the prompt return of children to the country in which they habitually reside so that issues of parental responsibility can be resolved by the courts in that country. The basis of the Convention is the best interests of all children for issues of their welfare to be determined by the courts of the country in which they habitually reside, rather than the

136 See, eg, J Behrens, B Smyth and R Kaspiew, 'Australian Family Law Court Decisions on Relocation: Dynamics in Parents' Relationships Across Time' (2009) 23 *Australian Journal of Family Law* 222, [4.2.2].

137 *Family Law Act 1975* (Cth) s 67V.

138 Ibid s 67X.

best interests of an individual child.[139] There is an exception to the requirement for the immediate return of a child, however, if it is established that the child would be exposed to physical or psychological harm or otherwise be placed in an intolerable situation.[140]

9.150 One approach that courts have used to alleviate concerns about the risk of physical or psychological harm to a child is to request non-molestation and other undertakings from the 'left-behind' parent.[141] The practical use and effect of such undertakings has been questioned. A 2003 report by the United Kingdom Reunite Research Unit reported that, of the six non-molestation orders given in abduction cases which the Unit considered, all six were broken.[142] Where a parent sought to enforce the undertakings through police complaints, the outcome generally was unsuccessful.[143]

> In one case the mother called the police in relation to the constant pestering and harassment by the father in the home State in contravention of an undertaking given to an English Court. These undertakings had been registered in the local Court in the home State. Nevertheless, the mother states that the police advised her that she would have to obtain a protection Order as the undertaking had 'no real effect'. The mother states that she has heard this story time and again from women who have been sent home subject to undertakings. She states her view that undertakings are 'completely ineffective'.[144]

Commissions' views

9.151 The Commissions seek stakeholder feedback on whether issues arise in practice from the interaction between protection orders under state and territory family violence legislation and recovery orders under div VII of the *Family Law Act* or the *Hague Convention*, as implemented by the *Family Law (Child Abduction Convention) Regulations*. If issues are identified, the Commissions are interested to hear what reforms are necessary or desirable in this context. One option, for example, could be to institute a formal legal or practical connection between undertakings sought as a condition of returning a child pursuant to the *Hague Convention* and protection orders under family violence legislation. This could involve, for example, a formalised process through which entry into non-molestation undertakings pursuant to a *Hague Convention* recovery order trigger proceedings for a protection order in favour of the child under state and territory family violence legislation, bringing all this information to the attention of magistrates.

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139 M Kaye, 'The Hague Convention and the Flight from Domestic Violence: How Women and Children are being Returned by Coach and Four' (1999) 13 *International Journal of Law, Policy and the Family* 191, 195.

140 *Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, Hague XXVIII, (entered into force generally on 1 December 1983) art 13(1)(b).

141 See discussion in M Kaye, 'The Hague Convention and the Flight from Domestic Violence: How Women and Children are being Returned by Coach and Four' (1999) 13 *International Journal of Law, Policy and the Family* 191, 200–202.

142 Reunite International, *The Outcome for Children Returned Following an Abduction* (2003), 28.

143 Ibid, 31.

144 Ibid.

9.152 Further, in Chapter 10, the Commissions consider the development of a national protection order database. One of the issues raised by such an initiative is which orders should be included and whether, for example, undertakings entered into as a condition of returning a child pursuant to the *Hague Convention* should be included.[145]

Question 9–10 In practice, what issues arise from the interaction between protection orders under state and territory family violence legislation and recovery orders under div VII of the *Family Law Act 1975* (Cth) for return of a child pursuant to the *Convention on the Civil Aspects of International Child Abduction*, as implemented by the *Family Law (Child Abduction Convention) Regulations 1986* (Cth)? If so, what legal or practical reforms could be introduced to address these issues?

Question 9–11 Should the *Family Law Act 1975* (Cth) be amended to include provisions dealing with family violence in recovery matters, in addition to the provisions of the Act that apply to family violence in parenting proceedings?

145 Question 10–21.

10. Improving Evidence and Information Sharing

Introduction

10.1 A central theme of this Inquiry is 'seamlessness'—the idea that the laws and procedures victims of family violence engage with should work together to protect and assist them.

10.2 This chapter considers two key issues relating to improving the information available to courts dealing with family violence. First, the chapter examines the use of evidence and other information provided by victims of family violence across family violence and family law matters, including ways in which protection orders granted under state and territory family violence legislation, and evidence given in protection order proceedings can be used in concurrent or pending family law proceedings. This discussion is framed within the context of an acknowledgement that not all persons who obtain protection orders will be involved in *Family Law Act* proceedings. For example, not all persons who obtain a protection order will also seek to resolve family

law matters in the Family Court, while others, such as victims of violence by a sibling or a same sex partner, will not be able to access the Family Court.

10.3 Secondly, this chapter considers ways to improve information sharing between courts, practitioners, relevant government agencies and other people and institutions involved in the family violence and family law systems, while protecting the privacy and safety of people involved in family violence litigation.

Protection orders as a factor in decision making about parenting orders

10.4 As discussed in Chapter 8, a federal family court must have regard to a number of considerations when making a parenting order. The 'paramount consideration' is 'the best interests of the child'.[1] Section 60CC of the *Family Law Act 1975* (Cth) sets out a number of matters that a court must consider when determining the best interests of the child. A 'primary consideration' is the need to protect the child from physical or psychological harm from being subjected to, or exposed to, family violence.[2] Additional considerations that a court may take into account include:

- any family violence involving the child or a member of the child's family (s 60CC(3)(j)); 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 (s 60CC(3)(k)).

10.5 The effect of these provisions is that family violence is expressly relevant to the court's decision making in relation to a parenting order. Further, s 60CC(3)(k) indicates that the existence of a final order (including final orders made by consent with or without admissions) or a contested protection order (including both final and interim orders) under state and territory family violence legislation is also, in itself, a relevant consideration in determining the best interests of a child.

10.6 Prior to amendments in 2006, s 68F of the *Family Law Act* (the former equivalent of s 60CC), directed the court to consider *any* family violence order that applied to the child or a member of the child's family. The amendments in 2006 narrowed this consideration to only a final or a contested family violence order in order to 'address a perception that violence allegations are taken into account without proven foundation in some family law proceedings'.[3]

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1 *Family Law Act 1975* (Cth) ss 60CA, 65AA.
2 Ibid s 60CC(2).
3 Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth), [67]–[68].

Use of protection orders as evidence of family violence

10.7 In 2007, the Australian Institute of Family Studies published research into allegations of family violence made in relation to parenting matters under the *Family Law Act* (the Moloney study).[4] The study considered the prevalence and nature of allegations of family violence in family law proceedings involving children; the nature of the evidence filed in support of the allegations; and the effect that the allegations, and evidence, had on the outcomes in the case.

10.8 The research indicated that most allegations of family violence were accompanied by little or no supporting evidence.[5] The study concluded that the 'scarcity of supporting evidentiary material suggests that legal advice and legal decision-making may often be taking place in the context of widespread factual uncertainty'.[6]

10.9 The Moloney study examined the evidence filed in support of allegations of family violence made in a selection of federal family courts, and the apparent strength of the evidence for, and responses to, allegations. The study grouped corroborative evidence into two groups. The evidence in the first category—evidence with 'relatively strong probative weight'—included a criminal conviction; a final protection order by contest; a final protection order at which the defendant did not appear; and direct witness accounts of violence or injuries. Evidence in the second category—evidence of 'less probative weight'—included a final protection order made by consent or consent without admissions; an interim protection order granted in the absence of the respondent; and sworn or unsworn hearsay accounts of family violence.[7]

10.10 The Moloney study also found that the outcomes in cases where allegations of family violence were made, but not supported by strong evidence, were similar to those in cases where there were no allegations of family violence. However, where allegations were made with a high degree of specificity and supported by evidence of strong probative weight, the family violence did influence the orders made by the court.[8] It is therefore important to consider ways in which to encourage and facilitate the provision of evidence of family violence of strong probative value. This issue is discussed later in this chapter.

Stakeholder views and other inquiries

10.11 During consultations, a number of stakeholders raised concerns that, in family law proceedings, a federal family court did not give sufficient weight to the fact that one party had obtained a protection order against the other.

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4 L Moloney and others, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-reform Exploratory Study* (2007) Australian Institute of Family Studies.
5 Ibid, 117.
6 Ibid, viii.
7 Ibid, app E.
8 Ibid, 109.

10.12 In particular, some stakeholders expressed the view that s 60CC(3)(k) should permit a federal family court to consider interim protection orders, and protection orders made by consent, as well as final and contested orders. Women's Legal Services Australia, in a submission to the review of the Family Court's response to family violence undertaken by Professor Richard Chisholm (the Chisholm Review),[9] stated that:

> In WLSA's view, there is no good reason to exclude consideration of non-contested interim AVOs. Such evidence could be set out, along with other evidence in a family law matter, so that the judge can appropriately give weight to each factor when determining the best interests of the child. Excluding consideration of non-contested AVOs may lead perpetrators to consent to an interim AVO as a tactic to exclude consideration of the AVO in a family law matter.
>
> In some registries there seems to be a reluctance by the court to give any weight at all to the existence of AVOs as they have been seen as a tactical move in family law proceedings. In combination with the affidavit evidence of the nature and extent of the violence, judges should also be encouraged to consider AVOs as good evidence of the existence of domestic violence. It is unacceptable that orders granted by a jurisdiction to protect the lives of people who have experienced violence not be taken into account in a jurisdiction that, on the balance of probabilities, is charged with the responsibility to determine what parenting arrangements are in the best interests of children.[10]

10.13 An opposing view is that any kind of protection order, in itself and without further evidence, should not be a separate, specific factor when determining a child's best interests. In particular, many protection orders are made by consent without admission of liability and, in such circumstances, the court is not required to make any findings as to whether the grounds for making the order are satisfied—meaning that a court has not determined whether there was in fact family violence. In such cases, it is argued that the fact of a protection order should have little or no weight in family law proceedings where family violence is alleged.

10.14 The Commissions heard in consultations that protection orders are sometimes sought for strategic advantage in family law matters, rather than because a person necessarily needs protection from family violence. Some claim that men and women make false allegations of family violence, an issue discussed later in this chapter. However, an empirical study by academics at Sydney University of the use of protection orders during post-separation conflict found that

> [w]hile applicants reported a valid legal basis for applying for family violence orders, orders were also sought for 'collateral purposes' such as determining the occupancy of the home on separation or maintaining boundaries between newly separated parents. In certain cases they were used as well for purposes connected with the family law dispute, on legal advice.[11]

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

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

11 P Parkinson, J Cashmore and J Single, *Post-Separation Conflict and The Use of Family Violence Orders* (2009), 1.

10.15 The study suggested that consideration should be given to removing the references to family violence orders in s 60CC(3)(k) of the *Family Law Act.* Given that the list of considerations in s 60CC already refers twice to family violence, the authors considered that the additional reference in s 60CC(3)(k) to protection orders was 'superfluous'. Instead, '[w]hat the court will really be concerned with is the substance of the matters with which the [protection order] sought to deal'.[12]

10.16 The Chisholm Review noted some issues with including protection orders in s 60CC of the *Family Law Act*:

> By including family violence orders in this list of matters relevant to the assessment of children's interests, it might be taken as suggesting that the order itself is a factor that should be taken into account. It then partly retreats from that suggestion by excluding interim and non-contested orders. The rationale is, obviously, that it may be wrong to infer from the making of such orders that there is a risk of violence. But is the implication that the court should infer that there is a risk of violence from the making of final and contested orders?
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> ... [W]hat is important is that the court should learn about the factual circumstances that might suggest a risk to the child or other person, regardless of what was the basis of a previous family violence order. As one legal submission pointed out, 'It is the underlying allegations that are far more important to the Court in determining the case than the existence or otherwise of an order'.[13]

10.17 As noted in Chapter 8, the Chisholm Review made several recommendations to revise how the courts consider the best interests of the child in family law proceedings. The Review considered that parents, advisers and courts should be encouraged to consider the best arrangements for a child in each particular case, rather than starting with an assumption that a particular outcome is likely to be best in a particular category of case. The Review recommended that family courts should consider a range of factors, similar to those presently included in s 60CC(3) of the *Family Law Act*. The Chisholm Review concluded that, if such reforms were adopted, there would be no need for s 60CC(3)(k) of the *Family Law Act.*[14]

Commissions' views

10.18 The fact that a victim of family violence has obtained a protection order may be one of many pieces of evidence provided by a victim to a family court to support allegations of family violence—other evidence could include, for example, doctors' reports or witness statements. A court exercising jurisdiction under the *Family Law Act*, when determining a child's best interests, will need to be satisfied for itself that there has been, or there is a risk of, family violence.

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12 Ibid, 36.
13 R Chisholm, *Family Courts Violence Review* (2009), 139–140.
14 Ibid, 140, Rec 3.4.

10.19 The Commissions consider that the distinction between final or contested orders, and interim orders, is arbitrary and not reflected in practice. An interim protection order may be made for a number of reasons that do not reflect the level of risk, or evidence, of family violence. For example, as noted in Chapter 6, the Commissions have heard that some magistrates in some jurisdictions prefer to make only interim protection orders and adjourn the final hearing until related criminal proceedings are resolved.

10.20 As noted by the stakeholders and commentators cited above, a federal family court must consider all evidence of family violence and give appropriate weight to that evidence. The legislative guidance in s 60CC(3)(k)—which suggests that some, but not all, protection orders are relevant—is misleading, in that it suggests that courts give more or less consideration to various kinds of protection orders, rather than looking behind those orders to the evidence of family violence.

10.21 In Chapter 8, the Commissions express a preliminary view that the distinction made in s 60CC(3)(k) between considering final or contested protection orders on the one hand, and interim or uncontested orders on the other, should be removed. The Commissions consider two options for the reform of s 60CC(3)(k):

- removing the express reference in s 60CC(3)(k) to consideration of protection orders altogether and, instead, relying on a general criterion of family violence contained in s 60CC(3)(j); or

- amending s 60CC(3)(k) to provide that any family violence, including evidence of such violence given in any protection order proceeding—including proceedings in which final or interim protection orders are made either by consent or after a contested hearing—is an additional consideration when determining the best interests of a child.

10.22 Both options focus on the allegation and evidence of family violence, rather than the type of protection order. As such, it is important that steps are taken to improve the quality of evidence of family violence before federal family courts.

Orders made by consent

10.23 All state and territory family violence acts include provisions that allow a court to make a final protection order by consent. These provisions generally provide that:

- a court may make a final protection order if the applicant and the respondent consent to the order;[15]

15 Generally, only a court may make a final protection order by consent. The exception is s 38 of the *Domestic and Family Violence Act 2007* (NT), which allows a court or clerk to make a final order.

- if the order is made by consent, the court is not required to make any findings as to whether the grounds for making the order are satisfied—for example, that there has been a particular act of family violence; and

- a court can make an order on the basis that the respondent disputes some or all of the allegations made in the application—that is, 'without admissions'.[16]

10.24 The making of a protection order 'by consent without admission of liability' enables a protection order to be made urgently, while also protecting a respondent's legal rights with respect to any pending criminal charges he or she may be facing. However, the Commissions have heard that the notation 'without admissions' is commonly added to orders by consent, even where there are no pending or likely criminal charges.

10.25 The Commissions have heard that the majority of protection orders are made by consent. By consenting to a protection order, both parties avoid having to attend a contested hearing before a magistrate. As noted by Professor Rosemary Hunter, this can have benefits for the parties and the court:

> Proponents of the practice argued that consent without admissions represented a win-win-win solution for all parties. It saved time for the court, the applicant got her order without having to wait around and without going into the witness box to ensure a potentially traumatic hearing, and the defendant was able to 'save face' to some extent.[17]

10.26 However, Hunter has identified some drawbacks to the practice of making consent orders without admissions. First, while in civil proceedings consent orders generally require negotiation and consent by both parties, in protection order proceedings the applicant for a protection order is rarely given an opportunity to oppose the order being made without admissions. When an order is made by consent, the applicant loses the opportunity to put detailed evidence before the court and for the court to make findings of family violence:

> If the great majority of intervention orders are granted either ex parte or by consent without admitting the allegations ... there is an overall lack of institutional affirmation of women's stories of abuse ... There are few findings by magistrates that these stories are *true*.[18]

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16 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 78; *Family Violence Protection Act 2008* (Vic) s 78; *Restraining Orders Act 1997* (WA) s 43(2); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 23(3); *Family Violence Act 2004* (Tas) s 22; *Domestic Violence and Protection Orders Act 2008* (ACT) s 43; *Domestic and Family Violence Act 2007* (NT) s 38. There are some variations across the jurisdictions. In particular, s 43(3) of the *Restraining Orders Act 1997* (WA) specifies that 'consent does not constitute an admission by the respondent of all or any of the matters alleged in the application'.

17 R Hunter, *Domestic Violence Law Reform and Women's Experience in Court: The Implementation of Feminist Reforms in Civil Proceedings* (2008), 94.

18 Ibid, 97 (emphasis in original).

10.27 Hunter argues that this lack of affirmation reinforces notions that women invent or exaggerate allegations of family violence, and use the legal system for collateral purposes.[19]

10.28 Secondly, Hunter expresses concerns about courts relying on consent in the context of family violence characterised by the exercise of power and control by one partner over the other.[20] The consent of the applicant is particularly relevant where the person against whom the order is to be made wishes the order to be made without admissions or seeks to vary the terms of the order. In such circumstances, courts should not assume that the parties have equal negotiating power, or that intimidation or threats will not influence the consent given by a victim of family violence.

10.29 Finally, protection orders made by consent—particularly consent without admissions—are seen to have less weight when it comes to proving allegations of family violence in family law proceedings. Because a consent order is a final order, it falls within the kinds of protection orders that may be considered by a federal family court when determining the best interests of a child under s 60CC of the *Family Law Act*. While the Explanatory Memorandum stated that the intention of this provision was 'to ensure that the court does not take account of uncontested' protection orders, the words of s 60CC(3)(k)—which direct a court to consider a protection order if 'the order is a final order; or the making of the order was contested by a person'—arguably suggest otherwise.

10.30 However, as noted above, the Moloney study characterised final protection orders made by consent or consent without admissions as evidence of 'less probative weight' in family law proceedings.[21] One participant in the ALRC's Family Violence Online Forum also noted that:

> If [a protection order] was made without admissions, some lawyers for the respondent may say it has no teeth as the person may have just agreed to it for the sake of peace or to move on. ... [T]he fact that the [protection order] was made without admissions goes to the quality of the evidence against the respondent and not the other way around. That is, the respondent consented to the order without admissions because it was in his interest to do so without a Magistrate actually making findings against him with the strong evidence provided.[22]

Commissions' views

10.31 The Commissions note that making an order by consent without admissions will be appropriate in some circumstances, such as where the respondent is facing criminal

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19 Ibid.

20 Ibid, 95.

21 L Moloney and others, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-reform Exploratory Study* (2007) Australian Institute of Family Studies, app E; see also R Hunter, *Domestic Violence Law Reform and Women's Experience in Court: The Implementation of Feminist Reforms in Civil Proceedings* (2008), 98.

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

charges for related conduct and does not want to prejudice that trial. The Commissions also recognise that it would be unrealistic to dispense with the making of consent orders. No court has the resources to hear every case that comes before it.

10.32 There are a number of options for reform to ensure that orders made by consent 'without admissions' are used appropriately. One option is to ensure that the notation on protection orders and court files specifically states that the order is made by consent 'without admission as to criminal liability of the allegations in the application for the protection order'.

10.33 Other options for reform are directed to improving the scrutiny and quality of the consent process. Judicial officers should be required to ensure that the victim agrees to the court making consent orders without admission of liability—agreement to orders by consent on such grounds should not be implied from the application alone.

10.34 Secondly, courts should satisfy themselves that consent orders give attention to the safety of victims of family violence. Courts should assure themselves that the victim of family violence has considered the practical implications of consenting to the order and, in particular, to any variations to the terms sought in the original application. There may be circumstances where it would be appropriate for the court to request a safety plan in writing to accompany the making of the protection order by consent. For example, a safety plan may cover matters such as how to facilitate contact with children safely, or access to the family home.

10.35 Finally, courts should ensure that the parties are aware of the consequences of consenting to a protection order without admission of liability. This is particularly important if parties are unrepresented or if there are concurrent or pending family law proceedings.

Proposal 10–1 Judicial officers, when making a protection order under state or territory family violence legislation by consent without admissions, should ensure that:

(a) the notation on protection orders and court files specifically states that the order is made by consent 'without admission as to criminal liability of the allegations in the application for the protection order';

(b) the applicant has an opportunity to oppose an order being made by consent without admissions;

(c) the order gives attention to the safety of victims, and, if appropriate, requires that a written safety plan accompanies the order; and

(d) the parties are aware of the practical consequences of consenting to a protection order without admission of liability.

Undertakings

10.36 In some circumstances, a person seeking a protection order may agree to withdraw the application if the person against whom a protection order is sought (the respondent) provides an undertaking. An undertaking is a promise to the court that a person will do, or refrain from doing, certain things. Usually, the undertaking will include the same types of conditions and prohibitions which would have been included in the protection order had it been issued.

10.37 There is some variation in the form of undertakings given in protection order proceedings. Sometimes, undertakings are given orally by the respondent, or the respondent's lawyer. Other times, undertakings are given in writing and may be signed by the respondent. In some cases, the applicant may also sign the respondent's written undertaking.

10.38 Dr Renata Alexander notes that sometimes the respondent is encouraged by the court or on legal advice to give an undertaking to the court, rather than consent to an order, so as to avoid a contest in court.[23] Occasionally, parties are encouraged to agree to mutual undertakings.[24]

10.39 Undertakings are problematic for a number of reasons. Unlike a protection order, breach of an undertaking is not a criminal offence and cannot be enforced by the police. Further, there is no obligation on parties to inform a court exercising jurisdiction under the *Family Law Act* of undertakings in relation to family violence, nor is the existence of an undertaking a specified factor to be considered when determining the best interests of a child.

10.40 Participants at the NSW Ombudsman Domestic Violence Community Stakeholders forum held in December 2009 noted concerns that there is a current trend on the part of police prosecutors to accept undertakings rather than proceed with hearings.[25]

10.41 The Commissions heard in one consultation that, before accepting an undertaking from a respondent, some magistrates will speak separately to the applicant to ensure that he or she is not withdrawing the application because of unfair pressure or intimidation by the respondent. Some magistrates will also explain that undertakings

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23 R Alexander, 'Family Violence' in Springvale Legal Centre (ed) *Lawyers Practice Manual Victoria* (2009) 208–1, [2.8.607].

24 Ibid.

25 NSW Ombudsman, *Domestic Violence Community Stakeholders Forum*, 9 December 2009.

are not enforceable, and that if the respondent breaches the undertaking, the only option is for the victim of family violence to make a new application for a protection order.[26]

Commissions' views

10.42 The Commissions understand that a victim of family violence may wish to avoid a contest in court and therefore agree to withdraw his or her application for a protection order on the basis that the respondent gives an undertaking to the court not to engage in family violence or other proscribed conduct.

10.43 A victim of family violence can also avoid contest in court by agreeing to a protection order by consent. However, the acceptance of undertakings can compromise the safety of victims of family violence because a breach of an undertaking—unlike a breach of a protection order—is not a criminal offence. Accordingly, the Commissions consider that it is essential that, prior to accepting an undertaking from a respondent, the court should be satisfied that the applicant understands the implications of withdrawing the application and relying instead on undertakings to the court from the respondent. The respondent should also understand that, in accepting an undertaking rather than pursuing an application for a protection order, the applicant is not precluded from making a further application if the respondent does not honour the undertaking, or the applicant continues to be at risk of family violence.

10.44 The Commissions are interested in stakeholder views on how these objectives may be achieved. Some options for reform include: legislative provisions directing judicial officers, when accepting an undertaking, to explain these matters to the parties; judicial training and education; or a requirement that the court forms used to take written undertakings note that an undertaking is not enforceable, and that, by accepting an undertaking, the applicant is not precluded from making a further application for a protection order.

10.45 In the Commissions' preliminary view, undertakings should generally be given in writing, rather than orally to the court. Undertakings given in writing mean that both parties can have a copy of the undertakings, and reduce the potential for ambiguity or confusion about the scope or content of the undertakings.

10.46 The Commissions are interested in hearing whether proceedings in which undertakings have been given, instead of a protection order being made, return to court on allegations of breach of the undertaking, or further family violence. The Commissions are also interested in hearing whether, in practice, persons who have provided undertakings to the court, or victims of family violence who accept such undertakings, inform a federal family court of the existence of such undertakings as part of their evidence of family violence in family law proceedings.

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26 G Zdenkowski, *Consultation*, Sydney, 6 November 2009.

Proposal 10–2 Before accepting an undertaking to the court from a person against whom a protection order is sought, a court should ensure that:

(a) the applicant for the protection order understands the implications of relying on an undertaking to the court given by the respondent, rather than continuing with their application for a protection order;

(b) the respondent understands that the applicant's acceptance of an undertaking does not preclude further action by the applicant to address family violence, if necessary; and

(c) the undertaking is in writing.

Question 10–1 What practical reforms could be implemented in order to achieve the objectives set out in Proposal 10–2?

Question 10–2 In practice, do victims of family violence, who rely on undertakings to the court from a person against whom a protection order is sought, often return to court because the undertaking has been breached, or to seek further protection from family violence?

Question 10–3 In practice, do victims of family violence who rely on undertakings to the court from a person against whom a protection order is sought inform federal family courts of the existence of such undertakings during family law proceedings?

Improving evidence in protection order proceedings

10.47 As noted above, the Commissions' view is that the evidence of family violence given in protection order proceedings—rather than the fact that a particular kind of protection order has been made—should, where relevant, be considered in family law proceedings. This is consistent with the approach in the Chisholm Review.[27] The fact that a person has obtained a protection order—be it final or interim, contested or by consent—should alert a federal family court to the likelihood or risk of family violence. It should also prompt parties and their lawyers to put any evidence of family violence before the court, so it can look behind the fact of the order and consider any supporting evidence of family violence when making parenting orders.

27 R Chisholm, *Family Courts Violence Review* (2009), 140.

10.48 Giving evidence of family violence can be a traumatic experience for victims of family violence. As noted by the Victorian Law Reform Commission (VLRC):

> Giving evidence can be one of the most intimidating and distressing aspects of the legal system for people who have been subject to family violence. Their evidence may include testimony about their experiences of sexual abuse, physical assault or other ways they have been humiliated, verbally abused or controlled. The dynamics of family violence, and the way it is seen by many in the community, mean that people who have been subjected to it often feel ashamed about, and responsible for, the abuse they have endured.[28]

10.49 This trauma is heightened if a victim is involved in multiple proceedings, which take place in different courts, subject to distinct evidentiary and procedural requirements—for example, evidence by affidavit or produced orally to the court—and may involve different, or no, legal representation.

10.50 Further, family violence, by its nature, is often difficult to corroborate and prove. The Moloney study noted that:

> Obtaining corroborative evidence is likely to be very difficult when the violence has occurred over an extended period of time, potential sources of proof may be lost, witnesses (where there were any) may no longer be available, injuries may have faded and the non-physical symptoms of trauma may not be obvious.[29]

10.51 Improving the way in which evidence is given in protection order proceedings is an important aspect of promoting better outcomes for victims of family violence involved in multiple legal proceedings. It is also likely to have a flow-on effect in improving the quality of evidence before the courts. Better quality evidence in protection order proceedings enhances the capacity for other courts to rely on protection orders, and the evidence adduced in the supporting proceedings—for example, for determining a child's best interests in family law proceedings.

10.52 One practical problem with this approach is that, because of the nature of protection order proceedings, the evidence given may not always meet the standards of evidence required in family law proceedings. Local and magistrates courts deal with a high volume of applications for protection orders. Given this, list hearings for protection orders are often brief. Dr Jane Wangmann, in her study of protection order proceedings in NSW Magistrates Courts, estimated that most protection order mentions

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28 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), [11.1].

29 L Moloney and others, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-reform Exploratory Study* (2007) Australian Institute of Family Studies, 117–118.

were dealt with in less than three minutes.[30] In addition, many applications are finalised without a contested hearing. The oral evidence of victims is usually limited.[31]

10.53 In light of this reality, courts hearing applications for protection orders are likely to rely on information contained in application forms, and in more limited cases, oral evidence. In this section, the Commissions discuss how these forms of evidence may be improved, while retaining the advantages of the speedy and accessible protection order process.

Written evidence

Information provided in application forms

10.54 A person seeking a protection order under state or territory family violence legislation may apply for an order by completing an application form. There is some variation in this process across jurisdictions—for example, in Victoria, a person seeking a protection order fills out an information form, and the Court Registry uses this information to lodge a formal application for an order on the person's behalf. In some cases, the police may also apply for a protection order on behalf of a victim of family violence.

10.55 The information and degree of detail sought in the application forms varies across jurisdictions. Some application forms simply ask the applicant to set out the grounds that he or she relies on.[32] This approach assumes that the person seeking a protection order understands the legislative definition of family violence and can frame his or her application accordingly—knowledge that a person is unlikely to have without assistance from the police or a lawyer. Other forms ask the applicant to describe the respondent's behaviour, but give no guidance as to the kinds of behaviour that may constitute family violence and lead the court to make a protection order.[33]

10.56 In contrast, some application forms guide the applicant step by step through the application. Some include a list of conduct that reflects the statutory definition of

30 J Wangmann, '"She Said …" "He said …" : Cross Applications in NSW Apprehended Domestic Violence Order Proceedings', *Thesis*, University of Sydney, 2009, 104. Wangmann notes that Hunter, in her research on protection order proceedings in the Victorian Magistrates' Court, also found that most uncontested matters were considered within three minutes.

31 Ibid, 105.

32 See, eg, New South Wales, *Application—Apprehended Domestic Violence Order*; Northern Territory Magistrates Courts, *Application for Domestic Violence Order* <www.nt.gov.au/justice/ntmc/forms_fees.shtml> at 29 March 2010.

33 See, eg, Magistrates Court of Western Australia, *Violence Restraining Order Application* <www.magistratescourt.wa.gov.au/content/restraining.aspx> at 9 April 2010.

family violence and asks for details of recent conduct.[34] Other application forms include the statutory definition of family violence as part of the form.[35]

Commissions' views

10.57 The Commissions consider that one way in which the quality of evidence before courts exercising jurisdiction under state and territory family violence legislation to support allegations of family violence can be improved is to improve the quality of information sought and therefore provided in application forms.

10.58 In particular, the Commissions consider that application forms should include an illustrative list of the kinds of conduct that constitute family violence. This will help make victims aware of the full range of conduct that may constitute family violence and prompt them to provide evidence of the types of family violence they have suffered. It would also assist applicants to identify certain types of family violence which are currently invisible, such as sexual assault or psychological or emotional abuse.[36] This is particularly important to assist victims of family violence who are making an application for a protection order without the assistance of lawyers or the police.

10.59 Application forms in different jurisdictions take different approaches to seeking information about family violence. For example, some forms set out a list of conduct that the applicant can tick if relevant; others set out the definition of violence before asking the applicant to provide details of incidents of family violence. The Commissions do not suggest that all forms need to be identical, but do propose that all application forms provide some guidance to applicants about the kinds of conduct that constitute family violence.

> **Proposal 10–3** Court forms for applications for a protection order under state and territory family violence legislation should include information about the kinds of conduct that constitute family violence in the relevant jurisdiction.

Affidavit evidence in protection order proceedings

10.60 In some jurisdictions, the application form completed by a person seeking a protection order must be sworn or made on oath. For example, s 43 of the *Family*

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34 See, eg, Magistrates' Court of Victoria, *Information for Application for an Intervention Order* (2009) <www.magistratescourt.vic.gov.au> at 2 February 2010; Magistrates Court of Tasmania, *Application for a Family Violence Order* <www.magistratescourt.tas.gov.au/divisions/family_violence/forms> at 29 March 2010.

35 See, eg, Magistrates Court of Queensland, *Protection Order Application* <www.communityservices.qld.gov.au/violenceprevention/legislation/dom-violence-orders.html> at 9 February 2010; ACT Magistrates Court, *Application for a Domestic Violence Order* (2009) <www.courts.act.gov.au/magistrates> at 9 February 2010.

36 The kinds of conduct that may constitute family violence are discussed in Ch 4.

Violence Protection Act 2008 (Vic) requires that an application for a protection order made by a police officer must be made on oath or certified by the police officer, while an application made by a person other than a police officer must be made on oath or by affidavit. To this end, the final paragraph of the information form to be completed by a person seeking a protection order is headed 'Affidavit' and, by signing, the applicant swears or affirms that 'the contents of my application are true and correct to the best of my knowledge'.[37] Application forms in Queensland and Tasmania take a similar approach.[38]

10.61 In other jurisdictions, there is no requirement that an application be supported by an affidavit. For example, in NSW, South Australia and the ACT, the court has discretion to accept affidavit evidence in certain circumstances, generally where the applicant is not able to give oral evidence to the court during a hearing.[39] The *Restraining Orders Act 1997* (WA) takes a different approach and gives the applicant the option of providing evidence by affidavit in support of the application.[40] In the Northern Territory, the application form includes a note, recommending that the applicant file a Statutory Declaration setting out the facts and circumstances which establish a domestic relationship, the basis for the application and future expectations.[41]

Commissions' views

10.62 One reason for not requiring an application to be accompanied by an affidavit is to make the application process more user-friendly and accessible, particularly to applicants without legal representation or police assistance. However, the fact that an application is unsworn can affect the evidentiary value of the matters set out in the application. This is not an issue where there is a court hearing, because the courts will critically assess the information provided in the application form, and confirm the content of the written application. However, if a protection order is made by consent, the evidentiary value of the matters set out in an unsworn application form is reduced—particularly in pending or concurrent family law proceedings.

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37 Magistrates' Court of Victoria, *Information for Application for an Intervention Order* (2009) <www.magistratescourt.vic.gov.au> at 2 February 2010.

38 Magistrates Court of Queensland, *Protection Order Application* <www.communityservices.qld.gov.au/violenceprevention/legislation/dom-violence-orders.html> at 9 February 2010; *Justices Rules 2003* (Tas) r 54L; Magistrates Court of Tasmania, *Application for a Family Violence Order* <www.magistratescourt.tas.gov.au/divisions/family_violence/forms> at 29 March 2010.

39 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 22 (interim orders only); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 21(6) (interim orders only); *Domestic Violence and Protection Orders Regulation 2009* (ACT) reg 23.

40 *Restraining Orders Act 1997* (WA) s 28.

41 Northern Territory Magistrates Courts, *Application for Domestic Violence Order* <www.nt.gov.au/justice/ntmc/forms_fees.shtml> at 29 March 2010.

10.63 The Commissions are interested in hearing whether there is value in the approach taken in the Victorian and Tasmanian family violence acts, which require that the information form (in Victoria) and application form (in Tasmania) be made on oath or sworn.

10.64 An alternative approach is that taken in the Western Australian family violence legislation, which gives the applicant for a protection order the option of providing affidavit evidence in support. This would give an applicant who is currently involved in family law proceedings, or who anticipates such proceedings, the opportunity to provide stronger evidence in support of a protection order that may be relied on in later family law proceedings.

10.65 The Commissions are interested in hearing about other mechanisms that would facilitate the use of evidence given in protection order proceedings in pending, concurrent or subsequent family law proceedings where family violence is alleged. In particular, the Commissions are interested in whether there would be any benefits or disadvantages to a standard form of affidavit that could be used in protection order proceedings under state or territory family violence legislation.

Question 10–4 In order to improve the evidentiary value of information contained in applications for protection orders under state and territory family violence legislation, would it be beneficial for such legislation to:

(a) require that applications for protection orders be sworn or affirmed; or

(b) give applicants for protection orders the opportunity of providing affidavit evidence in support of their application?

Question 10–5 What are the advantages or disadvantages of providing written rather than oral evidence to a court when seeking a protection order? Would a standard form of affidavit be of assistance to victims of family violence?

Question 10–6 Are there any other ways to facilitate the use of evidence given in proceedings for a protection order under state and territory family violence legislation in pending, concurrent or subsequent family law proceedings where family violence is alleged?

Oral evidence

10.66 State and territory courts have adopted a number of strategies to improve the way oral evidence is given in protection order proceedings. This section briefly considers the desirability of adopting any of these strategies more broadly.

Closed or open court proceedings

10.67 Principles of open justice generally require that court proceedings should be open to the public. Accordingly, most family violence legislation contains an express or implied presumption that protection order proceedings will be held in open court, but also includes provisions that allow or require the court to be closed in certain circumstances.[42] Circumstances in which the court may be closed differ across jurisdictions, for example:

- in NSW, where a child is a person seeking protection or is a witness in protection order proceedings, the court must be closed unless the court directs otherwise;[43]
- in Victoria, the court may be closed, or certain people excluded, if the court considers it necessary to do so to prevent an affected family member, protected person or witness from being caused undue distress or embarrassment;[44]
- in Western Australia, the court must be closed if the applicant wants the first hearing of the application to be held in the absence of the respondent;[45]
- in the ACT, the court can order that proceedings be closed if it is in the public interest or the interests of justice to do so;[46] and
- in the Northern Territory, the court must be closed if the only person seeking protection is a child, or when a vulnerable witness gives evidence, unless the court directs otherwise.[47]

10.68 In contrast, the *Domestic and Family Violence Protection Act 1989* (Qld) states that a court hearing an application for a protection order 'is not to be open to the public' but notes that the court 'may open the proceedings or part of the proceedings to the public or specified persons'.[48]

10.69 In its review of family violence laws, the VLRC noted that hearing protection order proceedings in closed court may 'significantly reduce the stress of having unidentified people hearing intimate details about the parties' family circumstances'.[49]

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42 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 58; *Family Violence Protection Act 2008* (Vic) s 68; *Restraining Orders Act 1997* (WA) ss 26–27; *Family Violence Act 2004* (Tas) s 31(1); *Domestic Violence and Protection Orders Regulation 2009* (ACT) reg 13; *Domestic and Family Violence Act 2007* (NT) s 106. The *Intervention Orders (Prevention of Abuse) Act 2009* (SA) does not address this issue.

43 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 41.

44 *Family Violence Protection Act 2008* (Vic) s 68.

45 *Restraining Orders Act 1997* (WA) s 27.

46 *Domestic Violence and Protection Orders Regulation 2009* (ACT) regs 14, 15.

47 *Domestic and Family Violence Act 2007* (NT) s 106.

48 *Domestic and Family Violence Protection Act 1989* (Qld) s 81.

49 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), [11.18].

On the other hand, the VLRC commented on the importance of ensuring that 'courts do not reinforce the view that family violence is a private matter' and that 'the system is open to public scrutiny'.[50] The VLRC recommended that a magistrate should have a discretion to order that the court be closed for protection order proceedings as well as for criminal prosecutions involving acts of family violence.[51]

Commissions' views

10.70 Where open court proceedings inhibit a victim of family violence or another witness from giving evidence, inadequate or incomplete evidence may be adduced. This may have repercussions not only for the victim and the case in issue, but also broader flow-on effects where family violence is alleged in pending, concurrent or subsequent family law proceedings involving the victim.

10.71 On the other hand, conducting protection order proceedings in open court ensures that the system is open to public scrutiny, may reinforce the obligation on all witnesses to tell the truth and makes more visible the reality of family violence in our community.

10.72 As noted above, there is some variation in the provisions in state and territory family violence legislation regarding the power to close the court. However, the Commissions note that, while the grounds to close the court vary, judicial officers hearing protection order proceedings in most states and territories have a discretion to close or open courts in certain circumstances. The point of greatest difference between state and territory family violence legislation is in the Queensland legislation, which states that protection order proceedings are to be heard in closed court, unless a court orders otherwise. The Commissions are interested in hearing how effective the different approaches of each jurisdiction are in protecting vulnerable applicants and witnesses in protection order proceedings, and, in particular, how the requirement under the Queensland legislation that, generally, protection order proceedings be heard in closed court, works in practice.

Question 10–7 Are the provisions in state and territory family violence legislation that allow the court to hear protection order proceedings in closed court effective in protecting vulnerable applicants and witnesses?

Question 10–8 How is the requirement in s 81 of the *Domestic and Family Violence Protection Act 1989* (Qld), that a court hearing an application for a protection order should not generally be open to the public, working in practice?

50 Ibid.
51 Ibid, Rec 142.

Cross-examination by a person who has allegedly used violence

10.73 Many parties to protection order proceedings represent themselves, including persons seeking protection and persons alleged to have used violence. This is often due to difficulties in obtaining legal representation. Unless legislation provides otherwise, a self-represented party will have a right to cross-examine witnesses. This can be problematic where a person alleged to have used violence is self-represented and cross-examines the person seeking protection. One victim of family violence who made a submission to the VLRC's review of family violence laws commented that:

> I have experienced this [personal cross-examination by the respondent] firsthand, and can say that to be cross-examined by the respondent and to have to cross-examine the respondent myself, is not a position I would wish on anyone. I was unprepared, overwhelmed and scared of the prospect of having to look at this man, little less have to talk to him and ask/answer questions.[52]

10.74 The VLRC recommended that a person against whom allegations of violence have been made should not be able to personally cross-examine the person seeking protection, any family members of the parties, or any other person the court declares to be a 'protected witness' in protection order proceedings.[53] This recommendation was implemented in s 70 of the *Family Violence Protection Act 2008* (Vic). There are also restrictions preventing persons alleged to have used violence from personally cross-examining witnesses in family violence legislation in Western Australia, South Australia and the Northern Territory.[54]

10.75 An issue that arises in this context is how to ensure that a self-represented party who is prevented from cross-examining a witness receives a fair hearing. In South Australia, Western Australian and the Northern Territory, the party may submit his or her questions to the court, which the court or an authorised person will then ask the witness. Under the Victorian family violence legislation, a court must adjourn proceedings to provide the party with a reasonable opportunity to obtain legal representation for the purpose of cross-examination.[55] If he or she does not obtain legal representation after being given a reasonable opportunity to do so, the court must order Victoria Legal Aid to offer legal representation for that purpose. Victoria Legal Aid is required to comply with this order.[56]

10.76 In Chapter 18, the Commissions discuss restrictions on the cross-examination of complainants in sexual offence proceedings by unrepresented defendants. In that chapter, the Commissions propose that Commonwealth, state and territory governments should legislate to prohibit an unrepresented defendant from personally cross-examining any complainant or other witness in sexual offence proceedings. The

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52 Ibid, [11.27].
53 Ibid, Rec 143.
54 *Restraining Orders Act 1997* (WA) s 44C; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 29(4); *Domestic and Family Violence Act 2007* (NT) s 114.
55 *Family Violence Protection Act 2008* (Vic) s 70.
56 Ibid s 71.

Commissions further propose that any person conducting such cross-examination should be a legal practitioner, as making a judicial officer ask questions on behalf of the accused may place the judicial officer in a difficult position in determining the admissibility of the questions and may raise perceptions of bias.

Commissions' views

10.77 The Commissions recognise the concerns about allowing a person who has used family violence to personally cross-examine a victim of that violence. This approach provides an opportunity for a person to misuse legal proceedings and exert power and control over the victim of his or her family violence. Considering the nature and dynamics of family violence, this may significantly inhibit the ability of a victim, or another witness, to provide truthful and complete evidence in protection order proceedings.

10.78 In the Commissions' preliminary view, state and territory family violence legislation should prohibit a person, who has allegedly used family violence, from personally cross-examining a person against whom he or she is alleged to have used family violence. This is consistent with the Commissions' proposal in the context of sexual assault.[57] For the reasons set out in that chapter, the Commissions further propose that any person conducting such cross-examination should be a legal practitioner. The Victorian family violence legislation provides an instructive model for how such a requirement could be implemented in practice—that is, for the court to adjourn proceedings to provide an unrepresented party with a reasonable opportunity to obtain legal representation and, if he or she is unable to obtain representation, issuing a court order for representation by Legal Aid in the relevant state or territory.

Proposal 10–4 State and territory family violence legislation should:

(a) prohibit a person who has allegedly used family violence from personally cross-examining, in protection order proceedings, a person against whom he or she has allegedly used family violence; and

(b) provide that any person conducting such cross-examination be a legal practitioner representing the interests of the person who has allegedly used family violence.

Abuse of process

10.79 One way of improving the integrity of evidence of family violence is to ensure that safeguards are in place to address two abuses of process: false or misleading

57 See Ch 18.

evidence of family violence and vexatious applications and cross applications for protection orders under state and territory family violence legislation.

False or misleading evidence about family violence

10.80 The Chisholm Review noted the impact of false or misleading evidence relating to family violence in family law proceedings:

> false or misleading evidence relating to violence can cause great distress, and lead to outcomes adverse to the interests of children. If it consists of false allegations, the adverse outcomes might be that the children spend less time than they should with the person wrongly accused of violence. If it consists of false denials, the adverse outcomes might be to put children or other family members at risk, or to prevent or discourage productive ways of dealing with the problem.[58]

10.81 Some stakeholders have expressed concerns that allegations of family violence or child abuse are sometimes fabricated in order to gain an advantage in family law proceedings, or to remove a person's partner from the home and deny him or her contact with children. However, there is no clear evidence to support such claims. Indeed, the Human Rights and Equal Opportunity Commission has urged 'caution against accepting this contention uncritically':

> There is no doubt that Family Court proceedings often are accompanied by allegations of domestic violence and the use of protection orders. However, this may reflect the fact that domestic violence often escalates when couples separate. Australian data demonstrate that women are as likely to experience violence by previous partners as by current partners and that it is the time around and after separation which is most dangerous for women.[59]

False allegations and statements in family law proceedings

10.82 Section 117AB of the *Family Law Act* requires a court to make a costs order against a person who 'knowingly made a false allegation or statement in the proceedings'. This section was included to address 'concerns expressed, in particular that allegations of family violence and abuse can be easily made and may be taken into account in family law proceedings'.[60] There is no specific provision in the *Family Law Act* to deal with false denials of family violence.

10.83 As discussed in Chapter 8, the Chisholm Review raised concerns that this provision could impede the disclosure of family violence in cases where a vulnerable parent's allegations of family violence cannot be corroborated by reliable evidence.[61] The Chisholm Review recommended that the costs order provision in s 117AB of the

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58 R Chisholm, *Family Courts Violence Review* (2009), 115.

59 Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Committee's Inquiry into the Provisions of the Family Law Amendment (Shared Parental Responsibility) Bill 2005* (2006) <www.hreoc.gov.au/legal/submissions/shared_parental_responsibility.html> at 29 March 2010.

60 Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth), 41.

61 R Chisholm, *Family Courts Violence Review* (2009), 118.

Family Law Act should be repealed and suggested that consideration should instead be given to amending the general costs provision in s 117 of the Act to direct a court to have regard to whether any person knowingly gave false evidence in the proceedings.[62] This kind of provision would cover both false allegations and false denials of family violence.

10.84 In addition, the Family Law Council found that there is no evidence that s 117AB 'has achieved its purpose' in relation to false allegations of family violence and recommended that the Attorney-General give consideration to clarifying the intention of s 117AB, either through legislative amendment or public education.[63]

False evidence given in proceedings for protection orders under state and territory family violence legislation

10.85 State and territory family violence legislation generally deals with persons who give false evidence or make false allegations or denials by using provisions relating to vexatious applications or other legislation protecting court processes. A person who gives false evidence may also be charged with a number of offences, including perjury, false swearing and false testimony.[64]

10.86 In some circumstances, a court's ability to award costs against a person who brings an application for a protection order that is 'deliberately false' or made in 'bad faith' is linked to vexatious application provisions. For example, s 61 of the *Domestic and Family Violence Protection Act 1989* (Qld) provides that a court may not award costs on an application for a protection order, or a revocation or variation of the order, unless the court dismisses the application as 'malicious, deliberately false, frivolous or vexatious'. In other jurisdictions, costs may be awarded against a person if the court is satisfied that an application for a protection order was made 'in bad faith'[65] or 'has not been made honestly'.[66] Issues relating to vexatious applications are discussed below.

10.87 In 2004, the Parliament of Tasmania considered whether the *Family Violence Act 2004* (Tas) should include a provision to impose a penalty for false or contrived claims of family violence. The government did not support such amendments on the basis that there were adequate sanctions in the *Police Offences Act 1935* (Tas) and other legislation for making false allegations:

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62 Ibid, 108–120, Rec 3.2.

63 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 11.

64 *Crimes Act 1900* (NSW) ss 327–330; *Crimes Act 1958* (Vic) s 314; *Criminal Code* (Qld) s 123; *Criminal Code Act Compilation 1913* (WA) s 124; *Criminal Law Consolidation Act 1935* (SA) ss 242–243; *Criminal Code* (Tas) ss 94–95; *Criminal Code* (ACT) ss 703, 705; *Criminal Code* (NT) ss 96, 99.

65 See, eg, *Family Violence Protection Act 2008* (Vic) s 154(3)(b); *Domestic and Family Violence Act 2007* (NT) s 61.

66 See, eg, *Domestic Violence and Protection Orders Act 2008* (ACT) s 117.

> If you make a false report to the police you can be charged; if you make a false statutory declaration you can be charged. If you falsely swear you can be charged and it is perjury. All of these things are available for people who fabricate claims, under the *Criminal Code* as well as the *Police Offences Act*. Anyone who does that will be charged and people have been charged. We would not put it in here because it is in other legislation and it is covered.[67]

Commissions' views

10.88 The Commissions' preliminary view is that existing measures to sanction persons who give false evidence of family violence are sufficient. Such measures include the courts' power to dismiss vexatious applications and award costs against a person who brings a vexatious application. The Commissions consider that these measures are sufficient safeguards against giving false evidence before courts generally and that there is no need for specific provisions relating to false allegations of family violence.

10.89 The Commissions endorse the recommendations made in the recent reviews of the *Family Law Act* by Chisholm and the Family Law Council relating to s 117AB of the *Family Law Act*, and note that false denials of family violence, as well as false allegations, should trigger the court's discretion to make a costs order.

Vexatious applications in protection order proceedings

10.90 Vexatious legal proceedings are proceedings that are brought or continued without reasonable grounds or for wrongful purposes—such as to harass or annoy the other party, or to cause delay or detriment.

10.91 Vexatious applications may arise in a number of ways in protection order proceedings under state and territory family violence legislation, including:

- vexatious applications for a protection order against the same person based on the same or similar allegations;
- vexatious cross applications by the respondent to an existing protection order against the person who sought the original order, sometimes resulting in mutual orders where both parties are granted protection orders against each other;
- vexatious applications by the respondent to vary or revoke a protection order made against him or her; and
- vexatious appeals against the making of protection orders or the conditions of the order.

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67 Tasmania, *Parliamentary Debates*, House of Assembly, 18 November 2004, 166 (J Jackson—Attorney-General).

10.92 There are concerns that, in bringing vexatious applications, a person who has used family violence can use the legal system to further harass, control and abuse the victim. In a submission quoted in the Victorian Parliament Law Reform Committee's report on vexatious litigants, Women's Legal Service Victoria stated that:

> Family violence is often characterized by one party attempting to control the other party and stalking by one party attempting to have contact with the other party against their wishes. Similarly a key feature of at least some vexatious litigation is an attempt to control the other party or maintain contact with him/her via persistent litigation. It appears that some vexatious litigants appear to be using the legal system as a vehicle for control and harassment of the other party.[68]

10.93 During consultations conducted by Professor Ian Freckelton SC with Victorian judicial officers and tribunal members for the purposes of the Law Reform Committee's report, a magistrate noted that:

> There are not a lot of vexatious litigants in the family violence jurisdiction but they have a big impact. They are difficult and can be violent and intimidating. They take time and energy and invoke frustration. Some are quite cold and calculating. Often people use the law to try to contact or see a person or to try to inconvenience them through repeated applications or applications for variations.[69]

Vexatious applications for protection orders

10.94 Courts can deal with vexatious applications and cross applications for protection orders using provisions in family violence legislation, court rules or legislation that deals specifically with vexatious court proceedings. Legislation differs across jurisdictions, but may allow the court to dismiss vexatious applications, award costs against a person who has brought a vexatious application and, in some circumstances, to order that a person cannot institute further proceedings without leave of the court.

10.95 ***Dismiss the application***. Some state and territory family violence acts specifically state that a court can dismiss frivolous or vexatious applications for protection orders. For example, the *Intervention Order (Prevention of Abuse) Act 2009* (SA) provides that the court, at the preliminary hearing—to which the respondent is not summonsed to appear—may dismiss an application on the ground that it is 'frivolous, vexatious, without substance or has no reasonable prospect of success'.[70] In NSW, an application for an apprehended personal violence order can be refused on the same basis.[71] However, the legislation does not contain a similar provision in relation to

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68 Law Reform Committee—Parliament of Victoria, *Inquiry into Vexatious Litigants* (2008), 59. See also B Paxton, 'Domestic Violence and Abuse of Process' (2003) 17(1) *Australian Family Lawyer* 7, 7.

69 I Freckelton, *Vexatious Litigants: A Report on Consultation with Judicial Officers and VCAT Members* (2008) Paper prepared for the Victorian Parliament Law Reform Committee, Inquiry into Vexatious Litigants, 34.

70 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 21(3)(b).

71 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 53.

apprehended domestic violence orders. In other jurisdictions, court rules generally allow a court to stay or dismiss vexatious applications.[72]

10.96 ***Costs***. Most state and territory family violence acts allow a court to make a costs order against a person who has made a vexatious application. For example, s 99(3) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) provides that a court is not to order costs against an applicant seeking protection unless the court is satisfied that the application was frivolous or vexatious.[73]

10.97 ***Prohibition on making further applications without leave of the court***. While dismissing the application and awarding costs may deal with a particular vexatious application, these measures do not prevent a person making further vexatious applications that harass the other party and abuse court processes. Legislation in some jurisdictions allows a court to declare a particular person to be a vexatious litigant, with the effect that that person may not commence new proceedings without leave of the court.

10.98 The *Family Violence Protection Act 2008* (Vic) is the only state or territory family violence legislation that permits the court to make orders with respect to vexatious litigants, as well as vexatious applications. The Act allows the Attorney-General, a person against whom the applications have been made, or a person with leave of the court, to apply for an order declaring a person to be a vexatious litigant.[74] The Chief Magistrate, Deputy Chief Magistrate or the President of the Children's Court may make such an order if satisfied that the person has 'habitually, persistently and without reasonable ground instituted proceedings under this Act against the same person'.[75]

10.99 The provision includes, as an example of such conduct, where a person has persistently and without any reasonable grounds:

- made applications for family violence intervention orders against the same family member;
- applied for the variation of a family violence intervention order made against a family member;
- applied for the revocation of a family violence intervention order made against the person;

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72 See, eg, *Magistrates Court Civil Procedure Rules 2009* (Vic) rr 9A.01, 9A.02; *Uniform Civil Procedure Rules 2005* (Qld) r 389A; *Magistrates Court (Civil) Rules 1992* (SA) r 86; *Court Procedure Rules 2006* (ACT) r 1147.

73 Family violence legislation in all jurisdictions except South Australia contain similar provisions: *Family Violence Protection Act 2008* (Vic) s 154; *Domestic and Family Violence Protection Act 1989* (Qld) s 61; *Restraining Orders Act 1997* (WA) s 69; *Family Violence Act 2004* (Tas) s 34; *Domestic Violence and Protection Orders Act 2008* (ACT) s 117; *Domestic and Family Violence Act 2007* (NT) s 91. In South Australia, the relevant provisions are contained in the *Summary Procedure Act 1921* (SA) s 189.

74 *Family Violence Protection Act 2008* (Vic) s 189.

75 Ibid s 193(1).

- appealed against the making of a family violence intervention order, or the conditions of the order, made against the person.[76]

10.100 A person declared to be a vexatious litigant cannot make an application for an order, cross application, or variation, revocation or extension of an order, without leave of the court. The Act includes provisions to allow a person who has been declared a vexatious litigant to appeal that decision.[77]

10.101 These provisions implemented recommendations made by the VLRC in its review of family violence laws.[78] The Explanatory Memorandum for the Family Violence Protection Bill 2008 states that this provision was included to:

> ensure that the procedures under the Bill cannot be misused as a form of harassment and to acknowledge that it would only be appropriate to limit a person's access to the court system if the person had demonstrably abused court processes in the past.[79]

10.102 In Queensland and Western Australia, the relevant magistrates court has a general power to prohibit a person from commencing certain proceedings without leave of the court.[80] In other states and territories, court rules or legislation governing vexatious proceedings permit only Supreme Courts to declare a person to be a vexatious litigant, or to require that a person seek leave before commencing further legal proceedings.[81]

Commissions' views

10.103 Vexatious applications in protection order proceedings under state and territory family violence legislation can be a means for a person to misuse the legal system to harass or intimidate a victim of family violence. In addition, because the existence of certain kinds of protection order is a relevant consideration to be taken into account by a court when making orders under the *Family Law Act,* vexatious applications for protection orders have the potential to affect the operation of both the family law and state and territory family violence regimes.

10.104 Courts exercising jurisdiction under state and territory family violence legislation should be able to respond to the misuse of protection order provisions—in particular, vexatious applications for protection orders made to harass or intimidate victims of family violence or other persons. The Commissions are particularly concerned about the risk that a person subject to vexatious applications may be

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76 Ibid.
77 Ibid s 195.
78 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), Recs 89–94.
79 Explanatory Memorandum, Family Violence Protection Bill 2008 (Vic), 61.
80 *Uniform Civil Procedure Rules 2005* (Qld) s 389A; *Vexatious Proceedings Restriction Act 2002* (WA) s 4.
81 *Vexatious Proceedings Act 2008* (NSW) s 8 (this Act also confers power on the Land and Environment Court and Industrial Court); *Supreme Court Civil Procedure Act 1932* (Tas) s 194G; *Supreme Court Act 1933* (ACT) s 67A; *Vexatious Proceedings Act 2006* (NT) s 7.

pressured to consent to a protection order, or do so in order to avoid repeated appearances in court.

10.105 The Commissions consider that there is merit in allowing courts to order that a person who has brought several vexatious applications or cross applications for protection orders against the same person without reasonable grounds may not make further applications except with the leave of the court. The Victorian family violence legislation—which has comprehensive vexatious litigant provisions—and the South Australian family violence legislation—which allows a judicial officer to strike out an application at a preliminary stage before a respondent is served—provide instructive models. The Commissions recognise that provisions that inhibit a person's ability to bring an application before a court can be inconsistent with the principle that justice should be accessible and open to all. However, such provisions may be justified to protect people from having to defend unreasonable and repeated applications for protection orders and to prevent abuse of the protection order system.

Question 10–9 Should state and territory family violence legislation allow a court to:

(a) make an order that a person who has made two or more vexatious applications for a protection order against the same person may not make a further application without the leave of the court; and/or

(b) dismiss a vexatious application for a protection order at a preliminary hearing before a respondent is served with that application?

Vexatious cross applications

10.106 In addition to concerns that applications for protection orders may be used by some people to harass or intimidate family members, the Commissions have heard concerns that some respondents make cross applications for protection orders against the original applicant without reasonable grounds to do so.[82] In particular, there are concerns that some respondents make cross applications in order to obtain a procedural advantage in anticipated family law matters.[83]

10.107 Vexatious cross applications are particularly problematic, because a person may agree to a mutual protection order being made by consent in order to avoid further proceedings. The VLRC considered the issue of cross applications in its review of family violence laws in Victoria:

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82 Issues regarding the use of cross applications in protection order proceedings in NSW courts are discussed in J Wangmann, '"She Said …" "He said …" : Cross Applications in NSW Apprehended Domestic Violence Order Proceedings', *Thesis*, University of Sydney, 2009.

83 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), [8.81].

> Original applicants are often pressured to accept an intervention order being made against them by consent, in exchange for respondents consenting to the intervention order against them. According to the commission's consultations, pressure to consent to having an intervention order made against the original applicant comes from magistrates, respondents' advocates and sometimes the applicant's own advocates.[84]

10.108 The VLRC concluded that there were a number of problems in the current use of cross applications, including that:

- a cross application can coerce or pressure a victim of family violence into consenting to a mutual order;
- unfair pressure to consent to a mutual order can lead to a protection order being imposed on a victim of family violence when there is no evidence that he or she has committed any acts of violence;
- mutual orders do not promote responsibility and accountability for those who use family violence; and
- mutual orders are difficult for police to enforce.[85]

10.109 The VLRC considered that there should be a limitation on making mutual orders by consent. The Commission recommended that a mutual protection order should not be made unless the magistrate is satisfied that there are sufficient grounds for making orders against each party on the basis that each party has committed family violence.[86]

Commissions' views

10.110 The Commissions are concerned about the misuse of cross applications for protection orders, and in particular about the potential for respondents to make cross applications in order to harass a victim of family violence or to affect concurrent or pending family law proceedings.

10.111 The Commissions note that cross applications can be made for legitimate reasons—for example, where both parties have engaged in violent conduct and there is a risk that the same or other family violence will be repeated. The Commissions also note that courts already have power to dismiss a cross application if it is made without reasonable grounds, or brought in order to harass or intimidate a person, and award costs.

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84 Ibid, [8.82].
85 Ibid, [8.91].
86 Ibid, Rec 88.

10.112 However, given concerns expressed about the misuse of cross applications, and the difficulties involved in making and enforcing mutual protection orders by consent, the Commissions consider that safeguards are required to prevent the misuse of cross applications. The Commissions consider that the family violence legislation in Victoria, based on recommendations by the VLRC, provides an instructive model, and propose that mutual orders should not be made by consent. Instead, a court should make a mutual protection order only where it is satisfied that the grounds for a protection order have been made out by both parties.

Proposal 10–5 State and territory family violence legislation should provide that mutual protection orders may only be made by a court if it is satisfied that there are grounds for making a protection order against each party.

Vexatious applications to vary or revoke protection orders

10.113 There are also concerns that some respondents make repeated applications to vary or revoke a protection order as a way to harass or intimidate a person who has obtained a protection order against them. State and territory family violence legislation may set out different procedures to vary or revoke a protection order, depending on whether the order was issued by a court or by police. This section is concerned only with protection orders made by a court.

10.114 State and territory family violence legislation generally provides that a court may vary or revoke a protection order. The most common ground to do so is where the court is satisfied that there has been a change in circumstances since the original order was made.[87]

10.115 Procedures to vary or revoke protection orders differ across jurisdictions. Some jurisdictions allow the respondent to the protection order to make an application to vary or revoke the order only with the leave of the court. For example, s 109 of the *Family Violence Protection Act 2008* (Vic) states that:

> (1) ... the respondent for a family violence intervention order may apply for the variation or revocation of the order only if the court has given leave for the respondent to make the application.
>
> (2) The court may grant leave under subsection (1) only if the court is satisfied that—
>
> (a) there has been a change in circumstances since the family violence intervention order was made; and
>
> (b) the change may justify a variation or revocation of the order.

87 See, eg, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 73(3); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 26(4)(b); *Domestic Violence and Protection Orders Act 2008* (ACT) s 59(2)(a)(i) (interim orders only).

10.116 This provision implemented a recommendation made by the VLRC's review of family violence laws, which considered that the requirement to seek leave was

> a necessary safeguard against court processes being used as a form of further abuse. It will ensure that a protected person only needs to attend court to defend the application where the respondent has demonstrated to a magistrate that there may be grounds for granting the application.[88]

10.117 Family violence legislation in Western Australia and the Northern Territory similarly requires a respondent to seek leave before making an application to vary or revoke a protection order.[89] The *Family Violence Act 2004* (Tas) requires both the original applicant and the respondent to seek leave in relation to protection orders made by a court, as opposed to protection orders issued by police.[90] There are no similar requirements in other family violence legislation.

Commissions' views

10.118 The Commissions consider that there is merit in requiring that a respondent to a protection order seek leave from the court before making an application to vary or revoke a protection order made against them. A provision of this kind will ensure that a variation or revocation is only sought by the respondent when there are reasonable grounds to do so—such as a change in the circumstances since the original order was made—and protect against vexatious applications against the victim of family violence.

Proposal 10–6 State and territory family violence legislation should require the respondent to a protection order to seek leave from the court before making an application to vary or revoke the protection order.

Removing impediments to information sharing

10.119 The remainder of this chapter considers how to improve information sharing between courts, practitioners, relevant government agencies and other people and institutions in the family violence and family law systems. 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*):

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88 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), [10.42].

89 *Restraining Orders Act 1997* (WA) s 46; *Domestic and Family Violence Act 2007* (NT) s 48.

90 *Family Violence Act 2004* (Tas) s 20(2). Provisions relating to police-issued protection orders are contained in s 14(9)–(10).

> 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 subpoenae 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.[91]

10.120 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 their children.[92]

10.121 The following two sections of this chapter consider information-sharing issues in proceedings involving family violence. The first section discusses legislative constraints on information sharing, and suggests options for relaxing some of these provisions. The second section considers strategies to promote information sharing between federal family courts, state and territory courts, and federal, state and territory government agencies—in particular, information-sharing protocols and a national protection order database.

10.122 Information sharing is one element of an integrated response to family violence in the context of multiple legal proceedings. It also has significance in risk assessment and the sharing of critical safety information. Integrated responses, and elements of those integrated responses, such as inter-agency collaboration and data collection, are discussed in Chapter 19.

Federal family court proceedings

Access to records

10.123 Information included in federal family court records may be relevant to proceedings under state and territory family violence laws. This information could include, for example, details of current or prior parenting orders, reasons for making these orders, as well as injunctions granted under the *Family Law Act*. Interviews or assessments of parents or children for the purposes of court proceedings, including family consultant assessments and clinicians' reports that have been obtained through the court, may also be relevant and are discussed later in this chapter.

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91 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 (citations omitted).

92 Ibid, Rec 6.2.1.

10.124 The *Family Law Rules 2004* (Cth) specify a limited range of people who may search the court record relating to a case, or—with the permission of the court—a document forming part of the record. These persons are:

(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.[93]

10.125 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.[94]

10.126 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.[95]

10.127 The Family Law Council made a submission to the ALRC's 2008 inquiry into Australian privacy laws (ALRC 108),[96] 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.[97]

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

94 Ibid r 24.13(3).

95 *Family Law Act 1975* (Cth) s 68P.

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

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

10.128 The Council advised that it was considering whether police officers should have access to databases of the family courts to prepare officers better to deal with situations of family violence which arise in a family law context. One of the examples that the 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.[98]

10.129 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.[99] Accordingly, the ALRC did not recommend legislative change in this regard.

Commissions' views

10.130 The Commissions are interested in stakeholder feedback on the accessibility and timeliness—in practice—of the record of any relevant family court proceedings to persons who have an interest in protection order proceedings under state and territory family violence legislation, including police who may be involved in enforcing protection orders.

10.131 In the Commissions' preliminary view, there is adequate flexibility in the provisions in the *Family Law Rules* to allow police officers and others to access information for the purpose of protection order proceedings under state and territory family violence legislation. To the extent that persons with a justifiable interest are not able to obtain access to family court records, this indicates a need for formalised information-sharing practices—for example, through an information-sharing protocol. This option is discussed below.

10.132 However, information-sharing obligations could also be imposed at the legislative level. The Commissions are interested in stakeholder views about the need for, or desirability of, a requirement in the *Family Law Act,* or the rules under that Act, for a federal family court to provide details of injunctions or orders to another court—for example, a state or territory court hearing proceedings under family violence legislation involving one or more of the parties to the family law proceedings.

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98 Ibid.

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

Question 10–10 In practice, are records of proceedings under the *Family Law Act 1975* (Cth) accessible—in a timely fashion—to persons seeking access for the purpose of protection order proceedings under state and territory family violence legislation? If not, are any amendments to the *Family Law Act* or the *Family Law Rules 2004* (Cth) necessary or desirable—for example, to impose an obligation on federal family courts to provide details of injunctions or orders to a state or territory court hearing proceedings under family violence legislation involving one or more of the parties to the family law proceedings?

Publication

10.133 As noted in Chapter 2, art 14 of 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.[100]

10.134 Consistently with this, s 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.[101] 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 that person to a member of the public, or a section of the public to which the account is communicated:

- 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

100 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976).

101 The offence is punishable by a maximum penalty of imprisonment for one year.

- any real or personal property in which the person has an interest or with which the person is otherwise associated.

10.135 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.[102] 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.

10.136 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.[103] Justice Kenny 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 made out merely because some allegations made in the proceedings are reiterated outside the court. Justice Kenny noted with approval the ruling in *Re Edelsten; Ex Parte Donnelly,*[104] 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'.[105] 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.

Commissions' views

10.137 The Commissions are interested in stakeholder views about whether s 121 of the *Family Law Act* unduly restricts public communication about family law proceedings and, if so, whether this adversely affects the sharing of information with persons seeking access for the purpose of protection order proceedings under state and territory family violence legislation, including police who enforce such orders.

10.138 The Commissions' preliminary view is that 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. This

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102 *Family Law Act 1975* (Cth) s 121(9)(a).
103 *Hinchcliffe v Commissioner of Australian Federal Police* (2001) 118 FCR 308, [54].
104 *Re Edelston; Ex parte Donnelly* (1988) 18 FCR 434.
105 *Hinchcliffe v Commissioner of Australian Federal Police* (2001) 118 FCR 308, [54].

is supported by the interpretations that courts have adopted in assessing whether a particular disclosure constitutes an 'account of proceedings' and dissemination 'to the public'.

Question 10–11 In practice, does the prohibition on publication set out in s 121 of the *Family Law Act 1975* (Cth) unduly restrict communication about family law proceedings to persons involved in protection order proceedings under state and territory family violence legislation, including police who enforce such orders? If so, are any amendments to s 121 necessary or desirable?

Family dispute resolution information

10.139 The role of family dispute resolution (FDR) is discussed in detail in Chapter 11. Broadly speaking, the *Family Law Act* requires the use of FDR before court action can begin, but provides for exceptions in cases of family violence and child abuse. This policy reflects concerns about the use of FDR in cases of family violence, which are discussed in Chapter 11.

10.140 However, under the *Family Law Act*, information obtained during FDR processes is in general confidential and inadmissible in subsequent court proceedings, although there are exceptions relevant to child abuse and family violence, discussed below. The confidentiality of FDR processes is important for a number of reasons, including: the need for candour by the parties and for impartiality on the part of the practitioner; the absence of legal safeguards (which may prejudice the position of parties); and protection of FDR processes from the distraction and harassment caused by legal proceedings.[106] Importantly, parties may opt for FDR processes precisely because of the confidentiality of such proceedings.

10.141 An issue for this Inquiry is whether the information obtained during FDR processes should be more readily available to family courts. This would have the advantages of improving information flow between FDR practitioners and the courts, and ensuring that courts are aware of relevant information about family violence disclosed during FDR processes. FDR practitioners presently communicate limited information to the courts, in the form of certificates from FDR practitioners. These certificates are discussed first. The next section considers the confidentiality of information communicated to FDR practitioners and the admissibility of such information in courts.

106 M Prigoff, 'Toward Candor or Chaos: The Case of Confidentiality in Mediation' (1988) 12 *Seton Hall Legislative Journal* 1.

Certificates from family dispute resolution practitioners

10.142 Pursuant to s 60I of the *Family Law Act*, before applying for an order under pt VII of the Act (child-related proceedings), a person must first make a genuine effort to resolve the dispute by family dispute resolution. Subject to certain exceptions—including where the court is satisfied that there are reasonable grounds to believe that there has been, or there is a risk of, family violence by one of the parties to the proceedings—a court must not hear an application for such an order unless the applicant has filed a certificate from an FDR practitioner (a s 60I certificate).

10.143 Despite the exception from FDR for matters involving family violence, experiences of physical or emotional abuse may be reported for the first time during FDR.[107] Commonly, an FDR practitioner in this situation will issue a s 60I certificate to the effect that FDR did not proceed because the practitioner considered that it would not be appropriate.

10.144 In a submission to the Chisholm Review, Family Relationships Service Australia submitted that:

> Currently Family Dispute Resolution practitioners have limited options for passing on information about risks identified to the Family Court where this would be appropriate. The Certificates prescribed in Section 60I of the *Family Law Act* allow for limited identification of reasons why Family Dispute Resolution is either inappropriate or unsuccessful.[108]

10.145 The Chisholm Review suggested that 'it may prove useful' to reconsider the drafting of s 60I of the *Family Law Act*.[109]

10.146 The Family Law Council considered the issue in more detail its 2009 report. In its view:

> The function of the Certificate as simply the vehicle which authorises parties to move to litigation does not reflect the financial investment by Government in creating family relationship centres, or the skill of the family dispute resolution practitioner in working with the family to provide guidance to the Court as to the program or services best suited to the needs of the participants.[110]

10.147 However, the Council was unable to 'ascertain a consensus' as to whether FDR practitioners could have some responsibility for communicating relevant information to the court without 'compromising the inadmissibility of the intervention, or the anonymity of a violence allegation thereby placing a victim at risk'.[111] The Council noted that 'many unintended consequences' would flow from changing the

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107 This is discussed in Ch 11.
108 R Chisholm, *Family Courts Violence Review* (2009), 77.
109 Ibid.
110 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), [10.7.1].
111 Ibid.

role of the FDR practitioner in this way, including: the need for increased funding for the additional report writing skills and tasks required; the probability that FDR practitioners would have to testify about their methods and conclusions; and the disincentive for those committing violence to participate in, and for victims to disclose violence in, FDR processes.[112] The Council's recommendation was that an options paper be written, outlining the advantages and disadvantages of reforms in this area, for comment by stakeholders.[113]

Commissions' views

10.148 During consultations with the Commissions, some federal magistrates noted the benefit of s 60I certificates in signalling that a proceeding under pt VII of the *Family Law Act* involves family violence concerns.[114] The limited amount of information currently included on s 60I certificates, however, constrains their potential for passing on information about family violence risks to federal family courts.

10.149 The Commissions consider there to be merit in the suggestion that the certificates should include additional information about why family dispute resolution was inappropriate or unsuccessful—for example, because there has been, or there is a future risk of, family violence by one of the parties to the proceedings. In addition to increasing the usefulness of s 60I certificates in proceedings in courts exercising family law jurisdiction, such a reform could also lead to a role for s 60I certificates in protection order proceedings under state and territory family violence legislation.

10.150 The Commissions note the concern that requiring additional information will change the role of FDR practitioners. Some of these concerns—such as the probability that FDR practitioners will have to testify—depend upon whether the information in s 60I certificates is treated as evidence of the allegation, and the nature of other information gained during FDR processes available to courts exercising family law jurisdiction. The Commissions are interested in hearing further from stakeholders about whether it is desirable to limit the use of information provided in s 60I certificates, such as by providing that the information can only be used for the purposes of screening and risk assessment by courts; or whether such certificates should be used more widely and, if so, in what ways.

Proposal 10–7 Certificates issued under s 60I of the *Family Law Act 1975* (Cth) should include information about why family dispute resolution was inappropriate or unsuccessful—for example, because there has been, or is a future risk of, family violence by one of the parties to the proceedings.

112 Ibid.
113 Ibid, Rec 8.1.
114 Federal Magistrates Court, *Consultation*, Sydney, 3 February 2010.

Question 10–12 If more information is included in certificates issued under s 60I of the *Family Law Act 1975* (Cth) pursuant to Proposal 10–7, how should this information be treated by family courts? For example, should such information only be used for the purposes of screening and risk assessment?

Communications to family counsellors and FDR practitioners

10.151 Sections 10D and 10H of the *Family Law Act* impose information-handling obligations on family counsellors and FDR practitioners respectively. These persons must maintain the confidentiality of all communications made to them except in limited situations, including disclosure:

- with the consent of the person who made the disclosure or, if the person is under the age of 18, with the consent of each of the child's parents or a court; or
- where the counsellor or practitioner reasonably believes that disclosure is necessary to:
  - protect a child from the risk of physical or psychological harm;
  - prevent or lessen a serious and imminent threat to the life or health of any person; or
  - report the commission, or prevent the likely commission, of an offence involving violence or a threat of violence to a person.

10.152 Family counsellors and FDR practitioners *must* disclose a communication if they reasonably believe that the disclosure is necessary to comply with a law of the Commonwealth or a state or territory. This includes, for example, mandatory reporting of child abuse.[115]

10.153 Previous reviews have suggested the need to relax the confidentiality provisions in ss 10D and 10H of the *Family Law Act*. A 2009 report of the Australian Institute of Family Studies suggested that communication of disclosures made in FDR processes may allow greater coordination where matters move between relationship services and the courts:

> Currently, much relevant information may be collected by relationship service professionals in screening and assessment processes, but this information is not transmissible between professionals in this sector and professionals in the legal sector, or between other agencies and services responsible for providing assistance. Effectively, families who move from one part of the system to the other often have to

115 Specific issues in relation to information sharing in the context of suspected child abuse are discussed in Ch 14.

> start all over again. For families already under stress as a result of family violence, safety concerns and other complex issues, this may delay resolution and compound disadvantages.[116]

10.154 The Chisholm Review recommended that the Australian Government should consider amending the confidentiality provisions in the *Family Law Act* to make information relevant to assessing the risks from family violence more readily available to federal family courts.[117] The Review commented that the court's capacity to protect children and families that come before it 'would almost certainly be enhanced if it had access to relevant information held by external agencies, including dispute resolution agencies'.[118]

10.155 On 25 February 2010, the *Sydney Morning Herald* reported that the Chief Justice of the Family Court had raised concerns with the Attorney-General about the non-disclosure of FDR information to the Family Court. It was reported that Chief Justice Bryant argued that this information should be made available to family law judges making parenting orders where an FDR practitioner believes there is a risk to a person's safety—for example, due to family violence, mental health or drug and alcohol issues.[119]

Options for reform

10.156 One option for reform is to broaden the scope of the exceptions to the confidentiality requirements imposed by ss 10D and 10H. A relevant model in this regard is the exceptions to provisions regulating the use and disclosure of personal information under federal and state and territory privacy laws.

10.157 As discussed in more detail below, Information Privacy Principle (IPP) 10 in the *Privacy Act 1988* (Cth) imposes a duty on Australian Government agencies not to disclose personal information other than in limited circumstances, including where an agency 'believes on reasonable grounds that the disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health' of a person.[120]

10.158 In ALRC 108, the ALRC recommended that the requirement for a threat to be imminent should be removed from principles governing use and disclosure in federal, state and territory privacy laws, noting that:

> The current requirement that the requisite threats to an individual be imminent as well as serious sets a disproportionately high bar to the use and disclosure of personal information. This is problematic in circumstances in which there may be compelling

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116 Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009), 367.
117 R Chisholm, *Family Courts Violence Review* (2009), Rec 2.5.
118 Ibid, 79.
119 C Nader, 'Family Court Wants Access to Mediation', *Sydney Morning Herald* (Online), 25 February 2010, <www.smh.com.au>.
120 *Privacy Act 1988* (Cth) s 14, IPP 11.

> policy reasons for the information to be used or disclosed but it is impracticable to seek consent. Agencies and organisations should be able to take preventative action to stop a threat from escalating to the point of materialisation. In order to do so, they may need to use or disclose personal information.[121]

10.159 In responding to the recommendation, the Australian Government agreed that the requirement for a serious threat to be imminent can be too restrictive. However, the Government noted some stakeholder views that the 'imminence' requirement operated as an important safeguard against the mishandling of personal information. The Government suggested a compromise position, which would permit the disclosure of personal information where necessary to prevent or lessen a serious—but not necessarily imminent—threat only after consent has first been sought, where seeking consent is reasonable and practicable.[122]

10.160 Sections 10D and 10H do not permit disclosures by family counsellors and FDR practitioners in situations where disclosure is intended to avert a threat to a person's safety. In comparison, similar exceptions to non-disclosure requirements are included in some privacy[123] and secrecy laws.[124] In ALRC 108, the ALRC recommended that a reasonable belief that use or disclosure is necessary to lessen or prevent a serious threat to a person's safety should be an exception to the use and disclosure principle.[125]

10.161 Another exception to the obligation of confidentiality in ss 10D and 10H applies where a family counsellor or FDR practitioner seeks to report the commission, or prevent the likely commission, of an offence involving violence or a threat of violence to a person. An option for expanding the scope of sharing information in this context is to permit the disclosure of information where a counsellor or practitioner reasonably believes that disclosure is necessary to report actual or threatened conduct that constitutes grounds for issuing a protection order.

10.162 Another option is for a broader exception to the confidentiality obligations that extends beyond threats to the life, health or safety of a person, to reflect the fact that a range of information is likely to be relevant to a parenting order that may not fall within such exceptions. For example, the Community and Disability Services Ministers' Advisory Council submitted to the ALRC in its inquiry into secrecy laws that, in the context of child protection, the threshold for release of information on public interest grounds should be whether the release is 'necessary to prevent or lessen

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121 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108 (2008), [25.83], Rec 25–3.

122 Australian Government, *Enhancing National Privacy Protection—Australian Government First Stage Response to the Australian Law Reform Commission Report 108 For Your Information: Australian Privacy Law and Practice* (2009).

123 See, eg, *Privacy Act 1988* (Cth) sch 3, NPP 2.1(e)(i).

124 See, eg, *Aged Care Act 1997* (Cth) s 86-2; *Customs Administration Act 1985* (Cth) s 16.

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

a threat to health, safety or *welfare* of a person' (emphasis added).[126] The Council emphasised that the inclusion of 'welfare' was particularly relevant in child protection. The ALRC noted that the desirability and operation of these types of exceptions 'depend on the context in which they operate' and that there 'may be circumstances in which it is appropriate for exceptions of this kind to cover a person's welfare, as well as life, health or safety'.[127] Another example would be a more specific exception enabling release of information to courts exercising family law jurisdiction in certain circumstances, or in accordance with specific protocols.

Commissions' views

10.163 The Commissions seek further information about whether, in practice, ss 10D and 10H of the *Family Law Act* operate to restrict inappropriately the release of information relating to the risks of family violence to courts—including state and territory courts exercising jurisdiction under family violence legislation.

10.164 The Commissions' preliminary view, however, is that the operation of the ss 10D and 10H confidentiality provisions should be relaxed. In particular, ss 10D(4)(b) and 10H(4)(b) should permit family counsellors and FDR practitioners to disclose communications where they reasonably believe that disclosure is necessary to prevent or lessen a serious threat to a person's life, health or safety.

10.165 This proposal would expand the present exception in two ways. The first is removal of the 'imminence' requirement. In the Commissions' preliminary view, there are compelling policy reasons to permit the disclosure of personal information in such circumstances. Family violence often manifests as controlling behaviour over a number of years, the threat from which may be very difficult to characterise as 'imminent' even where it is 'serious'. Expanding ss 10D and 10H in this way is consistent with the reasoning in ALRC 108.

10.166 Secondly, the proposed changes would permit a family counsellor or FDR practitioner to disclose communications where he or she reasonably believes that disclosure is necessary to prevent or lessen a serious threat to a person's safety. Safety has been described as 'the central concern of domestic violence intervention'.[128] Often safety concerns in the context of family violence will coexist with concerns about a person's life or health. However, this will not always be the case—for example, where a victim of family violence is in danger of harassment or intimidation. In the Commissions' preliminary view, this should be recognised as a permissible basis for the disclosure of information.

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126 See Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, ALRC 112 (2009), [10.102].

127 Ibid, [10.107].

128 L Laing, *Risk Assessment in Domestic Violence* (2004) Australian Domestic & Family Violence Clearinghouse, 1.

10.167 The Commissions are also interested in stakeholder views on the merits of permitting a family counsellor or FDR practitioner to disclose communications when he or she reasonably believes that disclosure is necessary to report conduct that he or she reasonably believes constitutes grounds for issuing a protection order under state and territory family violence legislation. The clearest application of any such reform is in jurisdictions where police officers apply directly for protection orders. A family counsellor or FDR practitioner who has been made aware of conduct that would constitute grounds for issuing a protection order would have the option of reporting this information to the police. A police officer could then decide, in accordance with standard operating procedures, whether to apply for a protection order. The process is less straightforward in those jurisdictions in which police officers do not play an active role in applying for protection orders. Although the police are still likely to be the most relevant agency for family counsellors and FDR practitioners to inform, there is no clear avenue through which police could make use of the information.

10.168 A common interpretative framework for family violence—proposed in Chapter 4—would assist a family counsellor or FDR practitioner who seeks to communicate information pursuant to an exception where he or she reasonably believes disclosure to be necessary to report conduct that he or she reasonably believes to constitute grounds for issuing a protection order under state and territory family violence legislation.

10.169 The Commissions are also interested in stakeholder views whether these proposals are sufficiently broad to encompass the range of information gained by family counsellors and FDR practitioners that should be available to courts, bearing in mind the competing interests in the confidentiality of counselling and dispute resolution processes. For example, should the exception be extended to preventing or lessening a serious threat to a child's welfare?

Question 10–13 Are the confidentiality provisions in ss 10D and 10H of the *Family Law Act 1975 Act* (Cth) inappropriately restricting family counsellors and family dispute resolution practitioners from releasing information relating to the risks of family violence to:

(a) courts exercising family law jurisdiction; and

(b) state and territory courts exercising jurisdiction under family violence legislation?

Proposal 10–8 Sections 10D(4)(b) and 10H(4)(b) of the *Family Law Act 1975* (Cth) should be amended to permit family counsellors and family dispute resolution practitioners to disclose communications where they reasonably believe that disclosure is necessary to prevent or lessen a serious threat to a person's life, health or safety.

Proposal 10–9 Sections 10D(4)(c) and 10H(4)(c) of the *Family Law Act 1975* (Cth) should permit family counsellors and family dispute resolution practitioners to disclose communications where they reasonably believe that disclosure is necessary to report conduct that they reasonably believe constitutes grounds for a protection order under state and territory family violence legislation.

Question 10–14 Should there be any other amendments to ss 10D and 10H of the *Family Law Act 1975* (Cth) enabling the release of any other types of information obtained by family counsellors or family dispute resolution practitioners? For example, should the legislation permit release where it would prevent or lessen a serious threat to a child's welfare?

Admissibility of communications to family counsellors and FDR practitioners

10.170 Even where a family counsellor or FDR practitioner is permitted to disclose a communication, it may not be admissible as evidence in court proceedings. Pursuant to ss 10E and 10J of the *Family Law Act*, evidence of anything said, or any admission made, by or in the company of a family counsellor or FDR practitioner is inadmissible 'in any court (whether or not exercising federal jurisdiction)' or 'in any proceedings before a person authorised to hear evidence (whether the person is authorised by a law of the Commonwealth, a State or a Territory, or by the consent of the parties)'. There are exceptions where:

- an admission by an adult indicates that a child under 18 has been abused or is at risk of abuse; or
- a disclosure by a child under 18 that indicates that the child has been abused or is at risk of abuse.

10.171 The competing public interests relating to the disclosure of communications to family counsellors have been explained as follows:

> On the one hand, the success of the counselling procedure may well depend on the counsellors and the parties being counselled knowing that what occurs at the meeting or counselling session is absolutely confidential and will not be disclosed in any way to any other person. If there is any risk of disclosure of what occurs in the course of the meeting, the parties will in all likelihood be inhibited from engaging in full and frank discussion of relevant matters. On the other hand, the interests of justice may require disclosure in certain limited situations.[129]

129 *R v Liddy (No 2)* (2001) 79 SASR 401, [8].

10.172 The Family Law Council briefly considered the prohibition on the admissibility of communications made to family counsellors in s 10E in its 2009 report in the general context of the disclosure of family violence in family law proceedings. The Council noted that it 'is therefore possible that a party to proceedings involving a child does not disclose that he or she and/or the subject children are being, or have been exposed to serious family violence',[130] and recommended that, among other things, the Attorney-General consider amending s 10E of the Act to include an exception to the inadmissibility of communications to a family counsellor or FDR practitioner 'when an adult or child discloses that a child has been exposed to family violence'.[131] This reasoning appears capable of applying to s 10J (which deals with FDR practitioners) as well as s 10E (which deals with family counselling).

10.173 Another issue concerns the interpretation of s 10E. In *Anglicare (WA) v Department of Family & Children's Services*, the Supreme Court of Western Australia held that the prohibition on admissibility 'in any court (whether or not exercising federal jurisdiction)' set out in s 19N of the *Family Law Act*—the predecessor to the current s 10E—was limited by the definition of 'court' in s 4 of the *Family Law Act*—being the court exercising jurisdiction in the *Family Law Act* proceedings. Accordingly, the inadmissibility provisions did not extend to proceedings in the Children's Court of Western Australia.[132]

10.174 Similar reasoning was used by the majority of the Supreme Court of South Australia in *R v Liddy (No 2)* to permit the admission of *Family Law Act* counselling records in criminal proceedings. However, in a dissenting opinion, Wicks J expressed the view that 'any court (whether exercising federal jurisdiction or not)' should be interpreted more broadly.

> Where non-federal jurisdiction, ie State jurisdiction, is concerned, the words (whether exercising federal jurisdiction or not) clearly make the expression 'court' applicable to courts generally, including this court, the Supreme Court of South Australia.
>
> If the expression 'court' is used to have the widest possible meaning and is not limited merely to courts exercising federal jurisdiction relating to family law, the structure of sub-s (2) is logical. The sub-section begins by prohibiting courts of every complexion and whether exercising federal or State jurisdiction, from admitting into evidence anything said at a meeting or conference to which the sub-section applies. Par (b) then proceeds to deal with tribunals, mediations and arbitrations where the bodies concerned are authorised to hear evidence. In other words, sub-s (2) embraces the entire field in Australia of bodies authorised to hear evidence, be they courts or otherwise, from admitting into evidence anything said or any admission made at a meeting or conference referred to in the sub-section.

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130 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), [8.2.2].

131 Ibid, Rec 8.2.2.

132 In this case, the communications to the family counsellor were inadmissible due to s 64(2) of the *Family Court Act 1997* (WA): *Anglicare (WA) v Department of Family and Children's Services* (2000) 26 Fam LR 218.

> … It seems to me that it would be illogical to limit the operation of the section to a few courts which deal with family law and yet to express par (b) in the widest possible terms specifically including persons authorised by a law of the Commonwealth, or of a State or territory or even by the consent of the parties, to hear evidence.[133]

Commissions' views

10.175 The Commissions support the Family Law Council's recommendation that s 10E of the *Family Law Act* be amended to include an exception allowing communications to a family counsellor or FDR practitioner to be admitted in evidence when an adult or child discloses that a child has been exposed to family violence. This appears in line with the existing exceptions in that provision protecting the interests of children. This amendment should also apply to s 10J of the Act, which applies to communications made to FDR practitioners.

10.176 The Commissions are interested, however, in stakeholder views as to whether ss 10E and 10J should be amended to enable the admission of any other evidence relating to family violence and, if so, what limits should be placed on the admissibility of such evidence.

10.177 Another issue is whether ss 10E and 10J should be amended to apply clearly to state and territory courts when they are not exercising family law jurisdiction. There is no clear policy rationale for communications to family counsellors and FDR practitioners being inadmissible in *Family Law Act* proceedings but admissible in protection order proceedings under state and territory family violence legislation. Such a policy also appears to be out of step with the inadmissibility of such communications in all federal, state and territory tribunal, mediation, and arbitration proceedings. On this basis, the Commissions consider that there is merit in expressly extending the application of the non-admissibility provisions in ss 10E and 10J of the *Family Law Act* to other courts, including state and territory courts hearing protection order proceedings under family violence legislation.[134]

10.178 However, the Commissions are concerned about the potential for such a reform to be detrimental to victims of family violence who are involved in family law proceedings and protection order proceedings under family violence legislation in state and territory courts. The Commissions seek feedback from stakeholders on the merits of extending the inadmissibility of communications made to family counsellors and FDR practitioners to proceedings in other courts—for example, courts hearing protection order proceedings under state and territory family violence legislation.

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133 *R v Liddy (No 2)* (2001) 79 SASR 401, [24]–[26].

134 Related issues will arise in the context of state and territory child protection proceedings.

Proposal 10–10 Sections 10E and 10J of the *Family Law Act 1975* (Cth) should enable the admission into evidence of disclosures made by an adult or child that a child has been exposed to family violence, where such disclosures have been made to family counsellors and family dispute resolution practitioners.

Question 10–15 Should ss 10E and 10J of the *Family Law Act 1975* (Cth) permit the admission into evidence of communications made to family counsellors and family dispute resolution practitioners which disclose family violence? If so, how should such an exception be framed?

Question 10–16 Should ss 10E and 10J of the *Family Law Act 1975* (Cth) be amended to apply expressly to state and territory courts when they are not exercising family law jurisdiction?

State and territory family violence proceeding information

10.179 The previous sections of this chapter have discussed options for improving access to information obtained in the course of, or in association with, federal family court proceedings by appropriate persons. Below, the Commissions discuss the availability of information obtained in protection order proceedings under state and territory family violence legislation to federal family courts. The manner in which this information can be shared is governed by specific provisions in family violence legislation in each of the states and territories. These operate over and above relevant state and territory court rules.

Non-publication provisions in family violence legislation

10.180 The family violence legislation in every state and territory imposes prohibitions on the publication of certain information about persons involved in, or associated with, protection order proceedings.[135] However, jurisdictions differ as to whether non-publication is the default position or is triggered by a court order—including any harm threshold that must be satisfied before a court may make an order for non-publication—and the exceptions and defences available to permit publication. Non-publication provisions in state and territory family violence legislation also differ as regards their duration—while some last indefinitely, others only apply until such time as a court has disposed of the proceedings.

135 In Western Australia, however, the prohibition is limited to information that would, or would be likely to, lead to the whereabouts of a party or a person who gives evidence: *Restraining Orders Act 1997* (WA) s 70.

10.181 In some states and territories, a 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. An exception to the prohibition applies where publication is with the magistrate's 'express permission'.[136] 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.[137] The NSW family violence legislation also distinguishes between information relating to children and other persons involved in protection order proceedings, only imposing a default prohibition in relation to children.[138]

10.182 The distinction between publishing identifying information relating to adults as compared with children is supported by art 3 of the *Convention on the Rights of the Child*, which requires that in all actions in courts of law concerning children, 'the best interests of the child shall be a primary consideration'.[139] Identifying a child involved in protection order proceedings will generally not be in that child's best interests. Article 14 of the *International Covenant on Civil and Political Rights* also recognises the particular privacy interests of children, limiting the requirement for suits of law to be made public 'where the interest of juvenile persons otherwise requires', in addition to where proceedings concern matrimonial disputes or the guardianship of children.

10.183 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, that the court must be satisfied that publication would expose the person to risk of harm.[140] This does not apply in the context of publishing identifying information about children involved in protection order proceedings, on which there is a default prohibition.[141]

Permissible and required publication of court proceedings

10.184 There are exceptions and defences to the broad scope of the prohibitions on publication included in state and territory family violence laws which affect the sharing of information with courts. In particular, the Queensland family violence legislation has an exception for 'persons concerned in proceedings in a court or to a police officer,

136 *Domestic and Family Violence Protection Act 1989* (Qld) s 82.
137 *Family Violence Act 2004* (Tas) s 32(2).
138 A prohibition on publishing the name of any other person involved in protection order proceedings only applies where there is a court order to this effect. See also *Domestic and Family Violence Act 2007* (NT) ss 26, 123.
139 See Ch 2.
140 *Domestic and Family Violence Act 2007* (NT) s 26. An offence for breach of such an order is set out in s 124.
141 Ibid s 123.

of any transcript of evidence, or other document for use in connection with the proceedings'.[142] The ACT family violence legislation includes a specific exception for information given to a court under s 60CF of the *Family Law Act* ('informing the court of relevant family violence orders').[143] Other exceptions in the ACT legislation include, for example, the provision of information to agencies responsible for child protection, legal aid and criminal justice. 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.[144] Many of the prohibitions on publication in state and territory family violence laws include exceptions where publication is with the consent of the person to whom the information relates or the court.

10.185 In addition to provisions that *permit* the publication of information relating to protection order proceedings, some family violence laws *require* courts to inform certain people about the making of a protection order. In Western Australia, where the person against whom a protection order is made is a child under 16 years of age, and the protected person is the child's parent or guardian, or another person responsible for the child's day to day care, the registrar must notify the Western Australian child protection agency of the order.[145] In South Australia, if a court makes a tenancy order, it must give notice of this order to the protected person, tenant, landlord, assignee and the registrar of the Residential Tenancies Tribunal.[146]

10.186 In March 2010, the Queensland Department of Community Services released a consultation paper on the *Domestic and Family Violence Protection Act 1989* (Qld). The Department 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. The Department raised concerns, however, that increased information sharing could result in a reluctance to report family violence due to concerns as to how the information will be used, and the need to ensure that information sharing is sensitive to any cultural issues that may arise—for example, where the information relates to Indigenous peoples or people from culturally and linguistically diverse backgrounds. The Department asked whether personal information should be able to be shared in the context of ensuring an integrated approach to family violence and, if so, what information and for what purpose.[147]

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142 *Domestic and Family Violence Protection Act 1989* (Qld) s 82(3)(a).
143 *Domestic Violence and Protection Orders Act 2008* (ACT) ss 111, 112.
144 Ibid s 112(3).
145 *Restraining Orders Act 1997* (WA) s 50C.
146 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 25.
147 Queensland Department of Communities, *Review of the Domestic and Family Violence Protection Act 1989—Consultation Paper* (2010), Question 5.1.1.

Prohibitions on courts and others disclosing information

10.187 A further way in which information sharing can be restricted is where family violence legislation restricts the information that a court may disclose, as compared with the prohibitions on publication considered above that apply to 'persons'. For example, the Western Australian family violence legislation places an obligation on courts not to disclose information to a party to proceedings that would, or would be likely to, reveal the whereabouts of another party or witness in the proceedings.[148]

10.188 The NSW family violence legislation prohibits information about the address at which the protected person resides from being included in a protection order or its supporting application.[149]

Commissions' views

10.189 Limiting the public disclosure of information relating to protection order proceedings under family violence legislation is important to protect the privacy interests of persons—in particular, children—involved with proceedings. Arguably, the need for secrecy in the context of protection order proceedings may be even greater than in the context of proceedings under the *Family Law Act*, discussed above. By definition, protection order proceedings will require parties to disclose highly sensitive information about physical and psychological harm which has been inflicted on them, and—where relevant—their sexual relationship. These issues may be absent from, or peripheral to, many proceedings captured by s 121 of the *Family Law Act*.

10.190 However, the Commissions are concerned about the possibility that non-publication provisions in state and territory family violence proceedings unduly restrict communication about protection order proceedings—in particular, with persons associated with family law proceedings in federal family courts. The Commissions are interested in stakeholder views on whether issues in this regard arise in practice.

10.191 In the event that there are such problems, the Commissions have identified several legislative options which may facilitate greater sharing of identifying information about adults involved in or associated with proceedings for protection orders, namely:

- requiring the prohibition on disclosure to be activated by a court order where the identifying information relates to an adult, rather than by default;
- imposing a requirement that the disclosure of identifying information must be reasonably likely to expose a person to risk of harm as a precondition for a court to issue an order prohibiting publication—as applies, for example, in

148 *Restraining Orders Act 1997* (WA) s 70. This prohibition does not apply where disclosure is with consent or the person to whom the information is revealed is already aware of such whereabouts.

149 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 43.

proceedings under the Northern Territory family violence legislation that are not related to children; and/or

- including an exception to prohibitions on publication for the disclosure of pleadings, transcripts of evidence or other documents to a police officer or to persons concerned in any court proceedings for use in connection with those proceedings—as applies, for example, under the Queensland family violence legislation.

10.192 The Commissions are interested in stakeholder views on the merits or otherwise of any such reforms. The Commissions do not suggest any options for increasing the publication of identifying information about children involved in protection order proceedings, since this would not be in the best interests of the child.[150]

10.193 Ensuring that laws allow disclosure of information to, for example, federal family courts may not be sufficient to ensure that information is actually shared in practice. This raises the question of whether state and territory family violence legislation should *require* courts to provide information about proceedings in certain circumstances—for example, where the court is aware of proceedings underway in a federal family court involving one or more of the parties to the protection order proceedings.

10.194 In the Commissions' preliminary view, a practical way, in the short term, in which to impose information-sharing requirements is through information-sharing protocols, rather than direct legislative obligations. Such protocols allow the development of a more nuanced framework that can accommodate situations in which disclosing information would be inappropriate or should be subject to additional conditions. However, the Commissions are interested in stakeholder views on whether there are some circumstances in which it is necessary or desirable for state and territory family violence legislation to require courts to disclose information which may be relevant to proceedings in federal family courts.

Question 10–17 In practice, do prohibitions on publication in state and territory family violence legislation unduly restrict communication about protection order proceedings which may be relevant to proceedings in federal family courts?

150 As noted above, this would risk violating international conventions which give primacy to promoting the best interests of the child.

Question 10–18 Should prohibitions on publication of identifying information about adults involved in protection order proceedings under state and territory family violence legislation be modified in one or more of the following ways to

(a) require the prohibition on disclosure to be activated by a court order;

(b) impose a requirement that the disclosure of identifying information must be reasonably likely to expose a person to risk of harm as a precondition for a court to issue an order prohibiting publication; and/or

(c) include an exception to prohibitions on publication for disclosure of pleadings, transcripts of evidence or other documents to police or other persons concerned in any court proceedings, for use in connection with those proceedings—for example, the exception set out in s 82(3)(a) of the *Domestic and Family Violence Protection Act 1989* (Qld)?

Question 10–19 Are there any situations in which state and territory family violence legislation should require courts to provide details of protection order proceedings or orders to federal family courts?

Agency information

10.195 The sharing of information that has been generated in, or in connection with, court proceedings is considered above. Information held by federal and state and territory government agencies may also be relevant to protection order proceedings under state and territory family violence laws and *Family Law Act* proceedings. The persons and courts with which this information is shared will impact on the availability of an integrated response in legal proceedings to protect victims of violence and their children.

10.196 Legal obstacles to sharing information may stem from privacy and secrecy laws. The extent to which these laws impede information sharing will also depend on the availability of provisions in other laws that authorise or require information sharing in certain contexts. Some state and territory family violence legislation includes such information-sharing provisions.

10.197 However, barriers to information sharing need not be legislative in nature. Often the obstacles are cultural. Promoting a culture of effective information sharing is considered in the following section of this chapter.

Privacy laws

10.198 The handling of personal information is regulated at the federal level and by each of the states and territories. The principal piece of federal legislation regulating privacy in Australia is the *Privacy Act*, which applies to Australian and ACT Government agencies and private sector organisations.[151] The Act contains a set of 11 IPPs that apply to Australian and ACT Government agencies, and 10 National Privacy Principles (NPPs) that apply to the private sector.

10.199 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:

> (a) the individual concerned has consented to use of the information for that other purpose;
>
> (b) 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;
>
> (c) use of the information for that other purpose is required or authorised by or under law;
>
> (d) 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
>
> (e) the purpose for which the information is used is directly related to the purpose for which the information was obtained.[152]

10.200 IPP 11 imposes an obligation of non-disclosure of personal information on Australian Government agencies other than where particular conditions have been satisfied. These conditions closely reflect the exceptions to the prohibition on use 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.

10.201 *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.

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

152 Ibid s 14, IPP 10.

> Common risk assessment tools are also an important aspect of improving the consistency and effectiveness of service responses across systems and organisations. Adopting a common approach for assessing and managing domestic and family violence throughout the service system ensures the focus of intervention and support remains on the safety of victims/survivors, and that they receive a consistent response regardless of the approach of the organisation that is providing the service.[153]

10.202 In 2008, the ALRC recommended that a uniform set of privacy principles should apply to private sector organisations and federal, state and territory government agencies.[154] The ALRC expressed the view that the use and disclosure of personal information should be permitted:

- for a purpose that is directly related to the primary purpose of collection, where the individual about whom the information relates would reasonably expect the information to be used in this way;
- with the consent of the individual to whom the information relates;
- 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.[155]

10.203 The Australian Government generally accepted the ALRC's recommended use and disclosure principle, including that the use or disclosure of personal information should be allowed 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 public safety. However, in light of stakeholder concerns about the possible breadth of this exception, the Government suggested that this exception should only apply after an agency or organisation has sought the consent of the person to whom the information relates, where reasonable and practicable. The

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153 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).

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

155 Ibid, Model Unified Privacy Principle 5.

Australian Government also expressed the view that the use and disclosure of personal information should be permitted where it is necessary for the purpose of locating missing persons.[156]

Secrecy laws

10.204 While privacy laws impose obligations on agencies with respect to the handling of personal information, secrecy laws impose obligations on individual public servants with respect to the handling of personal and other information held by government. Frequently, breach of secrecy laws gives rise to criminal liability. The manner in which secrecy laws can impact on information sharing in the context of proceedings associated with allegations of family violence can be illustrated by the *Social Security (Administration) Act 1999* (Cth), which governs, among other matters, the handling of social security information.

10.205 Pursuant to div 6 of the Act, the Secretary of the Department of Education, Employment and Workplace Relations may require a social security recipient to provide information and, in some circumstances, to undergo a medical, psychiatric or psychological examination.[157] Many situations can be envisaged where information collected under this division could be relevant to proceedings under family violence legislation or the *Family Law Act*. A prior psychiatric or psychological examination of a person against whom allegations of family violence have been made could assist in supporting or refuting such allegations. A prior medical examination of an alleged victim could be used to similar effect.

10.206 A secrecy offence is set out in s 204 of the *Social Security (Administration) Act*, which prohibits any person intentionally making a record of, disclosing or otherwise making use of information without authorisation.[158] The Secretary is permitted to disclose information in limited circumstances, including where he or she certifies that it is 'necessary in the public interest' to do so in a particular case or class of cases.[159] The *Social Security (Public Interest Certificate Guidelines) (DEEWR) Determination 2008* (Cth) provides that, in issuing a public interest disclosure certification, the Secretary must have regard to 'any situation in which the person to whom the information relates is, or may be, subject to physical, psychological or emotional abuse'.[160]

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156 Australian Government, *Enhancing National Privacy Protection—Australian Government First Stage Response to the Australian Law Reform Commission Report 108 For Your Information: Australian Privacy Law and Practice* (2009).

157 *Social Security (Administration) Act 1999* (Cth) s 63.

158 The maximum penalty for this offence is two years imprisonment.

159 *Social Security (Administration) Act 1999* (Cth) s 208(1)(a).

160 *Social Security (Public Interest Certificate Guidelines) (DEEWR) Determination 2008* (Cth) s 6(a).

10.207 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.[161] The ALRC recommended that Australian Government agencies should review the secrecy offences on the Commonwealth statute book to determine whether a criminal offence is warranted; and, if so, whether the offence complies with the ALRC's recommended best practice principles.[162] These include that—other than in limited circumstances—secrecy offences should include an express requirement that the unauthorised disclosure caused, or was likely or intended to cause, harm to an identified essential public interest.[163] The ALRC also recommended that secrecy offences should include an exception for disclosures in the course of an officer's functions or duties.[164] This exception may permit disclosures that are required or authorised under another law—for example, state and territory family violence legislation.

Information sharing required or authorised by law

10.208 Some state and territory family violence laws include information-sharing provisions that are directed towards overriding obligations of non-disclosure that would otherwise apply under privacy and secrecy laws. These provisions differ with respect to whether information sharing is required or merely authorised, and the kinds of information and agencies to which the disclosure provision applies.

10.209 Under the Tasmanian family violence legislation, '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*.[165] Section 3 of the 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'.

10.210 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;
- the Chief Executive Officer of the agency assisting the Minister administering the Restraining Orders Act—presently the Attorney-General;

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161 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, ALRC 112 (2009).
162 Ibid, Rec 11–1.
163 Ibid, Rec 8–2.
164 Ibid, Rec 10–2.
165 *Family Violence Act 2004* (Tas) s 37.

- 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.[166]

10.211 '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.[167]

10.212 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.[168]

10.213 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.

10.214 In some situations, agencies are *required* to share information relevant to family violence proceedings. 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'.[169] The Western Australian family violence legislation requires the Commissioner of Police, where practicable, to provide the court with information in

166 *Restraining Orders Act 1997* (WA) s 70A(1).
167 *Restraining Orders Regulations 1997* (WA) reg 15.
168 *Restraining Orders Act 1997* (WA) s 70A(4).
169 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 38.

relation to the respondent's criminal record or any previous similar behaviour that is relevant to a matter before the courts.[170]

Commissions' views

10.215 As noted above, *Time for Action* identified privacy laws as one of the ongoing obstacles to an integrated and effective response to family violence. Many stakeholders consulted in this Inquiry have agreed that they encounter difficulties sharing information because of privacy and secrecy laws. The Commissions seek further stakeholder views on whether privacy and secrecy laws are impeding federal, state and territory agencies from disclosing information which may be relevant to:

- protection order proceedings under state and territory family violence legislation;[171] and

- *Family Law Act* proceedings in federal family courts, to the extent that these give rise to family violence concerns.

10.216 The Commissions are particularly interested in whether additional legal or practical issues are encountered where information sharing takes place across federal and state and territory boundaries—for example, where a state or territory government agency provides information to a federal family court.

10.217 In the Commissions' preliminary view, the public interest in protecting victims of family violence from further abuse should take precedence over the public interest in respecting an individual's privacy. In particular, federal, state and territory agencies should be able to disclose personal information, on a confidential basis, to other agencies and court officers where this information is necessary for the purpose of initiating or conducting protection order proceedings. If limitations on use and disclosure under privacy laws are preventing this cooperation, then there is a strong argument for relaxing the limitations.

10.218 Implementation of the model use and disclosure principle set out in ALRC 108 would address many of the barriers currently raised by privacy laws. Of particular relevance in this context is the discretion to use and disclose personal information where an agency reasonably believes that such use or disclosure is necessary to lessen or prevent a serious threat to an individual's life, health or safety. As noted above, the Australian Government substantially accepted this recommendation, with the caveat that the agency should first obtain the consent of the person to whom the information relates, where reasonable and practicable. Pursuant to the ALRC's recommended framework, these same exceptions would also apply to use and disclosure principles in state and territory privacy laws.

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170 *Restraining Orders Act 1997* (WA) s 12(4).

171 The disclosure of information concerning child protection orders and proceedings is considered in Ch 14.

10.219 The Commissions are concerned, however, that such a reform may not be sufficient to enable information sharing in all circumstances where such sharing would be warranted. In particular, the Commissions consider there is merit in state and territory family violence legislation authorising certain information sharing. Such provisions would mean that information sharing would be 'required or authorised by law', and, therefore, an exception under privacy laws. Such provisions could also authorise disclosure for the purpose of many secrecy laws. In the Commissions' preliminary view, information-sharing provisions should be included in all state and territory family violence legislation.

10.220 The Commissions do not intend to specify the manner in which such information-sharing provisions should be drafted. The Commissions consider that each state and territory should have the discretion whether to draft such a provision as an open-ended authorisation to disclose information for the purpose of achieving a specified purpose—the Tasmanian model—or a codified information-sharing regime, under which disclosure may only be made of certain information and to specified persons—the Western Australian model. However, several elements of the information-sharing provision warrant attention.

10.221 *The purposes for which information can be disclosed*: At this stage, the Commissions endorse the purpose for information sharing set out in the Western Australian family violence legislation—that is, where the agency reasonably believes that disclosure is necessary to ensure the safety of a victim or the wellbeing of an affected child. In effect, this modifies the 'life, health and safety' exception in privacy laws, discussed above, by removing the requirement that a specific threat be 'serious'. The Commissions consider this change to be justifiable given the nature and dynamics of family violence. As discussed in Chapter 4, a central feature of family violence is that the person using it exercises control and power over the victim by inducing fear. In this way, violence can involve a continuum of controlling behaviour occurring over a number of years, rather than the single serious incidents that are the focus of the relevant privacy exception.

10.222 *To whom information may be disclosed*: This may not be an issue where information-sharing provisions are drafted in accordance with the Tasmanian model—that is, where the only requirement for disclosure is that it satisfies the requisite purpose. However, provisions modelled on, for example, the Western Australian family violence legislation, may unduly constrain the persons with whom information can be shared. In the Commissions' preliminary view, disclosure should be permitted to, at least, relevant government officers in other jurisdictions—for example, Commissioners of Police—and officers of federal, state and territory courts.

10.223 Legislative reform will only solve some of the barriers to information sharing. In this and previous inquiries, the Commissions have been made aware of significant cultural barriers to information sharing by government agencies. This issue is addressed below.

Question 10–20 Do privacy and/or secrecy laws unduly impede agencies from disclosing information which may be relevant to:

(a) protection order proceedings under state and territory family violence legislation; and/or

(b) family law proceedings in federal family courts?

Proposal 10–11 Legislative privacy principles applying to the use and disclosure of personal information by Australian Government and state and territory government agencies should permit use or disclosure where an agency reasonably believes it is necessary to lessen or prevent a serious threat to an individual's life, health or safety, as recommended by the ALRC in the report *For Your Information: Australian Privacy Law and Practice* (ALRC 108).

Proposal 10–12 State and territory family violence legislation should authorise agencies in that state or territory to use or disclose personal information for the purpose of ensuring the safety of a victim of family violence or the wellbeing of an affected child.

Proposal 10–13 Information-sharing provisions introduced pursuant to Proposal 10–12 should permit disclosure to, at least, relevant government officers in other jurisdictions and federal, state and territory court officers.

Strategies to promote information sharing

10.224 A common theme that has been raised throughout this discussion of information sharing is the limited change that can be effected by legislation alone. Many of the barriers to exchanging information are administrative and cultural in nature. This may occur where persons who hold information are unsure to whom it may be provided and on what conditions, which may lead to unnecessarily conservative approaches to disclosure. Accordingly, reforms to facilitate the sharing of information in appropriate circumstances may arise from strategies such as clear information-sharing protocols and a nationally accessible database of family violence-related information. These are discussed below.

Information-sharing protocols

10.225 Information-sharing protocols formalise what information can be exchanged, to whom, and on what conditions. A number of information-sharing protocols have been entered into between courts and child protection agencies.[172] However, the

172 Information sharing in the context of child protection is discussed in Ch 14.

Commissions are only aware of one such protocol in the context of family violence—the protocol in Western Australia between the Family Court of Western Australia, the Magistrates Court (in particular, the specialist Family Violence Court), and the Attorney-General's Department, Corrective Services Department and Legal Aid. The parties entered into the protocol in February 2009.[173]

10.226 The protocol acknowledges 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.[174]

10.227 The protocol makes 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 an officer from the Family Court of Western Australia or a family consultant may access information from the Magistrates Court's database.[175] Where a common client is established, the protocol permits, on written request, inspection of the relevant court records.[176] The protocol also specifies processes for liaison between a family consultant in the Family Court of Western Australia and the case management coordinator in the Family Violence Court.[177]

10.228 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.[178] 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

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173 A more limited information-sharing protocol in the context of family violence is in place in Tasmania. The protocol operates between police prosecutors, the Magistrates Court and the Tasmanian registry of the Family Court and relates to the suspension of Family Court parenting orders while protection orders are determined. It enables the transfer of files between the courts: see Urbis (for the Tasmanian Government Department of Justice), *Review of the Family Violence Act 2004 (Tas)* (2008), [3.5].

174 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), cls 1.2.1, 1.2.2.

175 Ibid, cl 2.2.

176 Ibid, cl 2.3.

177 Ibid, cl 3.1.

178 Ibid, cl 4.1.1.

may then make appropriate inquiries with the service and request any relevant information or documentation.[179]

10.229 The Commissions have heard anecdotally in this Inquiry that the Family Court of Western Australia receives better quality information than its federal counterpart because of a greater willingness by Western Australian Government agencies to share information with a state court. However, the protocol applies only to the Family Court of Western Australia—it does not extend to proceedings in the federal family courts. In addition, the protocol does not apply to proceedings in the District Court. Extending the protocol to the District Court could ensure, for example, that judges sentencing in the District Court are aware of orders made in the Family Court of Western Australia and that Family Court Judges are aware of protective bail conditions or orders made in sentencing in the District Court.[180]

Commissions' views

10.230 At present, there are few information-sharing protocols in the context of family violence. Such protocols appear to have considerable potential to improve information sharing between federal family courts, state and territory courts, and other relevant agencies and organisations. In particular, information-sharing protocols can clarify the situations in which information sharing is desirable and necessary, as well as the lawful boundaries of disclosure. In the Commissions' preliminary view, courts that hear protection order proceedings in each state and territory should enter into an information-sharing protocol with the Family Court, Federal Magistrates Court, police and relevant government departments. It may also be appropriate to include non-government organisations such as family violence support workers. The development of information-sharing protocols in the context of family violence is consistent with the views expressed in *Time for Action*.

Proposal 10–14 Courts that hear protection order proceedings in each state and territory should enter into an information-sharing protocol with the Family Court of Australia, Federal Magistrates Court, police, relevant government departments and other organisations that hold information in relation to family violence.

A national protection order database

10.231 Implementation of a national protection order database provides the opportunity for a system-wide approach to information-sharing. The impetus for a national protection order database is closely connected to the Australian Government's

179 Ibid, cl 4.2.
180 M Yeats, *Correspondence*, 23 December 2009.

commitment to work with states and territory governments to establish a national registration system for protection orders.[181]

National registration of protection orders

10.232 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 latter jurisdiction.[182] 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.

10.233 Provisions for notification between courts that an external protection order has been registered are only set out in some state and territory family violence laws. 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 also must 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 the external protection order—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.[183]

10.234 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, to establish a national scheme for the registration of protection orders. The Australian Government noted that this scheme would allow orders to be enforced across state and territory borders.[184]

10.235 At the time of writing, details have not been released about the manner in which the Australian Government intends to implement this commitment. Potentially, for example, a national scheme could take the form of mutual recognition or model family violence laws. However national registration is brought into effect, a logical

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181 Australian Government, *The National Plan to Reduce Violence against Women—Immediate Government Actions* (2009), 4.3.1.

182 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.

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

184 Australian Government, *The National Plan to Reduce Violence against Women—Immediate Government Actions* (2009). See Ch 1.

way to support its operation would be through a national protection order database. Such a scheme was suggested in the Model Domestic Violence Laws report released in 1999 by the Domestic Violence Legislation Working Group.[185]

A supporting database

10.236 The 1999 Model Domestic Violence Laws report proposed a national registration system for protection orders with a central database as the repository of the relevant information. As soon as possible after a court made a protection order, the court clerk would be required to give written notification. Notice would also be required if the order was extended, varied, revoked or set aside on appeal. Information would include the names of the parties, the period for which the order has effect and the prohibitions or conditions imposed by the order. Upon the entry of an order into the database, the order would be deemed to have been registered and to be enforceable in each state and territory.[186]

10.237 In 2008, the Australian Government Solicitor (AGS) commented on the ongoing usefulness of the scheme proposed in the 1999 Model Domestic Violence Laws, noting it had been unable to ascertain why a scheme of this kind had not been pursued.[187]

CrimTrac as the supporting database

10.238 The 1999 Model Domestic Violence Laws report 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. It is consequently the Working Group's preferred option with regard to the alternative registration schemes detailed in this division and the previous division.[188]

10.239 It appears that CrimTrac already includes some information about protection orders.[189] 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.[190]

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185 Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999), pt 3 'External Protection Orders'.
186 Ibid, pt 3 div 1.
187 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), [3.4.11].
188 Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999), 169.
189 CrimTrac, *Police Information* <www.crimtrac.gov.au/police_information/index.html> at 12 March 2010.
190 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), [3.4.9].

10.240 CrimTrac includes extensive safeguards to ensure the integrity and security of information held on its systems. All personal information is held securely. Access to operational data is acquired on a 'need to know' basis and audit logs are maintained of access to, and disclosure of, information.[191]

Extending the ambit of a protection order database

10.241 The 1999 Model Domestic Violence Laws report and, from the information presently available, the Australian Government's commitment to a national protection order registration system 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 this should be expanded to include, for example, orders and injunctions issued by a federal family court.[192] A review of the South Australian domestic violence laws commented, for example, that a national database

> could meet the need for reliable information about orders made in all Australian jurisdictions. If Family Court orders in respect of parenting of children and injunctions for the personal protection of children or parties were also included on such a database, it would go some way towards facilitating Courts exercising jurisdiction under State Acts to fulfil their obligations and in addition, would facilitate the enforcement of State based orders.[193]

10.242 Including orders made by federal family courts on a centrally accessible database would deal with the concerns expressed by the Family Law Council in its submission to ALRC 108 discussed earlier in this chapter—that is, that police may attend a scene and remove a person responsible for supervising contact under a parenting order without also removing the child. Inclusion of family court orders would be consistent with information about court notices and orders available on CrimTrac.

10.243 There may also be scope for a national protection order database 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).[194] Most relevantly, 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. No enforcement mechanism for the undertaking appears to be available in either jurisdiction after the child has been returned. 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

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191 CrimTrac, *Police Information* <www.crimtrac.gov.au/police_information/index.html> at 12 March 2010.
192 A further option for inclusion may be child protection orders.
193 M Pyke, *South Australian Domestic Violence Laws: Discussion and Options for Reform* (2007), 139.
194 The *Hague Convention* is noted in Ch 2.

> legal basis upon which the Court of the State in which the child has been returned, can require compliance with an undertaken given to another court.[195]

10.244 An important issue relates to who should have access to information held on a national protection order database. Clearly, the key stakeholders who can access information held on CrimTrac are police officers. In the context of a national protection order database, however, arguments can be made that a far broader class of persons should be permitted to seek access, including federal family courts, state and territory courts and child protection agencies.

Commissions' views

10.245 A national protection order database provides an opportunity for a formalised exchange of information relevant to proceedings involving family violence concerns. At its core is information about protection orders, including the prohibitions or conditions imposed by orders and their duration. However, there may also be scope to extend the ambit of the database to include information about parenting orders and—going further—child protection information from state and territory agencies and undertakings entered into pursuant to Hague Convention recovery orders. The Commissions are interested in stakeholder views about what information should be included in a national protection order database.

10.246 A related issue is the persons and entities that may access information on the national protection order database. The Commissions' preliminary view is that—at a minimum—access should be available to police officers, federal family courts and state and territory courts that hear protection order proceedings. However, the Commissions are also interested in hearing about others for whom access may be beneficial—for example, child protection agencies and children's courts. 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.

Proposal 10–15 A national protection order database should be established as a component of the Australian Government's commitment to the implementation of a national registration system for protection orders. At a minimum, information on the database should:

(a) include protection orders made under state and territory family violence legislation as well as orders and injunctions made under the *Family Law Act 1975* (Cth); and

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

(b) be available to federal, state and territory police officers, federal family courts, and state and territory courts that hear protection order proceedings.

Question 10–21 Is there any other information which should be included on, or are there any other persons who should have access to, the national protection order database, over and above those set out in Proposal 10–15?

11. Alternative Processes

Contents

Introduction

11.1 Disputes of all types are increasingly dealt with by methods of dispute resolution that do not involve a decision by a court or tribunal and instead involve 'alternative dispute resolution' (ADR) or—even more broadly—non-adversarial justice. This chapter examines ADR and restorative justice in disputes involving family violence; processes that operate within or alongside family law and criminal law respectively and which thus affect the operation of some of the legal frameworks that are the subject of this Inquiry.

11.2 ADR and restorative justice share common origins and philosophies as part of a move away from traditional legal processes and towards new forms of conflict resolution. A number of factors drove this shift, including the victims' rights movement, concern about the social and economic costs of increasing incarceration

rates, and growing awareness of the failure of the traditional justice system to address the underlying causes of offending and re-offending.[1]

11.3 This broader shift in awareness has also driven other approaches, including therapeutic jurisprudence and problem-solving courts, which are discussed in Chapter 20. However, ADR, restorative justice and therapeutic jurisprudence have developed as distinctive areas of law. ADR focuses on managing disputes in a collaborative way, whereas restorative justice is concerned with reparation and dialogue between offenders and victims.[2] Therapeutic jurisprudence differs from both ADR and restorative justice in that its focus is on judicially led interventions to 'solve' (for example) drug or housing problems. It also focuses more on the impact of the law on the offender.[3]

11.4 For reasons examined in this chapter, the use of non-adversarial methods is controversial in disputes involving violence and abuse. A major concern is that non-adversarial methods are often based on negotiations between parties and consensual agreements. In the context of family violence, the power relationships between the parties may make this dangerous or produce unfair or unsafe agreements. Further, non-adversarial methods often take place in private and may thus conceal violence. Nevertheless, much work has been done in recent years to develop non-adversarial methods in ways that provide protections for vulnerable parties.

11.5 This chapter focuses first on family dispute resolution (FDR), a form of ADR. It then deals with the use of ADR in child protection cases. While child protection is generally dealt with in Part C of this Consultation Paper, it is convenient to deal with the ADR practices in child protection within the broader context of ADR generally. Finally, this chapter discusses the potential and challenges of restorative justice in the context of family violence (including sexual assault).

Family dispute resolution and family violence

11.6 FDR is defined broadly in the *Family Law Act 1975* (Cth) as any non-judicial process where an independent FDR practitioner helps people affected, or likely to be affected, by separation or divorce, to resolve some or all of their disputes with each other.[4] Dispute resolution processes include mediation, conciliation and arbitration. In mediation, an impartial third party assists parties to negotiate an agreement. Conciliation is similar to mediation, except the conciliator may provide expert advice

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1 Law Reform Committee—Parliament of Victoria, *Inquiry into Alternative Dispute Resolution and Restorative Justice* (2009), 8.

2 See L McCrimmon and M Lewis, 'The Role of ADR Processes in the Criminal Justice System: A View' (Paper presented at Association of Law Reform Agencies for Eastern and Southern Africa, Entebbe, Uganda, 6 September 2005) and Law Reform Committee—Parliament of Victoria, *Inquiry into Alternative Dispute Resolution and Restorative Justice* (2009), 9–10.

3 Law Reform Committee—Parliament of Victoria, *Inquiry into Alternative Dispute Resolution and Restorative Justice* (2009), 198.

4 *Family Law Act 1975* (Cth) s 10F.

on possible legal outcomes and have an advisory role. In arbitration, an independent third party assesses the facts and determines the dispute according to law).[5] In practice, mediation is the key process used for Australian family disputes.[6] However, FDR services and agencies vary in their approaches and underlying philosophies.[7]

11.7 When the Family Court of Australia was established in 1976, it used counselling and conciliation. Since that time, FDR has expanded and developed extensively. FDR services are now provided by courts, Legal Aid Commissions,[8] community agencies and private providers. Most recently, the federal government has established a network of Family Relationships Centres (FRCs) throughout Australia that provide referral and FDR services.[9] Practitioners have developed increasingly sophisticated approaches and strategies for assessing the appropriateness of FDR in differing situations, addressing power imbalances, and including children in their practices.[10]

11.8 FDR is presently governed by a detailed legislative framework under the *Family Law Act* and associated regulations, discussed in more detail below. Broadly speaking, the current legislative framework encourages or requires the use of FDR before court action and supports referral to FDR after an application to the court has been made. Exceptions are provided in cases of family violence and child abuse, reflecting concerns, discussed below, about the use of FDR in such contexts. Information gained during the FDR process is, in general, confidential and inadmissible in subsequent court proceedings, although there are exceptions relevant to child abuse and family violence.[11]

Appropriateness of FDR in cases of family violence

11.9 Both practitioners and commentators have expressed concerns about using facilitative methods of FDR in cases involving family violence. As discussed below, the New South Wales Law Reform Commission (NSWLRC) explored these concerns in its 2005 report, *Community Justice Centres*,[12] where it expressed its concern 'about

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5 Family Law Council and Law Council of Australia—Family Law Section, *Best Practice Guidelines for Lawyers Doing Family Law Work* (2004).

6 D Cooper and R Field, 'Family Dispute Resolution of Parenting Matters in Australia: An Analysis of the Notion of an Independent Practitioner' (2008) 8 *Queensland University of Technology Law and Justice Journal* 158, 159.

7 Ibid, 164–165, discusses different models of mediation.

8 Legal Aid Commissions are required to consider whether a matter can be dealt with by dispute resolution before a grant of legal aid for family law matters can be made. If a matter is considered appropriate for dispute resolution, a grant of assistance will be made for a conference where the lawyer will represent the assisted party. The conferences are chaired by trained and qualified FDR practitioners. See KPMG, *Family Dispute Resolution Services in Legal Aid Commissions: Evaluation Report* (2008) Australian Government Attorney-General's Department, 11–12.

9 P Parkinson, 'Keeping Contact: The Role of Family Relationship Centres in Australia' (2006) 18 *Child and Family Law Quarterly* 157.

10 Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms—Summary Report* (2009), 94–95.

11 See further below. This issue is discussed in detail in Ch 10, in the context of information sharing generally in family law.

12 New South Wales Law Reform Commission, *Community Justice Centres*, Report 106 (2005), ch 4.

mediation taking place where violence is a factor, particularly in situations involving domestic violence'.[13]

11.10 The reasons why FDR may be inappropriate in the context of family violence include:

- safety concerns—the FDR process may place women and children in danger because the offender may use FDR as an opportunity for violence or intimidation;

- power imbalances—the extreme imbalance of power in relationships characterised by family violence undermines the fairness of the negotiating process in facilitative methods of FDR;

- mediation requires honesty, desire to settle the dispute and some capacity for compromise—behaviours which are 'not within the repertoire of perpetrators of violence, at least not in relation to the target of violence';

- mediation places too great a burden on the woman who has been the victim of violence, who may, for example, be afraid to be in the same room with the perpetrator; and

- FDR is a private and confidential process, with the effect that violence against women is shielded from the public eye.[14]

11.11 Other concerns include the difficulty of identifying violence. It has been suggested that it is very difficult for the targets of violence to reveal violence, and that those who commit violence are also unwilling to do so.[15] FDR may therefore take place in the absence of crucial information and there may be ongoing impacts on parties and their children.[16] Another issue is whether FDR is effective in situations of family violence: some research indicates that mediation will not produce agreements or, if it does, the agreements will not be successful in many cases.[17]

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13 Ibid, [4.41].

14 H Astor, 'Violence and Family Mediation: Policy' (1994) 8 *Australian Journal of Family Law* 3. See also R Field, 'Using the Feminist Critique of Mediation to Explore "the Good, the Bad and the Ugly" Implications for Women of the Introduction of Mandatory Family Dispute Resolution in Australia' (2006) 20 *Australian Journal of Family Law* 45.

15 H Astor, 'The Weight of Silence: Talking About Violence in Family Mediation' in M Thornton (ed) *Public and Private: Feminist Debates* (1995) 174.

16 D Kirkwood and M McKenzie, 'Family Dispute Resolution and Family Violence in the Family Law System' (2009) 14 *Current Family Law* 149, 150–152; M Kaye, J Stubbs and J Tolmie, 'Domestic Violence and Child Contact Arrangements' (2003) 17 *Australian Journal of Family Law* 93.

17 A Bailey and A Bickerdike, 'Family Violence and Family Mediation ' (2005) Autumn *DVIRC Newsletter* 13, 13; Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009), 102.

11.12 On the other hand, there are potential benefits of using FDR in cases involving family violence. The first is that FDR may be a more accessible method of resolving family disputes, as it is arguably both cheaper and faster than going to court.[18] FRCs in Australia provide three hours of mediation without charge and many other services have affordable fee levels. As one FDR practitioner commented:

> There were a lot of women who have been through family violence who want to mediate because the alternative for them is worse. The alternative for them is courts, is costs, is delay, is a decision they may not like anyway and they see this as a better option.[19]

11.13 Secondly, if FDR is conducted by an experienced practitioner with appropriate safeguards, it may have positive outcomes for people who have experienced family violence.[20] Some studies of FDR have identified high rates of participant satisfaction where there are well-trained, problem-solving FDR service providers with effective intake processes.[21] FDR may offer the parties more involvement in resolving their dispute, and may give victims more opportunity to speak about matters which are important to them.[22] As one woman explained:

> I was able to speak my mind and not have my opinions dismissed. The mediator gave me the opportunity to talk. He [ex-partner] had to sit and listen.[23]

11.14 Governments and service providers have devoted resources to training and development of FDR practitioners in the area of family violence. FDR practitioners must be accredited and the relevant Vocational Graduate Diploma of Family Dispute Resolution includes compulsory units dealing with violence and providing for the safety of vulnerable parties.[24] There has also been investment in research and policy development on FDR and violence.[25] As discussed below, a screening and risk assessment framework for cases involving violence and abuse has been developed.[26] Models of FDR are being developed that include lawyers in the process, with particular relevance to disputes involving violence.[27]

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18 Domestic Violence and Incest Resource Centre, *Behind Closed Doors: Family Dispute Resolution and Family Violence*, Discussion Paper No 6 (2007), 22.

19 Cited in Ibid, 30.

20 Ibid, 23.

21 Ibid.

22 Ibid.

23 Cited in Ibid.

24 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) reg 5.

25 H Astor, *Position Paper on Mediation [for the] National Committee on Violence Against Women* (1991) Office of the Status of Women; Keys Young, *Research/Evaluation of Family Mediation Practice and the Issue of Violence: Final Report* (1996) Australian Government Attorney-General's Department.

26 Australian Catholic University and Australian Government Attorney-General's Department, *Framework for Screening, Assessment and Referrals in Family Relationship Centres and the Family Relationship Advice Line* (2008).

27 R Field, 'A Feminist Model of Mediation That Centralises the Role of Lawyers as Advocates for Participants who are Victims of Domestic Violence' (2004) 20 *Australian Feminist Law Journal* 65.

11.15 The risks associated with family violence in FDR processes may be managed in a number of ways. Some examples include:

- ensuring that victims are prepared for the process;[28]
- taking practical measures to ensure safety, such as obtaining a silent phone number;[29]
- taking care with client contact, for example by making written material only available at the centre and not leaving phone messages;[30]
- minimising contact between clients on the day, by using separate waiting rooms and exits for clients, and staggered arrival and departure times;[31]
- allowing the presence of support persons;[32]
- continuously assessing clients' comfort levels and emotional state;[33]
- using 'shuttle' mediation, where parties sit in different rooms and the mediator 'shuttles' between them, or co-mediation with a gender-balanced team of mediators;[34] and
- private follow-ups with each party between sessions.[35]

11.16 While there are a range of views on the appropriateness of FDR in family violence contexts, a degree of consensus exists on certain matters. First, using FDR in cases involving family violence carries particular risks. Secondly, if family violence is to be dealt with in FDR processes, it must be handled by skilled and knowledgeable FDR practitioners using appropriate safeguards. Thirdly, in practice, some cases involving family violence do—and will continue to—proceed to mediation.[36] Indeed,

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28 Domestic Violence and Incest Resource Centre, *Behind Closed Doors: Family Dispute Resolution and Family Violence*, Discussion Paper No 6 (2007), 47.

29 Ibid, 42.

30 Keys Young, *Research/Evaluation of Family Mediation Practice and the Issue of Violence: Final Report* (1996) Australian Government Attorney-General's Department, 39.

31 Ibid.

32 Ibid.

33 Domestic Violence and Incest Resource Centre, *Behind Closed Doors: Family Dispute Resolution and Family Violence*, Discussion Paper No 6 (2007), 44.

34 KPMG, *Family Dispute Resolution Services in Legal Aid Commissions: Evaluation Report* (2008) Australian Government Attorney-General's Department, 46; Domestic Violence and Incest Resource Centre, *Behind Closed Doors: Family Dispute Resolution and Family Violence*, Discussion Paper No 6 (2007), 56–57.

35 Domestic Violence and Incest Resource Centre, *Behind Closed Doors: Family Dispute Resolution and Family Violence*, Discussion Paper No 6 (2007), 56–57.

36 H Astor, 'Violence and Family Mediation: Policy' (1994) 8 *Australian Journal of Family Law* 3, 12–13.

as is discussed below, the evaluation of the 2006 family law reforms by the Australian Institute of Family Studies (AIFS) shows that FDR is attempted in more frequently in cases involving violence than those not involving violence.[37]

FDR in family law legislation

11.17 This section sets out the legislative provisions regulating the use of FDR in the *Family Law Act*. Different regimes apply to FDR in relation to parenting orders and financial disputes. There are also some general provisions in the *Family Law Act* that govern FDR.

FDR and parenting orders

11.18 The 2006 reforms to the *Family Law Act* extended the use of FDR. With some exceptions, parties with a dispute about children must go to FDR before they can go to court,[38] and must make a genuine effort to resolve their dispute through FDR.[39] The exceptions to this requirement include where the parties agree and are applying to court only for a consent order.[40] Importantly, they also include cases where violence is an issue, such as where the court is satisfied that there has been, or there is a risk of, child abuse or family violence,[41] or where there are circumstances of urgency.[42]

11.19 If the parties do not reach agreement through FDR and do not satisfy one of the exceptions, the federal family courts can only hear parenting cases if the FDR practitioner provides a certificate relating to the parties' attendance and effort in the FDR process.[43] FDR practitioners may give several different types of certificates under s 60I of the *Family Law Act*, including a certificate to the effect that the person did not attend FDR because, having regard to the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (the *FDR Regulations*), the practitioner considers that 'it would not be appropriate' to conduct or continue FDR.[44]

11.20 In determining whether a dispute is appropriate for FDR, the FDR practitioner must take into account whether the ability of any party to negotiate freely is affected by a number of factors, all of which are potentially relevant to cases of violence. These include: any history of family violence among the parties; the likely safety of the

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37 Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009), 100. The evaluation is noted in Ch 1.

38 *Family Law Act 1975 (Cth)* s 60I.

39 Ibid s 60I(1). For a discussion of genuine effort in s 60I, its meaning and the implications of the provision in cases of violence, see H Astor, 'Making a "Genuine Effort" in Family Mediation: What Does It Mean?' (2008) 22 *Australian Journal of Family Law* 102.

40 *Family Law Act 1975* (Cth) s 60I(9)(a).

41 Ibid s 60I(9)(b).

42 Ibid s 60I(9)(d). Other circumstances include: where orders are applied for in response to other applications; where there has been serious disregard of previous family law orders; where parties are unable to participate effectively in FDR; and where other circumstances specified in the regulations are satisfied. No other circumstances are presently prescribed by the regulations.

43 Ibid s 60I(7).

44 Ibid s 60I(8)(aa), (d).

parties; the equality of bargaining power among the parties; the risk that a child may suffer abuse; the emotional, psychological and physical health of the parties; or any other relevant matter.[45] The *FDR Regulations* also require that an FDR practitioner must be satisfied of the appropriateness of FDR in each case before providing FDR.[46] An FDR practitioner is also obliged to terminate FDR if the practitioner is no longer satisfied it is appropriate, or is requested to do so by a party.[47]

FDR and financial disputes

11.21 The s 60I framework applies only to parenting orders. In relation to applications for financial disputes, the requirements are set out in the *Family Law Rules 2004* (Cth). Consistently with s 60I, the Rules include mechanisms for removing obligations to participate in FDR in cases of family violence.

11.22 This is done in two ways. First, the Rules require compliance with pre-action procedures set out in sch 1, but there is an exception for cases of allegations of family violence or the risk of family violence or fraud.[48] Secondly, while the procedures in sch 1 generally require the use of FDR, the Rules set out circumstances, including allegations of family violence or cases of urgency, in which the court may accept that it was not possible or appropriate for a party to comply with the pre-action procedures.[49]

FDR and the Family Law Act generally

11.23 Other provisions of the *Family Law Act* deal with aspects of FDR, including provisions encouraging its use. Section 13C empowers the court to make orders referring parties to FDR or family counselling at any stage in proceedings, on its own initiative or on application by a party or an independent children's lawyer.[50] If a party does not comply with such an order, the court may make further orders as it considers appropriate following a report from an FDR practitioner or counsellor.[51] Section 62B obliges a court to inform parties in a parenting proceeding about FDR and family counselling services. Section 69ZQ requires a court in child-related proceedings to encourage the use of FDR, where it considers it appropriate. A requirement to attend FDR may also be imposed as a condition of a bond where parenting orders are contravened.[52]

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45 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) reg 25(2).
46 Ibid reg 25(1), (4).
47 Ibid reg 29(c).
48 *Family Law Rules 2004* (Cth) r 1.05.
49 Ibid sch 1, cl 1(1),(4).
50 The court is required to consider seeking the advice of a family consultant before making such an order.
51 *Family Law Act 1975* (Cth) s 13D.
52 Ibid ss 70NEC, 70NFE.

Intersections between FDR and other agencies

11.24 FDR is part of a wider system of family law, and it intersects with that system at many points. How those intersections, and the law relevant to them, work in practice is of particular relevance to this Inquiry.

The Family Law Act and issues of confidentiality

11.25 First, some provisions in the *Family Law Act* are relevant to the way in which FDR intersects with other services. Division 3 of pt 2 of the Act includes provisions which make communications in FDR processes confidential and inadmissible in court proceedings, except for certain purposes.[53] Importantly, the exceptions to the confidentiality of such communications include where the practitioner reasonably believes it is necessary for a range of purposes relevant to family violence.[54] The exceptions to the admissibility of such communications include admissions or disclosures of child abuse or a risk of child abuse.[55] There are also obligations on FDR practitioners to notify child protection authorities in cases of suspected child abuse.[56]

11.26 The confidentiality provisions of the *Family Law Act* are discussed in Chapter 10 in the broader context of information sharing in the family law system. While the confidentiality of FDR is important in promoting an honest and open exchange between the parties that may lead to agreement, it may also inhibit information sharing and the development of collaborative relationships between different actors in the family law system. It may also impact on safety in cases that involve violence. That chapter therefore considers how best to achieve the right balance between these competing considerations.

Screening and risk assessment practices

11.27 A key element of FDR in practice is the process of screening and risk assessment, which is designed to ensure that victims of family violence are not using FDR in inappropriate circumstances, or to identify and mitigate any risk factors where FDR may be appropriate despite such risks.[57] Screening and risk assessment are important for any agency handling family disputes,[58] but it appears that FDR agencies

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53 Ibid ss 10H, 10J. Section 10J also applies to proceedings before a person authorised to hear evidence.

54 Ibid s 10H(4). These purposes include: protecting a child from the risk of harm; preventing or lessening a serious and imminent threat to the life or health of a person; reporting the commission, or preventing the likely commission, of an offence involving violence or a threat of violence to a person; preventing or lessening a serious and imminent threat to the property of a person; reporting the commission, or preventing the likely commission, of an offence involving intentional damage to property of a person or a threat of damage to property; or assisting an independent children's lawyer to represent a child's interests.

55 Ibid s 10J(2).

56 Ibid ss 67ZA, 67ZB, 111CV.

57 Australian Catholic University and Australian Government Attorney-General's Department, *Framework for Screening, Assessment and Referrals in Family Relationship Centres and the Family Relationship Advice Line* (2008), 13.

58 Screening and risk assessment in family law proceedings is discussed in Ch 14.

may be taking on this role for many professionals in the family law system, and may be acting as gatekeepers in the family law system. This issue is discussed below.

11.28 Screening and risk assessment varies across different FDR agencies. A report on the practice of FDR in Legal Aid Commissions completed by KPMG for the Australian Government Attorney-General's Department in 2008 indicated the wide variety of FDR practices that exist, even within the legal aid sector.[59] The report noted variations in practice in relation to:

- what and how information was obtained for the purposes of screening;
- which questions were asked about family violence and child abuse;
- who conducted the initial screening;
- how it was determined whether the case was suitable for FDR;
- the length of time taken for screening and intake (between one to six hours); and
- the skill and knowledge of intake officers to assess risk.[60]

11.29 The report noted that most screening questions focused on the physical aspects of family violence,[61] and recommended enhanced screening for non-physical forms of violence.[62] Secondly, it noted:

> FDR practitioners across all jurisdictions commented that, where information (especially copies of [protection orders] and allegations of child abuse) are not collected during screening, it can derail the conferencing process. FDR practitioners commented on examples where parties presented to conference and, during the conference, child abuse allegations or the existence of a [protection order] was revealed, requiring the FDR practitioner to discontinue the process.[63]

11.30 The report also identified that in all Legal Aid Commissions, matters involving allegations of child abuse were automatically considered unsuitable for conferencing.[64] However, there was variation in how Legal Aid Commissions approached issues of family violence. While the existence of family violence would 'not affect the mode of conferencing in one jurisdiction … in others it [would] be a serious consideration, determining suitability and the mode of conferencing'.[65] Where family violence arose

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59 KPMG, *Family Dispute Resolution Services in Legal Aid Commissions: Evaluation Report* (2008) Australian Government Attorney-General's Department.
60 Commissions variously used lawyers, clinically trained case managers, or intake officers: Ibid, 30–31.
61 Ibid, 36.
62 Ibid.
63 Ibid, 32.
64 Ibid, 33.
65 Ibid, 36.

as an issue, the usual practice was to adopt 'shuttle' conferencing (where the practitioner shuttles between the two parties who are in separate locations), either by person or telephone.[66] The report noted that the vast majority of clients surveyed felt safe or very safe both during and after the conference,[67] and the majority of FDR practitioners agreed that there were appropriate protocols in place for family violence.[68]

11.31 A number of other recommendations to strengthen screening and intake processes were made. Some of these relate to increasing the experience and knowledge of intake officers, lawyers, and FDR practitioners on particular matters;[69] using or modifying particular practices, such as interviews and screening questions;[70] and ensuring better preparation for the FDR process.[71] The report also recommended establishing protocols for delivering services to marginalised groups;[72] providing detailed practice guidance on the best interests of the child; [73] examining strategies for providing referral pathways to other support services;[74] and developing nationally consistent strategies for appropriately managing these issues.[75]

11.32 The Australian Government Attorney-General's Department has published a *Framework for Screening, Assessment and Referrals in Family Relationship Centres and the Family Relationship Advice Line* (*Screening and Assessment Framework*),[76] which addresses many of these issues in detail. The framework is an extensive resource available on the departmental website for FDR practitioners. It includes a screening and assessment framework, referral guidelines, and indicators of domestic and family violence, child abuse and abduction, and risk of self-harm. It discusses issues of supervision and practice support, and provides a range of resources for practitioners, including sample questions relevant to identification of violence.

11.33 The Victorian Government has similarly produced a comprehensive screening and risk assessment framework for all service providers in family violence.[77] This sets out a common framework, including six components: a shared understanding of risk

66 The Western Australian Legal Aid Commission was reported to offer face to face conferencing only on the basis that all parties were legally represented: Ibid, 33.
67 Ibid, 46.
68 Ibid, 47.
69 Ibid, 36 (in relation to risk assessment and management), 41 (knowledge of lawyers about the FDR process, and training for FDR practitioners, lawyers and intake officers on support issues).
70 Ibid, 36.
71 Ibid, 36 (providing practitioners with 24 hours' notice of information), 41 (preparing parties for the FDR process and its underlying intention).
72 Ibid, 54.
73 Ibid, 41.
74 Ibid, 49.
75 Ibid.
76 Australian Catholic University and Australian Government Attorney-General's Department, *Framework for Screening, Assessment and Referrals in Family Relationship Centres and the Family Relationship Advice Line* (2008).
77 Government of Victoria, *Family Violence Risk Assessment and Risk Management: Supporting an Integrated Family Violence Service System* (undated).

and family violence; standardised risk assessment; referral pathways and information sharing; risk management strategies; data collection and analysis; and quality assurance. It also includes three practice guides directed towards different levels of risk assessment processes for different categories of service providers. A common framework has advantages in terms of inter-agency trust and cooperation.

11.34 In relation to the issue of screening and risk assessment, the Family Law Council considered that:

> appropriate training in screening for family violence issues is essential for family dispute resolution practitioners, and those who refer matters to them. It is essential that practitioners have appropriate responses and options to offer once family violence is identified.[78]

11.35 The Council recommended that a consistent framework for screening and risk assessment be developed in accordance with principles adopted in the common knowledge base proposed by the Council,[79] and that frameworks, tools and materials be endorsed by the expert panel and reference group.[80]

FDR practitioners and other agencies in the family law system

11.36 FDR practitioners have become the gatekeepers to the family courts in children's cases because of the requirements of s 60I, discussed above. The evaluation of the 2006 reforms of the family law system conducted by AIFS showed that 50% of parents, post-2006, reported they had contacted or used a counselling, mediation or dispute resolution service, although only 31% of fathers and 26% of mothers reported they had attempted FDR or mediation specifically.[81] A significant proportion of cases in the AIFS study involved victims of family violence, and they were 'much more likely to have attempted FDR' than those who were not.[82]

11.37 The AIFS evaluation indicated that the legislative scheme may not be working well for victims of family violence. One of the problems relates to the way FDR practitioners are being used to issue s 60I certificates. Some lawyers appear to be sending victims of family violence to FDR services as a method of getting a s 60I certificate. While FRCs did not provide certificates 'as a matter of course', some clients or legal advisers nonetheless saw providing certificates as the primary function of FRCs or believed a certificate should be issued as a default option.[83] Importantly, the AIFS survey also revealed that clients who clearly fell within the exception to FDR

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78 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), 43.

79 This is noted in Chs 1 and 19.

80 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), 43.

81 Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009), 95. AIFS refers to this as the 'narrow' definition of FDR.

82 Ibid, 100. This was a finding based on a longitudinal survey of parents.

83 Ibid, 5–16.

in the family law legislation were 'not infrequently referred to the FRCs by lawyers (and to a lesser extent by courts)'.[84] The AIFS evaluation concluded that the rate of issuing of certificates had likely increased, and this was 'in part connected with an absence of triage by lawyers and other professionals'.[85] The evaluation noted that this may be linked to the 'anxiety on the part of lawyers about clients making or being seen to be making deliberately false allegations'.[86]

11.38 The views of FDR practitioners and clients as to when FDR is appropriate may diverge. The AIFS evaluation noted that victims may choose to use FDR in cases of family violence as the 'least worst' alternative for those families.[87] FDR may appeal to victims of family violence who hope that an agreement will mean an end to the violence. FDR practitioners may be pressured by those who commit violence and who see FDR as a method of achieving their own goals.

11.39 It also appears that, for some clients, the risk posed by family violence was not identified and managed effectively. The evaluation cited the following response as an example:

> For me, there were not enough sessions in the process. I was so scared and intimidated by my ex-husband that I had trouble thinking clearly. As a consequence of this, I felt bulldozed into making an agreement. … I also had to sit through a face-to-face session with my ex-husband before they'd believe that I was worried about him … I felt that my concerns were swept aside and the focus was on my ex-husband's needs/wants.[88]

11.40 Such examples led AIFS to conclude that:

> It has become clearer that the implementation of 'FDR with exceptions' is a complex process. Implementing the exceptions provision assumes that the person consulted by the client has the skills to make a reasonable judgment about eligibility (and perhaps just as importantly, has the time come to carefully 'hear' the client's story). The more conservative approach frequently seems to be to let an FRC or an FDR practitioner make such a judgment and use the certificate system as a substitute for claiming an exception. This represents a post-reform change that clearly places a greater set of responsibilities and resource demands on practitioners in the family relationships sector. It is a process that must also at times be confusing for clients.[89]

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84 Ibid.

85 Ibid, 5–17.

86 Ibid. The deterrent effect of the provisions in s 117AB which provide for costs sanctions in cases where deliberately false allegations are made is discussed in Ch 8.

87 Ibid, 5–11. See also National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 236.

88 Cited in Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009), 102.

89 Ibid,108.

11.41 AIFS also concluded that FRCs have 'become a 'logical entry point for effective triage' or an 'insurance policy' for victims of family violence.[90] Cases which clearly meet the legislative exception are frequently issued with s 60I certificates, and some parents 'who would probably meet the exception criteria commence and/or complete FDR'.[91]

Commissions' views

11.42 Three concerns arise from the AIFS study. First, there is evidence that some victims of family violence are being encouraged to participate in FDR processes or obtain s 60I certificates, despite the exceptions for family violence in the *Family Law Act*. Secondly, there is evidence that FDR practitioners are becoming an entry point for 'effective triage' or an insurance policy for victims of family violence. Thirdly, at least some victims of family violence feel that FDR processes fail to identify and manage the risk of family violence effectively.

11.43 The first and second issues raise the question of whether reforms are needed to the complex legislative scheme governing FDR in the *Family Law Act*—in particular, to s 60I—to ensure the appropriate handling of disputes involving violence.

11.44 The Commissions are interested in hearing from stakeholders how these provisions could be improved. For example, as the AIFS evaluation suggests, it may be that the exceptions in s 60I for cases of family violence are under-used because it is simpler for lawyers to 'tick a box' by submitting a s 60I certificate, rather than performing the more difficult task of screening and evaluating whether the risk of family violence will satisfy the court that the exception can be invoked. In that case, the legislation could be reformed (for example) to make it easier for a lawyer to know when a client can be exempted from the requirement to undergo FDR—for example, the legislation could specify that the exception applies if there is a protection order in place.

11.45 It may also be the case that non-legislative reforms are necessary to ensure the legislative scheme operates appropriately. Ideally, all personnel in the family law system should be capable of identifying violence and dealing with it appropriately. The extent of violence in the separating and divorcing population is such that violence is likely to be core business for most professionals in the family law system. Further, any agency or professional could be the first port of call for a party who has been the target of violence, and that agency or professional needs to be able to identify, manage or refer cases appropriately.

11.46 In order to achieve this, family lawyers need training on how to identify and manage family violence appropriately. Preferably, as discussed below, this training should be conducted in conjunction with FDR practitioners, in order to improve

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90 Ibid, 5–19.
91 Ibid, 5–19.

interdisciplinary collaboration. Family lawyers also need adequate support for this role. Family lawyers need clear pathways for referring clients to other services, and a support network for dealing with issues of family violence. Family lawyers also need clear guidance as to when it is appropriate to refer a matter to an FDR practitioner. This could be provided, for example, in the best practice principles for family lawyers developed by the Family Law Council.

11.47 The third issue, the inadequacy of at least some FDR processes to manage the risk of family violence, highlights the need to ensure best practice in screening and risk assessment. As discussed above, much valuable work has already been done in this field, including the development of the *Screening and Risk Assessment Framework* by the Australian Government Attorney-General's Department, and the publication by the Victorian Government of a comprehensive screening and risk assessment framework. In the Commissions' view, these frameworks are valuable resources that should be promoted widely.

11.48 As noted earlier, the Family Law Council recommended in its 2009 report that screening and risk assessment frameworks, tools and materials be endorsed by an expert panel and reference group. The adoption of these frameworks and tools should be encouraged through appropriate training, inclusion in accreditation processes, and through audits and evaluation.

11.49 The Commissions consider that the recommendations made by KPMG in its evaluation of FDR practices in the legal aid sector have significant value. Many, but not all, of those recommendations relating to cases of family violence may also be relevant outside of the legal aid sector. For example, FDR practitioners should ensure appropriate screening for non-physical forms of violence, further develop policies as to how to manage the risk of family violence, and ensure appropriate preparation for FDR processes. Further development of best practice in this area should take these recommendations into account.

Question 11–1 Should any amendments be made to the provisions relating to family dispute resolution in the *Family Law Act 1975* (Cth)—and, in particular, to s 60I of that Act—to ensure that victims of family violence are not inappropriately attempting or participating in family dispute resolution? What other reforms may be necessary to ensure the legislation operates effectively?

Proposal 11–1 Australian governments, lawyers' organisations and bodies responsible for legal education should develop ways to ensure that lawyers who practice family law are given adequate training and support in screening and assessing risks in relation to family violence.

Proposal 11–2 The Australian Government should promote the use of existing screening and risk assessment frameworks and tools for family dispute resolution practitioners through, for example, training, accreditation processes, and audit and evaluations.

FDR practitioners and lawyers

11.50 The level of cooperation and collaboration between FDR practitioners and lawyers was raised as an issue in both the AIFS evaluation and the 2009 report of the Family Law Council.[92] The AIFS evaluation noted the potential for the aims of legal and service professionals to conflict, and stated that:

> Any initiatives designed to promote a shared commitment to responsible FDR between lawyers and FDR professionals, and between lawyers and other service sector professionals, are likely to improve the efficacy of services generally.[93]

11.51 Research by Professor Helen Rhoades and others in 2008 on inter-professional relationships between FDR practitioners and lawyers demonstrated that, although some practitioners enjoy positive professional contact, many have little collaborative contact with the other profession and there are some significant misunderstandings and tensions between the two groups.[94]

11.52 This study also found that successful collaborative relationships were marked by a number of features:

- practitioners described their relationship as a complementary services approach in which each group saw themselves and the other profession as contributing different but equally valuable complementary skills and expertise to the dispute resolution process;
- practitioners from both groups understood and respected the nature of each profession's roles, responsibilities and ways of working with family law clients;
- practitioners had a shared expectation of the dispute resolution process and a shared understanding of the FDR program's aims and approach to working with family law clients;
- family lawyers engaged in 'positive' advocacy practices;

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92 Ibid, ch 5; Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), 44.

93 Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009), 110.

94 H Rhoades, H Astor, A Sanson and M O'Connor, *Enhancing Inter-Professional Relationships in a Changing Family Law System: Final Report* (2008), iv.

- practitioners trusted the intake screening and referral practices of the other profession in cases involving family violence; and

- practitioners engaged respectfully with members of the other profession and extended professional courtesies, such as the provision of timely feedback about clients.[95]

11.53 In groups with good inter-professional relationships, practitioners trusted each other to handle violence appropriately in most cases, although some reservations were still expressed by both groups about the identification and handling of violence.[96] However, a survey of a larger group of lawyers and FDR practitioners conducted for the same study found that there was much greater distrust of the practices of the other profession in identifying and handling cases involving violence.[97]

11.54 In its 2009 report, the Family Law Council suggested a number of strategies 'to develop and enrich inter-disciplinary cooperation and collaboration, particularly between FDR practitioners and family lawyers'.[98] These recommendations were based on the work conducted by Rhoades and others, and included:

- building opportunities for positive personal contact;

- building understanding of roles and responsibilities;

- providing lawyers and judicial officers with information about funded community based programs;

- considering ways to improve communication and feedback about clients; and

- family violence training for both professions.[99]

11.55 The Family Law Council recommended the expansion of Australia-wide family pathways networks to support cooperation and referrals across the family relationship and family law system.[100]

Commissions' views

11.56 FDR practitioners and lawyers are likely to be required to work together more extensively as FDR develops. Although some lawyers and FDR practitioners have

95 Ibid.
96 Ibid, 25–26.
97 Ibid, 44–46.
98 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), 44–45.
99 Ibid, 45.
100 Ibid, Rec 4.

good relationships, there is room to improve relationships between the two sectors. The Commissions support the recommendations of the Family Law Council in this respect. However, the Commissions are interested in hearing from stakeholders if any further strategies are desirable to improve relationships between the sectors.

Proposal 11–3 Measures should be taken to improve collaboration and cooperation between family dispute resolution practitioners and lawyers, as recommended by the Family Law Council.

Interactions between FDR and protection orders

11.57 This section discusses three potential issues arising out of the interaction of the requirements for FDR in the *Family Law Act* and family violence legislation: whether different definitions of family violence in legislation and in practice cause any practical difficulties; the role of protection orders in FDR processes; and the potential for FDR processes to breach protection orders.

Definition of family violence

11.58 The definition of family violence in s 4 of the *Family Law Act*, and proposals to amend the definition, are discussed in detail in Chapter 4 of this Consultation Paper. As discussed there, this definition is more restrictive than that used in some state or territory family violence legislation, and in practice-based material such as the *Screening and Risk Assessment Framework*, discussed above,[101] and in the Family Court of Australia's *Family Violence Strategy*.[102]

11.59 Dr Rae Kaspiew has noted in this regard:

> The issues around definition, and the contrast between the legislative definition … and the practice-based definitions … point to shifting and potentially inconsistent approaches in legal and FDR processes. They may militate against the development of a coherent understanding of violence being applied across different practice contexts.[103]

11.60 As noted above, the evaluation of FDR practices in the legal aid sector found that screening questions tended to focus on physical forms of abuse,[104] and recommended enhanced screening for non-physical forms of violence.[105]

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101 Australian Catholic University and Australian Government Attorney-General's Department, *Framework for Screening, Assessment and Referrals in Family Relationship Centres and the Family Relationship Advice Line* (2008), 52, notes the definition in the *Family Law Act* and other definitions.

102 Family Court of Australia, *Family Violence Strategy* (2004–2005), 3.

103 R Kaspiew, 'Family Violence in Children's Cases under the Family Law Act 1975 (Cth): Past Practice and Future Challenges' (2008) 14 *Journal of Family Studies* 279, 287.

104 KPMG, *Family Dispute Resolution Services in Legal Aid Commissions: Evaluation Report* (2008) Australian Government Attorney-General's Department, 36.

105 Ibid.

11.61 The Commissions are interested in hearing from stakeholders whether the variations between the legislative definitions and practice-based definitions in FDR have had any practical impact in FDR practices.

Question 11–2 Does the definition of family violence in the *Family Law Act 1975* (Cth) cause any problems in family dispute resolution processes?

Protection orders in FDR processes

11.62 Another potential issue is the use of protection orders in FDR processes. As discussed earlier, the evaluation of FDR practices in the legal aid sector noted that FDR practitioners across all jurisdictions commented that failures to ask about and obtain copies of protection orders could 'derail the conferencing process'.[106]

11.63 Some, but not all, examples of screening tools in the *Framework for Screening and Risk Assessment* include questions about the existence of protection orders.[107] In the Victorian screening and risk assessment tool, the practice guide for identifying family violence does not include a question about the existence of protection orders, but does list breaches of protection orders as a consideration for preliminary assessments.[108]

11.64 The existence of a protection order indicates that there are likely to be issues of safety involved that need to be addressed, and the conditions of a protection order may provide useful information about the nature of the risks involved. Further, as noted below, it may be necessary to obtain a copy of a protection order to ensure that FDR practitioners are not making arrangements for FDR that require parties to breach the order. For these reasons, the Commissions consider that it is clearly necessary to include questions about the existence of protection orders, and to ask for copies of protection orders, as part of the process of identification and risk assessment in FDR.

11.65 The Commissions are interested to hear from stakeholders whether, in practice, protection orders are identified and used in risk assessment and management in FDR processes and whether any reforms are necessary to improve such identification and use.

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106 Ibid, 32. In an older survey conducted in 1996, the agencies surveyed all reported asking about protection orders and indicated that a current order would increase their caution about proceeding, although they would not definitely exclude mediation merely because of the order: Keys Young, *Research/Evaluation of Family Mediation Practice and the Issue of Violence: Final Report* (1996) Australian Government Attorney-General's Department, 38.

107 See Australian Catholic University and Australian Government Attorney-General's Department, *Framework for Screening, Assessment and Referrals in Family Relationship Centres and the Family Relationship Advice Line* (2008). For examples where protection orders are not asked about, see Attachment A, 79; Attachment F; Attachment G, 109–110. For examples where protection orders are asked about, see Attachment A, 87; Attachment D; Attachment G, 110–111.

108 Victorian Department of Human Services, *Family Violence Risk Assessment and Risk Management Framework* (2007), 61.

Question 11–3 In practice, are protection orders being used appropriately in family dispute resolution processes to identify family violence and manage the risks associated with it? Are any reforms necessary to improve the use of protection orders in such processes?

Breaches of protection orders by FDR

11.66 Another issue that may arise is that, as noted earlier, the conditions of a protection order may be inconsistent with arrangements made for, or the requirement in s 60I of the *Family Law Act* to attend, FDR. Conditions of protection orders are discussed in Chapter 6. As discussed there, a protection order often will prohibit a person from directly or indirectly contacting or approaching another person. FDR processes conducted in the presence of both parties could, therefore, breach a protection order.

11.67 Most commonly, this issue is dealt with in the application forms for protection orders, which include an exception to prohibitions on contacting the protected person for the purposes of FDR processes. There is such an exception in the application forms of Victoria, Tasmania, the Northern Territory and the ACT.[109] The form for South Australia includes a standard exception for counselling (but not mediation), if it is directed by the Family Court, and for any orders made by the Family Court.[110] The application form in NSW includes an ambiguous exception for counselling, mediation and conciliation.[111] There is no standard exception in the forms for Queensland or Western Australia.[112]

11.68 In 2003, the NSWLRC recommended that the terms of a standard APVO be amended to permit parties to contact each other for the purpose of arranging or

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109 Magistrates' Court of Victoria, *Information for Application for an Intervention Order* (2009) <www.magistratescourt.vic.gov.au> at 2 February 2010; Magistrates Court of Tasmania, *Application for a Family Violence Order* <www.magistratescourt.tas.gov.au/divisions/family_violence/forms> at 29 March 2010; Northern Territory Magistrates Courts, *Application for Domestic Violence Order* <www.nt.gov.au/justice/ntmc/forms_fees.shtml> at 29 March 2010; ACT Magistrates Court, *Application for a Domestic Violence Order* (2009) <www.courts.act.gov.au/magistrates> at 9 February 2010.

110 Magistrates Court of South Australia, *Affidavit to Support Application for Domestic Violence Restraining Order* <www.courts.sa.gov.au> at 8 March 2010.

111 New South Wales, *Application—Apprehended Domestic Violence Order*. The condition is, however, ambiguous, as it states that the defendant must not 'approach or contact the protected person(s) by any means whatsoever, except through the defendant's legal representative or as agreed in writing or as permitted by an order or directions under the *Family Law Act 1975*, for the purpose of counselling, conciliation, or mediation'. It is not clear from this whether the counselling, conciliation or mediation must be directed or ordered under the *Family Law Act*.

112 Magistrates Court of Queensland, *Protection Order Application* <www.communityservices.qld.gov.au/violenceprevention/legislation/dom-violence-orders.html> at 9 February 2010; Magistrates Court of Western Australia, *Violence Restraining Order Application* <www.magistratescourt.wa.gov.au/content/restraining.aspx> at 9 April 2010. As noted in Ch 6, the application form for Western Australia does not allow applicants to indicate which conditions they would like imposed upon the respondent. The Commissions propose that this form should be amended to allow applicants to do so: Proposal 6–6.

engaging in mediation.[113] This was based on a suggestion made by the Community Justice Centres.[114] The Local Court NSW suggested that the legislation should be amended to similar effect.[115]

11.69 Typically, the standard condition prohibiting contact automatically includes an exception allowing contact for the purposes of FDR process. The ACT form, however, enables the applicant to nominate which exceptions to the prohibition on contact should apply, including at counselling or mediation.

11.70 A different approach is taken in Western Australia. The *Restraining Orders Act 1997* (WA) provides that it is a defence to a breach of a protection order if the person was using FDR as defined by the *Family Law Act* or using conciliation, mediation or another form of consensual dispute resolution provided by a legal practitioner.[116] This is the only such provision in family violence legislation.

Commissions' views

11.71 Practical problems are apparent, at least in NSW, with the conditions of protection orders that preclude the use of FDR processes. This raises the potential for conflict between the protection order and family law legislation.

11.72 As discussed below, in many cases, FDR processes are likely to be inappropriate if a protection order has been issued for cases of family violence. Further, strategies such as shuttle mediation can be employed to enable compliance with such a condition. Nevertheless, there may be cases where an exception for counselling or mediation is justified. The approach taken in most jurisdictions, of allowing such an exception as part of a standard order, minimises the potential for conflict when this occurs.

11.73 The Commissions' preliminary view is that the protection order application forms should include the option of an exception allowing contact in the case of FDR processes. There is merit in making this a separate option that can be selected by the applicant, as is done in the ACT, rather than automatically including it within the general prohibition on contact. This gives the applicants (and the court) the opportunity to consider the desirability of contact for the purposes of FDR processes. However, there may be practical advantages in an automatic exception, because family law proceedings may not be contemplated at the time a protection order is obtained. The Commissions are interested in hearing stakeholder views on this issue.

11.74 This exception should apply to participation in FDR processes as ordered or directed by the Family Court, or provided under the *Family Law Act*. This would cover

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113 New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report No 103 (2003), Rec 17.
114 Ibid, [5.42].
115 Ibid, [5.34].
116 *Restraining Orders Act 1997* (WA) s 62(a), (b).

the use of FDR to comply with s 60I of the *Family Law Act*, as discussed above. The exception should not apply to informal attempts to mediate by family or community members, as these do not necessarily include appropriate safeguards for addressing family violence, and may leave victims vulnerable to pressures to mediate.

11.75 The Commissions' view is that it is preferable to minimise the potential for conflict through an exception to a condition of a protection order, rather than provide (as is done in Western Australia) in legislation that attendance at mediation is a defence to a breach of a protection order.

Proposal 11–4 State and territory courts should ensure that application forms for protection orders include an exception allowing contact for the purposes of family dispute resolution processes.

ADR in family violence legislation

11.76 In most Australian jurisdictions, there is no specific provision in family violence legislation empowering courts to refer parties to mediation, although there may be power to refer matters to mediation under other legislation.[117]

11.77 The key exception is in the ACT, where a registrar may refer a protection order proceeding to mediation.[118] During a preliminary conference for an application for protection order,[119] if the registrar is satisfied that the application is likely to be more effectively resolved by mediation than by a hearing, the registrar must recommend mediation to the parties, give the parties information about mediation, and adjourn the preliminary conference to enable mediation. This requirement was first inserted in 2005, and the Explanatory Statement for the relevant bill explains that the obligation 'highlights the importance of alternative dispute mechanisms in preventing further violence by facilitating discussions between the parties to an order'.[120] The ACT Magistrates Court also has express power under the *Domestic Violence and Protection Orders Act 2008* (ACT) to order the respondent or an aggrieved person to take part in (among other things) mediation.[121]

117 For example, see *Alternative Dispute Resolution Act 2001* (Tas) s 5(1).
118 *Domestic Violence and Protection Orders Act 2008* (ACT) s 25.
119 Other than an emergency protection order.
120 Explanatory Statement, Domestic Violence and Protection Orders Amendment Bill 2005 (ACT). The present clause is the same as s 18A of the *Domestic Violence and Protection Orders Act 2001* (ACT), which was inserted by s 11 of the *Domestic Violence and Protection Orders Amendment Act 2005* (ACT). This clause was not discussed in the Legislative Assembly of the ACT during the passage of the latter Act.
121 *Domestic Violence and Protection Orders Act 2008* (ACT) s 89.

11.78 In NSW, there is legislative power to refer matters to mediation in relation to Apprehended Personal Violence Orders (APVOs),[122] but not in relation to Apprehended Domestic Violence Orders (ADVOs). ADVOs relevantly apply to domestic relationships, broadly defined.[123] This reflects the NSWLRC's recommendations in its 2003 report, *Apprehended Violence Orders*.[124] In that report, while the NSWLRC recommended an explicit legislative basis for referral to mediation in the context of APVOs,[125] it expressed the following view:

> It should be emphasised that this section deals exclusively with mediation of APVO disputes. The Commission is of the view that mediation should not be encouraged in relation to ADVOs. The Commission concurs with the arguments put in submissions that the fear and imbalance of power typically characterising domestic violence makes mediation in ADVO matters unsuitable, unproductive and unsafe.[126]

11.79 Consistently with this view, the NSWLRC also considered that there should not be a power of referral in the case of APVOs where there was a history of, or allegations of, personal violence, or conduct amounting to serious harassment.[127] This view is reflected in the legislation.[128]

11.80 The NSWLRC considered the issue again in its 2005 report reviewing Community Justice Centres, which provide mediation services in NSW.[129] It noted that negotiations concerning a return to a violent relationship or the level, frequency and the intensity of violence 'will always be inappropriate', a view which was reflected in the policy of the Community Justice Centres.[130] The NSWLRC further stated:

> The Commission puts no premium on the distinction between ADVOs and APVOs in this context. The distinction between ADVOs and APVOs may, in some cases, be an inadequate way of identifying appropriate matters for mediation and more information will usually be required before a properly trained person can make a decision about whether or not to proceed. Some APVO matters may be similar in many respects to some ADVO matters but the relationship between the parties may not be 'domestic' under the terms of the law. The dynamics of violence, harassment and controlling

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122 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 21.

123 Ibid s 15.

124 New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report No 103 (2003), Ch 5.

125 Ibid, Rec 17.

126 Ibid, [5.50].

127 Ibid, [5.51].

128 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 21(2) provides that a matter is not to be referred to mediation if the court is of the opinion that there has been a history of physical violence to the protected person by the defendant; the protected person has been subjected to conduct by the defendant amounting to a personal violence offence or stalking or intimidation under s 13 of that Act; the defendant has engaged in conduct amounting to harassment relating to the protected person's race, religion, homosexuality, transgender status, HIV/AIDS infection or disability; or there has been a previous attempt at mediation in relation to the same matter and the attempt was not successful. Further, the *Community Justice Centres Act 1983* (NSW) provides the Director with a discretion to decline any dispute: ss 20(3), 22, 24.

129 New South Wales Law Reform Commission, *Community Justice Centres*, Report 106 (2005), [4.31]–[4.41].

130 Ibid, [4.31]–[4.34].

> behaviours can be present in many relationships besides those that fall within the current definition of 'domestic'[131] … ADVOs may be used inappropriately (although such cases may be rare) in much the same way that APVOs are often said to be used inappropriately.[86] It will also be the case that domestic violence and other violence does not only take place in the context of ADVOs and APVOs. So even if policies regarding mediation of ADVOs and APVOs are dealt with in the context of AVO legislation, some matters involving violence will still come to CJCs by other means. CJCs, therefore, need to deal with domestic violence and other violence when it presents itself as part of a dispute and, while paying due regard to the presence of an AVO (and any restrictions contained in it) or an application for one, should not use the type of AVO as a sole guide to the appropriateness, or otherwise, of a dispute for mediation.
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> The Commission, however, remains concerned about mediation taking place where violence is a factor, particularly in situations involving domestic violence.[132]

11.81 The NSWLRC recommended that a list of factors indicating when mediation might be inappropriate be included in the *Community Justice Centres Act 1983* (NSW).[133] This recommendation was not implemented in the subsequent *Community Justice Centres Amendment Act 2007* (NSW).

11.82 Similarly to the NSW legislation, the *Intervention Order (Prevention of Abuse) Act 2009* (SA) distinguishes between protection orders in relation to family violence and in other cases. Section 21(4) of that Act provides that a court must consider, in determining whether to dismiss an application, 'whether it might be appropriate and practicable for the parties to attempt to resolve the matter through mediation or by some other means'. However, this only applies where the application alleges 'non-domestic abuse'.[134]

Commissions' views

11.83 The Commissions endorse the concerns expressed by the NSWLRC about the use of ADR where family violence is a factor. Only the ACT specifically mandates referral of matters to mediation in protection order proceedings involving family violence.

11.84 However, the Commissions are not aware of how frequently this provision is used or whether in other jurisdictions ADR mechanisms are used in relation to similar proceedings. The Commissions are also not aware whether the policies of ADR practitioners prevent the use of ADR in protection order proceedings involving family violence.

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131 This passage referred to the definition in legislation that was later repealed. The present definition of 'domestic' in s 5 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) is broader. This definition is discussed in Ch 4.

132 New South Wales Law Reform Commission, *Community Justice Centres*, Report 106 (2005), [4.40]–[4.41].

133 Ibid, Rec 17.

134 This provision is not discussed in the Second Reading Speech or canvassed in M Pyke, *South Australian Domestic Violence Laws: Discussion and Options for Reform* (2007).

11.85 The Commissions are, therefore, interested in hearing from stakeholders whether ADR mechanisms are used in relation to protection order proceedings under family violence legislation and, if so, whether reforms are necessary to ensure that they are used only in appropriate circumstances.

Question 11–4 In practice, are alternative dispute resolution mechanisms used in relation to protection order proceedings under family violence legislation? If so, are reforms necessary to ensure these mechanisms are used only in appropriate circumstances?

Dispute resolution in child protection

Dispute resolution law and practice in child protection cases

11.86 In most Australian states and territories, child protection legislation includes provisions designed to facilitate negotiated solutions. In addition, some government and community agencies use ADR procedures for child protection cases and have developed policy and practice in relation to ADR. There is a great deal of variation in the processes and terminology used to describe them.

11.87 Two frequently used processes are family group conferencing and mediation. Other examples of ADR in this area are conferences prior to a court hearing; the role of Family Consultants in the Family Court;[135] and ADR processes developed for Indigenous families, such as Care Circles.

Family group conferencing and pre-hearing conferences

11.88 Family group conferencing began in New Zealand in the late 1980s and was based on Maori concerns and cultural practice.[136] As originally conceived in New Zealand, family group conferences involve the child or young person, their representative, the parents, extended family members, other support people nominated by the family, the referring care and protection worker and possibly other participants.[137] The focus of the conference is on empowering the family to make its own decision about the care of the child or children.

11.89 The first stage of the conference involves provision of information by child care workers and other professionals, especially focusing on the concerns held for the child and the resources that might be available to the child and family. It provides an

135 The Magellan project is considered below and in Ch 14.

136 J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), 481; N Harris, *Family Group Conferencing in Australia 15 Years On* (2008) National Child Protection Clearinghouse 1.

137 N Harris, *Family Group Conferencing in Australia 15 Years On* (2008) National Child Protection Clearinghouse, 1, 3.

opportunity for supported dialogue between professionals and the family. The second phase of the conference involves 'family alone time,'[138] when the family discusses possible solutions without the professionals. The third stage involves working towards an agreement, where the family and professionals negotiate a plan that is acceptable to all. If a plan is agreed, it will be recorded and implemented.[139]

11.90 The original New Zealand model has been adapted in other jurisdictions.[140] While most Australian states and territories have adopted a form of conferencing, the characteristics of conferences vary. There are differences in how often and when conferencing is used, how 'family alone time' is used, and the way in which conferencing outcomes are implemented.[141] For example, in New Zealand the conferencing outcome must be implemented unless it is impractical or inconsistent with the legislation, whereas in Australia implementation is generally not mandated and the relevant child protection departments retain some discretion.[142]

11.91 ADR is also used prior to hearings in child protection cases. For example, the *Children and Young Persons (Care and Protection) Act 1998* (NSW) provides that after a care application has been served, the Registrar of the Children's Court is to arrange and conduct a preliminary conference between the parties.[143] However, it appears that while these conferences are sometimes conducted as a form of ADR, they are also sometimes conducted as a directions hearing designed to prepare the case for litigation.[144]

11.92 The Children's Court of Victoria also uses dispute resolution conferences.[145] Guidelines for those conferences indicate that the dispute resolution conference is to be 'an exercise in negotiation and joint problem solving' which aims to 'optimise the participation of significant persons from a child's family' and other networks.[146]

11.93 It is apparent from these examples that there is variation in the way that pre-hearing conferences are used. They can be conducted with a dispute resolution focus, and have many similarities to mediation or family group conferences, or they can be focused on case management for litigation.

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138 K Olsen, 'Family Group Conferencing and Child Protection Mediation: Essential Tools for Prioritizing Family Engagement in Child Welfare Cases' (2009) 47 *Family Court Review* 53, 56.

139 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), 12.

140 J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), 481; N Harris, *Family Group Conferencing in Australia 15 Years On* (2008) National Child Protection Clearinghouse, 1.

141 N Harris, *Family Group Conferencing in Australia 15 Years On* (2008) National Child Protection Clearinghouse, 1.

142 Ibid.

143 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 65.

144 J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), 481, 469.

145 Children's Court of Victoria, *Guidelines for Dispute Resolution Conferences* (2007).

146 Ibid, 2.

11.94 The ALRC and the Human Rights and Equal Opportunity Commission (HREOC)[147] examined the use of family group conferencing and pre-hearing conferences in the report, *Seen and Heard: Priority for Children in the Legal Process* (ALRC 84).[148] The report discussed the benefits of such procedures and noted a number of concerns, including the fact that 'the vulnerability of some family members within violent and abusive families may mean that dynamics in conferences could hamper appropriate resolutions'.[149] It recommended further research into effective conferencing practices, and the setting down of procedures in child protection legislation based on this research.[150] These recommendations have not yet been implemented.[151]

Mediation

11.95 Mediation is also used in child protection matters. For example, the NSW government agency, Community Services (formerly known as the Department of Community Services) offers ADR, using its own staff who have been trained in mediation.[152] Where internal ADR has not succeeded, or where it would be unsuitable, external mediators may be used. Extensive preparation occurs before the mediation session, and safety plans may need to be made. Techniques such as shuttle mediation, teleconferencing and co-mediation may be used in cases where there are safety concerns. Mediation is seen as an extension of good case work practice, supportive of good relationships with families and reducing litigation.

Family Consultants

11.96 The Family Court of Australia uses Family Consultants in children's cases. They have a general role in supporting negotiated resolution of disputes concerning children. The court has a Child Responsive Program for children's cases and Family Consultants become involved with families early in their engagement with the court.[153] Family Consultants perform an important role in identifying cases that involve violence and abuse.[154] The Family Court also has the Magellan case management model for cases involving serious allegations of child abuse, which involves allocation

147 This has since been renamed the Australian Human Rights Commission.

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

149 Ibid, [17.49]. Other concerns included: the appropriate level of children's involvement; the need to ensure that the best interests of the child were promoted in conferencing; and the need to ensure that the initial risk assessment was not subject to negotiation or compromise: [17.49]–[17.54].

150 Ibid, Recs 169–170.

151 Further information on implementation is available on the ALRC's website.

152 C Abram, 'ADR in a Care and Protection Context—The NSW DoCS Model' (2001–2) 2 *Developing Practice: The Child, Youth and Family Work Journal* 20.

153 See also Ch 14.

154 J McIntosh and C Long, *The Child Responsive Program Operating Within the Less Adversarial Trial: A Follow Up Study of Parent and Child Outcomes* (2007), 5. For an overview of Family Court initiatives in children's cases see B Fehlberg and J Behrens, *Australian Family Law—The Contemporary Context* (2008).

of cases to a small team of judges, registrars and Family Consultants. The Magellan Project is discussed in detail in Ch 14.

ADR and Indigenous peoples

11.97 There has also been a focus on using ADR in child protection matters involving Indigenous peoples. In 2006, the NSW Aboriginal Child Sexual Assault Taskforce addressed the issue of using ADR for child sexual assault matters and concluded that further research and consideration was required on this issue.[155] In 2002, a Western Australian inquiry into the response of government agencies to complaints of family violence and abuse in Indigenous communities also supported the use of ADR.[156]

11.98 Such a focus has particular significance for Indigenous peoples because of the high levels of involvement of child protection agencies with Indigenous children, the high levels of violence in some Indigenous communities and the significant levels of distrust of child protection agencies by Indigenous peoples.[157]

11.99 One example of ADR in this context is the pilot of Care Circles in the Children's Court in Nowra, NSW. Such a Circle can be convened by consent where the Children's Court had already determined a child or young person to be in need of care and protection.[158] Participants in the Care Circles include three Indigenous community members, family members, lawyers (including a children's lawyer), departmental child protection officers, the Care Circle Project Manager and a magistrate.[159] Care Circle conferences focus on issues such as custody and contact arrangements and support for the family, although the magistrate ultimately makes the decisions.[160] Care Circles thus have some similarities with family group conferences, but also borrow from and adapt ideas and procedures from sentencing circles used in criminal matters (discussed below).

11.100 The *Children, Youth and Families Act 2005* (Vic) requires that significant decisions under the Act involving an Indigenous child should involve a conference including an Indigenous convener from an approved organisation, the family and other appropriate members of the Indigenous community as determined by the parent.[161] In practice, departmental facilitators work with independent Indigenous facilitators to

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155 Aboriginal Child Sexual Assault Taskforce (NSW), *Breaking the Silence: Creating the Future. Addressing Child Sexual Assault in Aboriginal communities in NSW* (2006).

156 S Gordon, K Hallahan and D Henry, *Putting the Picture Together, Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (2002).

157 Aboriginal Child Sexual Assault Taskforce (NSW), *Breaking the Silence: Creating the Future. Addressing Child Sexual Assault in Aboriginal communities in NSW* (2006).

158 J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), 479–80.

159 NSW Department of Justice and Attorney General and NSW Department of Community Services, *Care Circles* (2009) <www.lawlink.nsw.gov.au/lawlink> at 22 March 2010.

160 Ibid.

161 *Children, Youth and Families Act 2005* (Vic) s 12(1)(b).

convene a conference.[162] This developed from a pilot program involving a partnership between the Victorian Department of Human Services and the Rumbalara Aboriginal Co-operative, which was evaluated as a success in 2003.[163]

Benefits, concerns and intersections

11.101 The benefits of using ADR in child protection matters are significant. ADR processes are often faster and more cost-effective.[164] There is the potential to repair important relationships and open channels of communication.[165] Procedures and outcomes may be tailored to the needs and interests of children, families and their cultures.[166]

11.102 Importantly for this Inquiry, many of the models of ADR in child protection involve group processes in which anyone who is relevant to the child's life, care and safety can be present. All of the agencies who are involved with the child and family can come together, talk directly with each other and hear and understand the perspectives of all involved. The family law and socio-legal service systems have been referred to as a maze.[167] It is possible that forms of ADR could assist in creating pathways of communication and decision-making for the individuals who may find the 'maze' hard to traverse.

11.103 ADR in child protection matters is, at least initially, resource intensive, as it may require extensive preparation in order to be effective.[168] However, there is empirical evidence from programs in the United States that using ADR may save resources later.[169] It is possible that the fragmentation of the system may make the assessment of savings difficult, as expenditure by one organisation may result in savings for another.[170]

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162 N Harris, *Family Group Conferencing in Australia 15 Years On* (2008) National Child Protection Clearinghouse, 16.

163 Linqage International, *ATSI Family Decision Making Program Evaluation: Approaching Families Together* (2003) Victorian Department of Human Services.

164 N Thoennes, 'What We Know: Findings from Dependency Mediation' (2009) 47 *Family Court Review* 1, 31–32.

165 Ibid, 32–33; R Sheehan, 'Alternative Dispute Resolution in Child Protection Matters: The Victorian Experience' (2006) 59 *Australian Social Work* 157.

166 N Thoennes, 'What We Know: Findings from Dependency Mediation' (2009) 47 *Family Court Review* 1; Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [17.48].

167 T Brown and R Alexander, *Child Abuse and Family Law: Understanding the Issues Facing Human Service and Legal Professionals* (2007), 128.

168 P Ban, 'Dialogue and Alignment in Preparing Families for Family Group Conferences' (2009) 20 *Australian Dispute Resolution Journal* 33.

169 N Thoennes, 'What We Know: Findings from Dependency Mediation' (2009) 47 *Family Court Review* 1, 8.

170 N Harris, *Family Group Conferencing in Australia 15 Years On* (2008) National Child Protection Clearinghouse, 4, cites UK research that suggests that the decentralised structure of the child welfare system there may contribute to low take-up of Family Group Conferencing.

11.104 There are a number of concerns about the use of ADR in child protection cases similar to those about the use of FDR in cases of family violence. A key concern is the potential for such processes to compromise the safety of children.[171] Further, there are significant imbalances in power between: the child and parents, between parents (especially in cases of violence); and between families and government departments and other experts.[172] There is also the challenge of representing the interests of children who sometimes (appropriately) may not be part of the ADR process but are directly affected by it.[173] The complexity of the cases means that most ADR involves multi-party processes requiring skilled management by well trained, experienced and possibly multiple conveners.

11.105 Although the use of ADR in child protection matters appears to be developing, and has received strong support from some quarters,[174] there appears also to be resistance to its development. Concern has been expressed that existing powers in legislation to use ADR are not used frequently enough.[175] This may be the result of a lack of familiarity or training in ADR, or a lack of understanding of its potential in child protection cases.[176] It would appear that some lawyers do not understand the appropriate role of lawyers in child protection mediation, and this may impede agreements in some cases.[177]

Commissions' views

11.106 As the ALRC and HREOC stated in ALRC 84, the use of ADR in child protection cases 'hold[s] a good deal of promise for the resolution of disputes about the care and protection of children'.[178] Of particular relevance to this Inquiry is the possibility that ADR can improve communication between the many agencies and individuals involved in making decisions in child protection matters. As well as providing an opportunity for professionals to meet and hear each other's perspectives, it may help children and young people and their families understand a system that has been described as a 'maze.' The Commissions are interested in hearing from stakeholders how these potential benefits can best be realised.

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171 J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), 489.

172 R Sheehan, 'Alternative Dispute Resolution in Child Protection Matters: The Victorian Experience' (2006) 59 *Australian Social Work* 157, 169.

173 Ibid; Strategic Partners, *Family Services Branch Child Inclusive Practice in Family and Child Counselling and Family and Child Mediation* (1998).

174 In NSW the Wood Inquiry was 'of the strong view that ADR should be used before and during care proceedings: J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), 489.

175 N Harris, *Family Group Conferencing in Australia 15 Years On* (2008) National Child Protection Clearinghouse, 7; J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008).

176 J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), 470.

177 R Sheehan, 'Alternative Dispute Resolution in Child Protection Matters: The Victorian Experience' (2006) 59 *Australian Social Work* 157; C Abram, 'ADR in a Care and Protection Context—The NSW DoCS Model' (2001–2) 2 *Developing Practice: The Child, Youth and Family Work Journal* 20, 25.

178 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [17.48].

11.107 The Commissions note that, as with FDR, ADR in child protection matters involves a number of challenges in the context of family violence. These include dealing with relationships of power; protection from violence, abuse and intimidation; and ensuring that all voices are heard, including the voice of the child. Many of these concerns, however, may be addressed through training of convenors and ensuring best practice in ways similar to that discussed above in the context of FDR. The Commissions are interested in hearing views on whether legislative or other reforms are needed to ensure that family violence is addressed appropriately in such practices.

Question 11–5 How can the potential of alternative dispute resolution mechanisms to improve communication and collaboration in the child protection system best be realised?

Question 11–6 Is there a need for legislative or other reforms to ensure that alternative dispute resolution mechanisms in child protection address family violence appropriately?

Restorative justice

Definitions

11.108 As the ALRC noted in the 2006 Report, *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103), there is no accepted definition of restorative justice. Restorative justice may be defined as a process, or in terms of its aims or philosophy.

11.109 One widely accepted definition of restorative justice is 'a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future'.[179] However, such processes need not involve face-to-face meetings between victims and offenders, and can be used for victims alone or involve representatives of victims.[180] Restorative justice initiatives may be employed at any stage in the criminal justice process, including the sentencing stage.[181] Other stages could include: before or at the time a person is charged; after a person is convicted but before sentencing; and after a person has served his or her sentence.

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179 T Marshall, *Restorative Justice: An Overview* (1996) Home Office—United Kingdom, 5. John Braithwaite has similarly described it as 'a process where stakeholders affected by an injustice have an opportunity to communicate about the consequences of the injustice and what is to be done to right the wrong': J Braithwaite and H Strang, 'Restorative Justice and Family Violence' in H Strang and J Braithwaite (eds), *Restorative Justice and Family Violence* (2002) 1, 4.

180 K Daly, 'Sexual Assault and Restorative Justice' in H Strang and J Braithwaite (eds), *Restorative Justice and Family Violence* (2002) 62, 77.

181 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), [7.156].

11.110 On a philosophical level, restorative justice can be described 'as an approach to crime that focuses on repairing the harm caused by criminal activity and addressing the underlying causes of criminal behaviour'.[182] Other purposes of restorative justice include 'reintegrating offenders into their communities … and restoring the relationship between victim and offender'.[183]

11.111 The underlying principles of restorative justice programs have been described as follows:

> Restorative justice programs are based on the belief that parties to a conflict ought to be actively involved in resolving it and mitigating its negative consequences. They are also based, in some instances, on a will to return to local decision-making and community building. These approaches are also seen as means to encourage the peaceful expression of conflict, to promote tolerance and inclusiveness, build respect for diversity and promote responsible community practices.[184]

11.112 Restorative justice is founded on a critique of the adversarial nature of the conventional criminal justice system:

> Restorative justice is a way of thinking about what is best for the many connections among crime victims, their offenders and the criminal justice process. Restorative justice advocates suggest that conventional assumptions about these connections may be wrong: that victims should be at the centre rather than excluded from the process, that victims and offenders are not natural enemies, that victims are not primarily retributive in their view of justice, that prison is not necessarily the best way to prevent repeat crime. The erroneous assumptions of conventional justice, the advocates suggest, contribute to rising public dissatisfaction with justice across the common law countries.[185]

11.113 The critiques of the criminal justice system in the restorative justice literature are relevant to an understanding of the limitations of legal frameworks in addressing issues of family violence, and have informed many of the laws reforming, for example, sexual assault, as is discussed in Chapter 15.

11.114 Professor John Braithwaite has suggested that restorative justice has far-reaching implications. In his view, it is more than a way of reforming the criminal justice system. Rather, 'it is a way of transforming the entire legal system, our family lives, our conduct in the workplace, our practice of politics'.[186]

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182 Ibid, [4.20].

183 A Cossins, 'Restorative Justice and Child Sex Offences: The Theory and the Practice' (2008) 48 *British Journal of Criminology* 359, 360.

184 United Nations Office of Drug and Crime, *Handbook on Restorative Justice Programmes* (2006), 5. See also Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), [4.20].

185 LW Sherman and H Strang, *Restorative Justice: The Evidence* (2007) Smith Institute, 12.

186 J Braithwaite, 'Principles of Restorative Justice' in A von Hirsch and others (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (2003) 1, 1.

Types of practices

11.115 Restorative justice is not a simple 'one size fits all' practice. Professor Julie Stubbs has used the term 'restorative justice practices' to 'highlight the diversity among initiatives undertaken in the name of restorative justice'.[187] In this Inquiry, the Commissions use the term 'restorative justice practices' when referring to the practices and processes associated with restorative justice, although authors also use terms such as 'initiatives', 'processes' and 'programs'.[188]

11.116 There are a number of restorative justice practices, with the three most common being victim-offender mediation, conferencing, and circle and forum sentencing.[189] What these practices have in common is the use of

> inclusive decision-making processes that involve bringing the offender, the victim, and sometimes members of the wider community, together to determine collectively the approach to be taken to a crime.[190]

11.117 In victim-offender mediation, the focus is face-to-face dialogue between victims and offenders, under the guidance of trained mediators. The usual outcome is an agreement about what needs to be done to repair the harm—for example, an apology, repayment, or an undertaking to seek counselling.[191] However, the key feature is the dialogue, which aims to empower the victim and develop empathy for the victim in the offender.[192]

11.118 Conferencing involves a wider kind of meeting between victims, offenders, family members, and supporters under the guidance of a coordinator. This approach became popular in the 1990s.[193] As with victim-offender mediation, participants discuss the crime and its impact, and typically reach an agreement. Conferencing is used commonly for young offenders in Australia, in which case its purpose is usually to divert the offender from the criminal justice system. In some cases, such as in NSW and Tasmania, the option for conferencing is part of a wider scheme in which police are empowered to warn, caution or conduct conferences as an alternative to court action.[194]

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187 J Stubbs, 'Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice' in H Strang and J Braithwaite (eds), *Restorative Justice and Family Violence* (2002) 42, 42.

188 See, eg, Law Reform Committee—Parliament of Victoria, *Inquiry into Alternative Dispute Resolution and Restorative Justice* (2009), 194–195; United Nations Office of Drug and Crime, *Handbook on Restorative Justice Programmes* (2006).

189 See generally United Nations Office of Drug and Crime, *Handbook on Restorative Justice Programmes* (2006), Ch 2.

190 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), [4.20].

191 New South Wales Government Lawlink, *Victims of Crime–Registers and Conferencing* (2007) <www.lawlink.nsw.gov.au> at 11 November 2009.

192 J Ptacek, 'Resisting Co-optation: Three Feminist Challenges to Antiviolence Work' in J Ptacek (ed) *Restorative Justice and Violence Against Women* (2010) 5, 8.

193 Ibid, 9.

194 *Young Offenders Act 1997* (NSW) pt 5; *Youth Justice Act 1997* (Tas) s 9.

11.119 Another type of restorative practice, developed primarily in the context of Indigenous offenders, is circle (or forum) sentencing. This practice usually involves judicial officers sitting together with elders of the community, as well as lawyers and other participants, in an informal setting to discuss the crime, its impact, and the appropriate sentence. Circle sentencing is unlike victim-offender mediation in that it is led by a judicial officer rather than a mediator, and the judicial officer determines the sentence, rather than an agreement being made by the participants.[195] The principles of circle sentencing have been extended to non-Indigenous offenders in some contexts, such as the Northern Territory Community Court.

11.120 A number of restorative justice practices have been established in Australian states and territories. These vary widely in their scope and the stage of the criminal justice process at which they may be invoked. The practices differ in terms of their impact or link with the criminal justice system. For example, practices that occur post-sentence are purely for the benefit of the parties and have no impact on the sentence received. On the other hand, youth justice conferencing is typically intended to divert the incident from the criminal justice altogether. Other ways in which practices might interact with the criminal justice system include, for example, the possibility that the outcomes of such processes are considered in sentencing, or may suspend the criminal justice process. Where restorative justice practices do interact with the criminal justice system, one concern is whether a person's consent to be involved in such a practice is triggered by a fear of the consequences of the criminal process.[196]

11.121 Restorative justice practices in Australian states and territories have been used primarily for juvenile offenders.[197] These practices, however, are being used increasingly for adult offenders—for example, the Neighbourhood Justice Centre pilot commenced in Victoria in 2008 deals with adult offenders, and the *Crimes (Restorative Justice) Act 2004* (ACT) sets out comprehensive schemes for youth and adult offenders, although the latter is yet to commence.[198] These are discussed further below.

11.122 Restorative justice practices have been introduced since 1999 in nearly all Australian states and territories to sentence Indigenous offenders.[199] However, Kathleen Daly has cautioned against conceptualising restorative justice practices as a

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195 See generally NSW Attorney-General's Department, *Evaluation of Circle Sentencing Program* (2008). The Judicial Commission of NSW has also produced a DVD on Circle Sentencing.

196 J Braithwaite and H Strang, 'Restorative Justice and Family Violence' in H Strang and J Braithwaite (eds), *Restorative Justice and Family Violence* (2002) 1, 20.

197 See, eg, Law Reform Committee—Parliament of Victoria, *Inquiry into Alternative Dispute Resolution and Restorative Justice* (2009), 190. See also A Cossins, 'Restorative Justice and Child Sex Offences: The Theory and the Practice' (2008) 48 *British Journal of Criminology* 359, 359.

198 Other examples of restorative justice practices include Forum Sentencing in NSW and programs run by the Restorative Justice Unit (of the NSW Department of Corrective Services); the Community Court in Darwin; the Justice Mediation Program in Queensland; and victim-offender mediation practices in South Australia. Tasmania and Western Australia. Programs specific to Indigenous peoples typically include adult offenders.

199 For a brief history, see I Potas and others, *Circle Sentencing in New South Wales: A Review and Evaluation* (2003) Judicial Commission of New South Wales and Aboriginal Justice Advisory Council, 3.

form of Indigenous justice. She states that 'the devising of a (white, bureaucratic) practice that is *flexible and accommodating* towards cultural differences does not mean that conferencing *is* an indigenous justice practice'.[200] Rather, Daly prefers to understand conferencing as 'a fragmented justice form: it splices white, bureaucratic forms of justice that may include non-white (or non-western) values or methods of judgement, with all the attendant dangers of such "spliced justice"'.[201]

11.123 Importantly for this Inquiry, restorative justice practices traditionally have been used in cases of 'minor' or 'less serious' offences in Australia. They have not frequently been used in cases of family violence or sexual assault, although as discussed below, there have been some developments in this area.

Application to family violence

11.124 Restorative justice practices in Australia differ widely in their application to family violence. There are some general limits to, and criteria for, these programs that restrict their application to family violence. As most of these programs are located at the level of the Local or Magistrates Court, they are limited to the same criminal jurisdiction as those courts.[202] Further, the programs usually require some acknowledgement of responsibility or finding of guilt; require the consent of both parties; and depend upon the assessment of the offender as suitable for the program, which usually takes into account the willingness of the offender to engage with such a practice. In NSW, some schemes also require the likelihood of imprisonment, which may render ineligible some offences that may constitute family violence.[203]

11.125 In addition, a large number of these programs have specific exclusions, either by way of legislation or guidelines, for conduct that might constitute family violence. In particular, it is common for such programs to exclude sexual offences and certain violent offences. For example, the NSW legislation establishing youth justice conferencing, the *Young Offenders Act 1997* (NSW), excludes its application to offences under the relevant family violence legislation (including a breach of a protection order, stalking and intimidation), and to a range of other offences that may constitute family violence.[204]

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200 K Daly, 'Restorative Justice: The Real Story' in E McLaughlin and others (eds), *Restorative Justice: Critical Issues* (2003) 195, 201.

201 Ibid.

202 These are generally offences that are triable summarily, which are normally less serious than offences tried on indictment.

203 See *Criminal Procedure Regulation 2005* (NSW) sch 4, cl 8(1)(e); sch 5, cl 7(1)(c).

204 *Young Offenders Act 1997* (NSW) s 8; *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 11–14. Section 4 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) defines a 'personal violence offence' as including several offences set out in *Crimes Act 1900* (NSW), including sexual assault offences set out in div 10.

11.126 Similarly, in Western Australia, youth conferences (known as juvenile justice teams) cannot be held with respect to offences contained in schs 1 and 2 of the *Young Offenders Act 1994* (WA).[205] These include offences involving sexual assault and violence.

11.127 The youth conferencing practice in Tasmania (known as Community Conferencing) excludes 'prescribed' offences including murder, attempted murder, manslaughter, aggravated sexual assault, and rape.[206] Under the *Criminal Procedure Act 1986* (NSW), certain offences are excluded from the scope of intervention programs such as forum sentencing and circle sentencing. These offences include malicious wounding or infliction of grievous bodily harm; sexual offences; stalking and intimidation; and offences involving firearms.[207] In Victoria, sexual offences are excluded from the Young Adult Restorative Justice Group Conferencing program by legislation.[208]

11.128 The most ambitious restorative justice legislation in Australia, the *Crimes (Restorative Justice) 2004 Act* (ACT), makes specific provision for restorative justice practices to apply (in the case of both young and adult offenders) to crimes constituting family violence under its family violence legislation.[209] However, these provisions are part of the 'second phase' of the restorative justice program, and to date have not been brought into effect.[210] The Restorative Justice Unit of the ACT Department of Justice and Community Safety is currently consulting and planning for this second phase.[211] The 'first phase' of the program applies to 'less serious offences' committed by young offenders.[212] The restorative justice program in the ACT is broad, operating at every stage of the criminal process and enabling multiple agencies to refer cases to such processes.

11.129 More commonly, the relevant guidelines or procedures list the offences that are excluded from the scope of restorative justice practices. Most straightforwardly, the NSW Forum Sentencing Operating Procedure excludes 'domestic violence offences' where the offender has been in an intimate personal relationship with the victim.[213]

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205 *Young Offenders Act 1994* (WA) s 25(1), schs 1, 2.

206 *Youth Justice Act 1997* (Tas) s 3 (definition of 'prescribed offence'). Only murder, attempted murder, and manslaughter are prescribed offences for those under 14.

207 *Criminal Procedure Act 1986* (NSW) s 348.

208 *Magistrates' Court Act 1989* (Vic) s 4O; *Children, Youth and Families Act 2005* (Vic) s 520C. The Young Adult Restorative Justice Group Conferencing program is for 18–25 years old in the City of Yarra, run under the auspices of the Neighbourhood Justice Centre.

209 *Crimes (Restorative Justice) Act 2004* (ACT) ss 16(1), (2).

210 Ibid s 15(4).

211 N Inkpen, *Consultation*, Canberra, 16 December 2009.

212 *Crimes (Restorative Justice) Act 2004* (ACT) s 14.

213 The Forum Sentencing Operating Procedure specifies that the person cannot be referred to a Forum if the offence before the court, among other things, is a domestic violence offence where the offender has been in an intimate personal relationship: NSW Department of Justice and Attorney General, *Forum Sentencing Operating Procedure* (2008), [2.1.1]. 'Intimate personal relationship' is further defined broadly in the procedures, in similar terms to the family violence legislation in NSW. The *Criminal Procedure Regulation 2005* (NSW) sch 5 cl 7 also requires that the offender not have a previous

Sexual offences are excluded by the practice direction of the Ngambra Circle Sentencing Court in the ACT,[214] and by the guidelines of the Community Court in the Northern Territory.

11.130 These exclusions may apply only to certain serious offences. For example, the juvenile pre-court diversion scheme in the Northern Territory excludes certain offences including murder, manslaughter, rape, serious physical assault,[215] and serious property damage.[216] The Victorian youth justice conferencing program excludes similar offences including serious crimes of violence.[217] Other guidelines state that caution should be exercised in respect of certain offences relevant to family violence—for example, the Tasmanian Community Conferencing guidelines,[218] and the Community Court in the Northern Territory.[219]

11.131 In other cases, while offences constituting family violence may not be excluded, additional guidelines or protocols may be in place. For example, additional guidelines apply to mediation and conferencing practices run by the Restorative Justice Unit in NSW,[220] and the youth justice conferencing practice in Queensland.[221]

11.132 Other restorative justice practices, do not appear to give special treatment for offences of family violence. For example, sexual assaults are dealt with in family conferences in South Australia.[222]

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conviction for a large number of violent offences and weapons or firearms offences. Further, the *Criminal Procedure Act 1986* (NSW) s 348 excludes offences including malicious wounding or infliction of grievous bodily harm; sexual offences; stalking and intimidation; and offences involving firearms. There is also a requirement that the facts are likely to lead to a sentence of imprisonment: *Criminal Procedure Regulation 2005* (NSW) sch 5, cl 7(1)(c).

214 According to its Final Interim Practice Direction, 21 April 2004, cl 15. In addition, those with an 'unresolved addiction to illicit drugs (other than cannabis)' are also not eligible: cl 14.

215 T Cunningham, *Pre-court Diversion in the Northern Territory: Impact on Juvenile Reoffending* (2007) Australian Institute of Criminology, 2.

216 See Northern Territory Police, *Juvenile Pre-Court Diversion Scheme* (2006) <www.pfes.nt.gov.au> at 18 November 2009.

217 Victorian Government Department of Human Services, *Youth Justice Group Conferencing Program Guidelines* (2007), 6. See also *Children, Youth and Families Act 2005* (Vic) ss 414–415.

218 Department of Health and Human Services—Tasmania, *Community Conferencing Guidelines* (2008), [3.2.4] (sexual offences).

219 Ibid, cl 14.

220 Information obtained from the Restorative Justice Unit of the NSW Department of Corrective Services, 11 January 2010.

221 Special procedures apply for serious and sexual offences: Queensland Government Department of Communities, *Youth Justice Conferencing Queensland—Restorative Justice in Practice* (2009), 110.

222 *Young Offenders Act 1993* (SA). See also K Daly, B Bouhours and S Curtis-Fawley, *South Australia Juvenile Justice* (2007).

Benefits of, and concerns about, restorative justice

11.133 Restorative justice practices may have a number of benefits. The ALRC has noted that:

> Restorative initiatives have the potential to: increase the satisfaction of participants in the criminal justice system; encourage offenders to accept responsibility for their conduct; reduce recidivism by addressing the causes of criminal behaviour; and provide insight into the causes of crime.[223]

11.134 Lawrence Sherman and Heather Strang have noted that there are two types of claims made for restorative justice, the procedural claim and the effectiveness claim:

> The procedural claim is that restorative justice (RJ) is seen by victims and offenders as a more humane and respectful way to process crimes than conventional justice (CJ). The effectiveness claim is that RJ is better than CJ in producing important results that we want from justice: less repeat offending, more repair of harm to victims, fewer crimes of vengeance by victims, more reconciliation and social bonding among families and friends affected by crime, and more offences brought to justice.[224]

11.135 However, others have expressed general concerns about restorative justice, including the lack of conceptual clarity and empirical evidence in support of the claims for restorative justice, and the tendency to underemphasise the role of criminal law in denouncing violence.[225]

Appropriateness of restorative justice

11.136 In the context of this Inquiry, the Commissions acknowledge that the appropriateness of restorative justice in relation to family violence and sexual assault is a divisive issue. This is particularly so in the context of Indigenous women and child victims of family violence or sexual assault.

Family violence

11.137 Some advocates have supported the use of restorative justice practices in the context of family violence, arguing that they have the potential to increase women's choices; provide women with a voice; draw on the support of their family and friends in a way that may increase their safety;[226] provide a flexible environment for communication and, if desired, repair the relationship.[227]

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223 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), [4.21].

224 LW Sherman and H Strang, *Restorative Justice: The Evidence* (2007) Smith Institute, 13.

225 J Stubbs, *Restorative Justice, Domestic Violence and Family Violence* (2004) Australian Domestic and Family Violence Clearinghouse, 4.

226 LW Sherman and H Strang, *Restorative Justice: The Evidence* (2007) Smith Institute, 13.

227 J Stubbs, 'Restorative Justice, Gendered Violence, and Indigenous Women' in J Ptacek (ed) *Restorative Justice and Violence Against Women* (2010) 103, 105.

11.138 However, many others have voiced significant concerns.[228] These concerns include fears for women's safety, concerns about the ability of restorative justice to hold offenders accountable, and broader concerns about the role of restorative justice in the politics of gender and race.[229]

11.139 Stubbs, for example, has noted that restorative justice practices may be an opportunity for further abuse, especially emotional abuse, in the context of family violence:[230]

> It is not clear what, if any, victim-centred screening occurs. Safety assessments that are not informed by an adequate understanding of domestic violence or family violence may be of little value or even dangerous. Moreover, there seems to be a common focus on safety within the process of restorative justice but little recognition of ongoing safety concerns subsequent to the restorative justice conference, sentencing circle or mediation.[231]

11.140 Another objection is that restorative justice practices may not take sufficient account of the dynamics of family violence. In doing so, they may compromise women's safety and fail to hold offenders accountable.

11.141 For example, there are questions about:

- the genuineness of apologies within a family violence context, as apologies are often a feature of the violence itself;[232]
- the ability of restorative justice practices to recognise and redress the power imbalance inherent in relationships characterised by family violence, and to recognise the subtle signs of that power imbalance;[233]
- the potential for misconceptions and stereotypes of family violence to prevail;[234]

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228 For overviews of the debate, see, eg, J Braithwaite and H Strang, 'Restorative Justice and Family Violence' in H Strang and J Braithwaite (eds), *Restorative Justice and Family Violence* (2002) 1; J Ptacek, 'Resisting Co-optation: Three Feminist Challenges to Antiviolence Work' in J Ptacek (ed) *Restorative Justice and Violence Against Women* (2010) 5; J Stubbs, *Restorative Justice, Domestic Violence and Family Violence* (2004) Australian Domestic and Family Violence Clearinghouse; J Stubbs, 'Restorative Justice, Gendered Violence, and Indigenous Women' in J Ptacek (ed) *Restorative Justice and Violence Against Women* (2010) 103.

229 J Ptacek, 'Resisting Co-optation: Three Feminist Challenges to Antiviolence Work' in J Ptacek (ed) *Restorative Justice and Violence Against Women* (2010) 5, 19.

230 J Stubbs, 'Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice' in H Strang and J Braithwaite (eds), *Restorative Justice and Family Violence* (2002) 42, 57.

231 J Stubbs, *Restorative Justice, Domestic Violence and Family Violence* (2004) Australian Domestic and Family Violence Clearinghouse, 15.

232 Ibid, 16.

233 Ibid, 14–15.

234 J Stubbs, 'Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice' in H Strang and J Braithwaite (eds), *Restorative Justice and Family Violence* (2002) 42, 57.

- the capacity for sustained changes in the behaviour of the offender;[235]

- the assumptions embedded in restorative justice practices such as the paradigm of crime as a discrete incident between strangers,[236] and reliance on the norms of participants concerning family violence;[237] and

- the potential for restorative justice to create a privatised, or 'second rate', justice system for victims of family violence,[238] that focuses on 'restoring' relations rather than denouncing family violence.[239]

11.142 Donna Coker draws a distinction between the terms 'restorative justice' and 'transformative justice':

> the concept of *restoration* suggests that a prior state existed in which the victim experienced significant liberty and the offender was integrated into a community; in many cases neither is true. Rather than restorative justice, battered women should have the option to choose processes that operate with a *transformative* justice ideal.[240]

11.143 For Coker, transformative justice models may be more appropriate in cases of family violence. These models 'rely more prominently on changes in batterer networks, provision of support for battered women, and processes that link gender ideology and subordination with experiences of racial subordination and colonization'.[241] Transformative justice focuses on reintegration of the offender rather than eliciting forgiveness from the victim, as '[p]ressure to forgive places the victim in an untenable position of once again subordinating her own needs to those of the abuser'.[242] Further, transformative justice should move beyond 'symbolic reparations' to address the material needs of the victim, for example, through access to victims' compensation schemes or direct transfers of money from the offender to the victim.[243]

11.144 So far, little empirical research has been undertaken specifically in relation to the application of restorative justice practices to situations of family violence. One important study is the 2007 review of restorative justice practices in family violence in New Zealand. This review found that participants generally viewed those processes positively, with 79% of victims saying they would do it again, although these findings are based on a small sample of 19 victims and are based on particular models in New

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235 Ibid, 57.
236 Ibid, 43.
237 D Coker, 'Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence' in H Strang and J Braithwaite (eds), *Restorative Justice and Family Violence* (2002) 128, 139.
238 For example, Coker cites research that indicates that friends and family of a man who engages in family violence tend to support his view of himself as a victim: Ibid, 129, 149.
239 J Ptacek, 'Resisting Co-optation: Three Feminist Challenges to Antiviolence Work' in J Ptacek (ed) *Restorative Justice and Violence Against Women* (2010) 5, 20.
240 D Coker, 'Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence' in H Strang and J Braithwaite (eds), *Restorative Justice and Family Violence* (2002) 128, 143.
241 Ibid, 145.
242 Ibid, 148.
243 Ibid, 149.

Zealand.[244] Only two of the victims felt unsafe during the process—but only six victims were asked about safety concerns.[245]

11.145 A further debate is the appropriateness of restorative justice for Indigenous victims of family violence.[246] Stubbs notes that while there are 'problems in conflating Indigenous justice with [restorative justice], [there is] no agreement on how to differentiate between the two'.[247] For example, circle sentencing is commonly considered a restorative justice practice, but this is contested by others.[248]

11.146 Part of that debate stems from the perception that restorative justice may be more culturally appropriate to Indigenous legal systems than conventional criminal justice,[249] and may help to 'heal' communities. There are, however, significant concerns over the degree of community control and recognition of the distinctive voices and needs of Indigenous women, including their needs for safety. Professor Larissa Behrendt has emphasised that

> principles of self-determination and empowerment need to guide any restorative justice strategy that seeks to navigate and negate the dynamics and forces that encourage family violence to flourish.[250]

11.147 The design of restorative justice practices for Indigenous people requires extreme care. Loretta Kelly cautions that:

> Family violence programs should be designed and implemented in a manner that acknowledges the post-colonial context of violence, but which protects the well-being and safety of women and children. … Non-Indigenous people design and enforce oppressive and discriminatory institutions, which we are then expected to use to protect ourselves.[251]

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244 V Kingi, J Paulin and L Porima, *Review of the Delivery of Restorative Justice in Family Violence Cases by Providers funded by the Ministry of Justice* (2008) Crime and Justice Research Centre Victoria University of Wellington, 73.

245 Ibid, 55, 58.

246 For an overview, see J Stubbs, 'Restorative Justice, Gendered Violence, and Indigenous Women' in J Ptacek (ed) *Restorative Justice and Violence Against Women* (2010) 103.

247 Ibid, 111.

248 Ibid.

249 Ibid, 112. See also Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), 80.

250 L Behrendt, 'Lessons from the Mediation Obsession: Ensuring that Sentencing "Alternatives" Focus on Indigenous Self-Determination' in H Strang and J Braithwaite (eds), *Restorative Justice and Family Violence* (2002) 178, 190.

251 L Kelly, 'Using Restorative Justice Principles to Address Family Violence in Aboriginal Communities' in H Strang and J Braithwaite (eds), *Restorative Justice and Family Violence* (2002) 206, 208.

Sexual assault in the family context

11.148 Few empirical studies have been conducted about the use of restorative justice in sexual assault cases.[252] Notwithstanding this, conferencing for sexual assault takes place for juvenile sexual assault offenders in South Australia and Queensland.[253]

11.149 Daly suggests that '*any* crime may be amenable to a restorative process (whether as diversion from court, pre-court sentencing advice, or post-probation or post-prison meeting), but in many cases, victims may not want to participate in a face-to-face meeting with an offender'.[254] With respect to sexual assault, she states:

> restorative justice must ultimately be concerned *first* with vindicating the harms suffered by victims (via retribution and reparation) and then, *second*, with rehabilitating offenders. Currently, the use of conferencing as a diversion from court in Australia and New Zealand is skewed more toward diversion as a form of rehabilitation. … Perhaps because the offenders are juveniles in these diversionary conferencing schemes, this skew toward rehabilitation is appropriate; but if restorative justice is to be applied to more serious cases and to adult offenders, then the process, and underlying philosophical premises, may have to change.[255]

11.150 Dr Annie Cossins disagrees with Daly that restorative justice may provide victims of sexual assault with 'a greater degree of justice than court'.[256] She also queries whether restorative justice practices are ever appropriate for adult sexual assault offenders:

> In assessing the appropriateness of restorative justice for child sexual assault cases, it is necessary to recognize that sexual assault is one of the 'hard cases', because it is unclear whether it is possible to achieve the philosophical ideals of restoration when bringing together an offender and a victim in an informal meeting to deal with one person's exploitation of another. The question that many proponents and critics have discussed is whether restorative justice should become 'mainstream justice' for sexual assault or whether it should only be available for juvenile offenders to encourage them 'to grow out of crime without punishment and stigmatization'.[257]

11.151 The Victorian Law Reform Commission (VLRC) has considered the use of restorative justice practices in the context of family violence and sexual offences. In its review of family violence, it concluded that:

> Establishing any restorative justice model for family violence matters depends on the development of appropriate models based on rigorous research. The commission's position is that there is insufficient clarity in the research to support the adoption of

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252 A Cossins, 'Restorative Justice and Child Sex Offences: The Theory and the Practice' (2008) 48 *British Journal of Criminology* 359, 361. The only significant study appears to be K Daly, B Bouhours and S Curtis-Fawley, *South Australia Juvenile Justice* (2007).

253 These practices are discussed further below.

254 K Daly, 'Sexual Assault and Restorative Justice' in H Strang and J Braithwaite (eds), *Restorative Justice and Family Violence* (2002) 62, 77.

255 Ibid, 84.

256 A Cossins, 'Restorative Justice and Child Sex Offences: The Theory and the Practice' (2008) 48 *British Journal of Criminology* 359, 360.

257 Ibid.

> restorative practices for use in family violence matters and little experience in using such practices. Common standards of practice have not been developed and it would be necessary to train practitioners to use these practices in family violence matters.[258]

11.152 The VLRC, in its report on sexual offences, recommended the establishment of a joint working party to consider options for responding, with a particular focus on the South Australian model.[259] In 2009, the Victorian Parliament Law Reform Committee further considered the use of restorative justice practices in the context of family violence and sexual assault. It concluded it did not have sufficient evidence for it to make recommendations, other than recommendations for further research in the area.[260] The Commissions are not aware that any research has begun as a result of these recommendations.

11.153 The National Council to Reduce Violence against Women and their Children, in the *Time for Action* report, similarly concluded:

> These perceived benefits of and concerns about restorative justice have not been adequately tested because gender-based violence has been almost entirely excluded from restorative justice processes in Australia and internationally.
>
> In efforts to guard against the risks of revictimisation, women subjected to sexual assault and domestic and family violence may be deprived of potential enhancements in access to justice. With this in mind, the National Council supports the cautious exploration of how elements of restorative justice may be incorporated into, or run in parallel with, the conventional criminal justice system to achieve just outcomes for women.[261]

11.154 The National Council recommended that trials should be undertaken and evaluated, 'with necessary caution … to explore the utility and suitability of restorative justice for cases of domestic and family violence and sexual assault'.[262] It similarly recommended that restorative justice practices, driven by Indigenous communities, should be trialled and evaluated in the context of Indigenous victims of family violence and sexual assault.[263]

Effectiveness of restorative justice

11.155 Later in this chapter, the Commissions ask a question about the appropriateness of restorative justice practices in the context of family violence.[264] A separate issue is whether such practices are effective—whether in terms of outcomes

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258 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), 84.
259 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), 478.
260 Law Reform Committee—Parliament of Victoria, *Inquiry into Alternative Dispute Resolution and Restorative Justice* (2009), 333, Recs 72–73.
261 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), 107.
262 Ibid, Rec 4.5.2.
263 Ibid, Rec 4.5.3.
264 Question 11–7.

for the offender, victim, or society more broadly. In relation to one outcome with respect to offenders—recidivism—the ALRC noted in ALRC 103 that:

> Participants in restorative justice initiatives generally report high levels of satisfaction with the process but studies of the effect of restorative justice initiatives on recidivism rates have produced mixed results.[265]

11.156 In the Indigenous context, Jacqueline Fitzgerald has studied statistics from the New South Wales Bureau of Crime Statistics and Research that relate to adult Aboriginal offenders in NSW involved in circle sentencing. Fitzgerald concludes that the evidence suggests that 'circle sentencing has no effect on the frequency, timing or seriousness of [re]offending'.[266] Reducing recidivism rates, however, is only one of several objectives of circle sentencing for Indigenous offenders. She notes that, '[i]f it strengthens the informal social controls that exist in Aboriginal communities, circle sentencing may have a crime prevention value that cannot be quantified through immediate changes in the risk of reoffending for individuals'.[267] Fitzgerald also suggests that consideration could be given to complementing circle sentencing with programs such as cognitive behavioural therapy, drug and alcohol treatment and remedial education.[268]

11.157 Thus far, little evidence is available to assess the effectiveness of restorative justice practices in the family violence context, or the extent to which restorative justice practices address the underlying causes of family violence.[269] The New Zealand evaluation, referred to above, does provide some insights. It provides support for the claim that the procedures of restorative justice are helpful, with victims and offenders appreciating 'the open dialogue and the healing process that occurred in a non-judgemental environment', 'being able to meet the offender in a safe supportive environment'; and 'being able to put things right, feeling supported and being treated with respect'.[270] It reported, however, that victims expressed mixed views as to whether the violence had stopped after the meeting, with about a third saying it had, while another third reported the nature of the violence had shifted from physical to psychological.[271] While more than half the offenders felt they had learnt about their

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265 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006).

266 J Fitzgerald, 'Does Circle Sentencing Reduce Aboriginal Offending?' (2008) 115 *Crime and Jusice Bulletin* 1, 7.

267 Ibid.

268 Ibid.

269 See J Stubbs, *Restorative Justice, Domestic Violence and Family Violence* (2004) Australian Domestic and Family Violence Clearinghouse, 4–5; J Stubbs, 'Restorative Justice, Gendered Violence, and Indigenous Women' in J Ptacek (ed) *Restorative Justice and Violence Against Women* (2010) 103, 109.

270 V Kingi, J Paulin and L Porima, *Review of the Delivery of Restorative Justice in Family Violence Cases by Providers funded by the Ministry of Justice* (2008) Crime and Justice Research Centre Victoria University of Wellington, 91.

271 Ibid.

behaviour and thought they needed to change, victims generally thought offenders still needed more help after the meeting than the offenders did.[272]

Commissions' views

11.158 The Commissions' preliminary view is that the use of restorative justice practices in the context of family violence is fraught with difficulties, and any use of such practices in that context requires extremely careful thought and preparation. These difficulties have, to date, caused family violence to be excluded from the scope of a number of restorative justice practices, or to be subject to additional protocols. If restorative justice practices are to be used in the family violence context, the Commissions' preliminary view is that these should be implemented only after extensive community consultation in the development of protocols by restorative justice professionals, as the Restorative Justice Unit in the ACT is currently doing.

11.159 The use of restorative justice practices for sexual offences, however, appears to the Commissions to be inappropriate generally. The dynamics of power in a relationship where sexual offences have been committed make it very difficult to achieve the philosophical and policy aims of restorative justice in that context. The Commissions consider that restorative justice processes carry a high risk of secondary victimisation for victims of sexual offences. Nevertheless, in view of the availability of conferencing for sexual assault in certain jurisdictions, the Commissions are interested in hearing about the experiences of participants. The Commissions are also interested in hearing whether conferencing is appropriate for a limited class of sexual offences or offenders and, if so, what safeguards are necessary or desirable.

11.160 The Commissions agree with the recommendations of the VLRC that appropriate models need to be 'based on rigorous research'.[273] Further research was recommended by the VLRC and the Victorian Parliament Law Reform Committee.[274] As well, the Restorative Justice Unit in the ACT is presently exploring the application of restorative justice processes in the context of family violence. Further trials and evaluations were also recommended by the National Council to Reduce Violence Against Women and their Children. In the Commissions' view, it is premature to make proposals in this area given these current and proposed developments. This issue should be revisited at a later stage.

11.161 The Commissions are interested, however, in views from stakeholders as to the appropriateness or otherwise of restorative justice in the context of family violence, including whether it is appropriate for particular types of conduct or categories of people. If it is appropriate at all, the Commissions are interested in hearing what safeguards are necessary to ensure both the safety of the victims and the efficacy of the practice.

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272 Ibid.

273 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), 84.

274 Ibid; Law Reform Committee—Parliament of Victoria, *Inquiry into Alternative Dispute Resolution and Restorative Justice* (2009), Recs 72–73.

Question 11–7 Is it appropriate for restorative justice practices to be used in the family violence context? If so, is it appropriate only for certain types of conduct or categories of people, and what features should these practices have?

Question 11–8 Is it appropriate for restorative justice practices to be used for sexual assault offences or offenders? If so, what limits (if any) should apply to the classes of offence or offender? If restorative justice practices are available, what safeguards should apply?

Part C

Child Protection

12. Child Protection—Introduction

Contents

Introduction

Terms of Reference

12.1 This part of the Consultation Paper focuses upon issues concerning children and considers, as directed in the Terms of Reference, 'what, if any, improvements could be made to relevant legal frameworks to protect the safety of women and their children'.[1]

1 The Terms of Reference are set out at the front of this Consultation Paper.

The Terms of Reference engage issues of child protection and safety on a number of levels. The first Term of Reference focuses on the interaction in practice of a range of laws—including between child protection laws and the *Family Law Act 1975* (Cth); and between child protection laws and relevant Commonwealth, State and Territory criminal laws.

12.2 The second Term of Reference focuses on sexual assault in the family violence context and the impact of inconsistent interpretation or application of laws, including rules of evidence, on victims of such violence. As noted in Chapter 1, in the case of children, the issue of sexual assault potentially brings together all the areas of law under consideration in this Inquiry. Sexual assault is considered in Part D of this Consultation Paper.

12.3 The intersection of laws is illustrated in the following comment provided to the Commissions, described as a 'succinct outline' of issues for children and protective parents when they attempt to navigate the interface between child protection and the Family Court:

> If a notifier, often the mother contacts [the child protection agency] re concerns post separation and before there is Family Court involvement and the notifier is being protective by preventing contact with the alleged perpetrator at that time, this will then mean that this child is considered to have a parent who is able and willing to protect and therefore the response will not be an investigation but rather recorded on the system as a Child Concern Report ...
>
> Often eventually the matter goes to the Family Court and the allegations are raised in that forum. But in these circumstances there has been no investigation by [the child protection agency] and no outcome to provide to the Family Court. During these interim periods the Family Court appears to act as if the allegations—having not been considered adequate to investigate by [the child protection agency]—are not significant enough therefore to influence the Family Court decision making and interim decisions are often made allowing contact with the alleged perpetrator despite the allegations. These allegations can include physical sexual emotional and/or neglect issues.
>
> The Family Court is mandated to report suspected abuse to [the child protection agency] and will provide reports of harm to [the agency]. If the information is considered at this time to reach the threshold then a notification maybe recorded ... If the notifier's concerns are negated and/or not able to be confirmed by the child, commonly the notifier will be considered likely to be the problem. The outcome will then reflect that the harm is from the notifier not the alleged perpetrator or commonly that it is both parents who are contributing to the emotional harm of a child caught up in the Family Court conflict ...
>
> All of the issues outlined are relevant to all types of harm to children. Child sexual abuse seems to multiply the above identified concerns. Counsellors are informing mothers not to name sexual abuse as an issue due to the likely response by systems ... This advice is no doubt based on the litany of examples counsellors will have been privy to about protective parents who refuse to provide children 'unsupervised contact' with an alleged sexual perpetrator and subsequently have the contact decision become a 'live with' the perpetrator decision due to non compliance by the protective parent. Often the alleged perpetrator has not had significant care responsibilities for

> the child before the punitive decision has been made. How is this consistent with the child's best interests? I have examples of protective parents who have refused unsafe contact for their child only to lose the care of their child to the alleged sexual perpetrator. They have often exhausted every avenue for assistance and every complaints mechanism to no avail.
>
> ... Over ten years ago a mother committed suicide and killed her young child rather than allow her child to be placed with his father who she believed and counsellors believed was sexually abusing her child. I think the importance of what is happening to our children and their protective parents in our systems for a long time now can no longer be ignored.[2]

Outline of this part

12.4 This part of the Consultation Paper will focus on the issues raised by the first Term of Reference in relation to child protection. This chapter provides an introduction to these issues. Following a snapshot of the extent of the problem of child abuse and a discussion of terminology, the chapter provides a brief overview of child protection followed by particular aspects of the constitutional framework for dealing with child protection issues in the Australian federal system[3] and a consideration of the 'best interests of the child' principle.

12.5 The remaining two chapters in this part concern first, interactions between child protection and criminal law and, secondly, a chapter that focuses on the interactions between the family law and child protection systems.

Extent of the problem of child abuse and neglect

12.6 Child abuse and neglect, like family violence, are matters of increasing concern in Australia. The report, *The Cost of Child Abuse in Australia*,[4] estimated that, in 2007, 177,000 children under the age of 18 were abused or neglected in Australia, but stated the figure 'could be as high as 666,000 children and young people'.[5] The corresponding cost of child abuse incurred by the Australian community in 2007 was estimated to be between $10.7 and $30.1 billion. In addition, the projected cost over the lifetime of children who were first abused or neglected in 2007 is between $13.7 and $38.7 billion.[6]

12.7 As with family violence, particular circumstances increase the likelihood of child abuse and neglect. For example, younger children are more vulnerable to maltreatment; children with a disability are more likely to be abused than other

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2 Child Safety Senior Practitioner, *Correspondence*, 30 March 2010.
3 See further, Ch 2.
4 Access Economics Pty Limited, Australian Childhood Foundation and Child Abuse Prevention Research Australia, *The Cost of Child Abuse in Australia* (2008).
5 Ibid, xvi.
6 Ibid, xvi.

children; and Indigenous children aged 0 to 17 years were 4.6 times more likely than average to be the subject of a substantiated report of abuse or neglect.[7]

12.8 The exposure of children to violence has a significant community impact because its effects may be enduring and compounded where a child, who was exposed to violence, uses violence in adulthood:

> Children are impacted adversely by experiencing or being aware of violence toward a parent. The impacts can be physical, emotional or psychological, which can be both short and long term. Children exposed to violence have higher levels of aggression, behavioural problems and anxiety, and lower self esteem. Exposure to family violence affects a child's relationships, social and cognitive development, education and mental health.
>
> Early childhood adversity and abuse lead to enduring consequences that extend into adult life. Consequences can include mental health problems in adulthood. When predicting levels of depression in adults, the greatest contributing factors include neglect, excessive physical punishment and family conflict. Among the strongest predictors of problems related to alcohol use is physical and verbal abuse.[8]

12.9 The intergenerational and complex nature of violence in some Indigenous communities, particularly sexual violence, was highlighted by a Women's Legal Service representative on Commissions' Family Violence Online Forum:

> A real problem is the intergenerational nature of child sexual abuse, the normalisation of it, and having to deal with that, it's not always an issue of evidence, but who is the perpetrator when children are acting out. In families where intergenerational abuse is present, it's hard to point the finger, and when you're dealing in this legal context of individual rights and interests in time with children—how that is constructed in a way to protect the child and for the mother—to give the woman power to protect the child against the extended family, when it might be the father's father. I've been giving a lot of women that advice about protecting a child from a paternal grandfather. And it's not easy to construct court orders in terms of extended families, because fathers step away and they may be in denial about that abuse and may have been victims themselves. You might have parents who are trying to break that cycle but struggling and coming to us for advice. ...
>
> The biggest thing from my point of view is the co-ordination of getting women into safe houses, and making them understand that we have to do that first, so we're trying to work between the lawyer and the family support services and the court support worker, and it's trying to get the women to understand to move to safety. That's our first priority. And getting a safe place is a major issue. If you've got a lady with a son over 10, you can't get into the women's shelters, so she chooses to go back or lives in a car, usually where they can't be recognised, so it will be somewhere without a big number of ATSI people, which puts them in a dangerous situation.[9]

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7 Ibid, 9.

8 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), 22.

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

12.10 This example illustrates the points of intersection and issues of interaction between child protection and criminal law. It also highlights that family violence issues require the engagement of appropriate services at critical times—quite apart from any issues that sit within a legal framework.

Terminology

12.11 For the purposes of this part of the Consultation Paper the following terminology is used.

Child protection laws

12.12 'Child protection laws' includes laws described as 'child welfare laws'. The latter term is used in the *Family Law Act* and refers to a prescribed class of laws.[10]

Child maltreatment

12.13 In this Part the expression 'child maltreatment' is used generically to refer to

> any non-accidental behaviour by parents, caregivers, other adults or older adolescents that is outside the norms of conduct and entails a substantial risk of causing physical or emotional harm to a child or young person. Such behaviours may be intentional or unintentional and can include acts of omission (i.e., neglect) and commission (i.e., abuse).[11]

12.14 In particular contexts specific definitions of various types of conduct within the concept of 'child maltreatment' may apply:

> In the absence of universal definitions of child abuse and neglect, different professional fields have developed their own definitions. There are medical and clinical definitions, social service definitions, legal and judicial definitions, and research definitions of child maltreatment.[12]

12.15 While 'child maltreatment' is used as the generic expression, specific contexts may require a consideration of the particular kind of action or omission that triggers child protection intervention.[13]

Parental responsibility

12.16 The primary intersection between child protection and family law systems arises in relation to determinations of responsibility for the continued care and responsibility of a child or young person. The *Family Law Act* characterises the responsibility in

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10 *Family Law Act 1975* (Cth) s 4(1); *Family Law Regulations 1984* (Cth) reg 12B sch 5.

11 R Price-Robertson and L Bromfield, *National Child Protection Clearinghouse Resource Sheet No 6—What is Child Abuse and Neglect?* (2009) Australian Institute of Family Studies. See also: P Holzer and L Bromfield, *Child Abuse Prevention Resource Sheet No 12: Australian Legal Definitions—When is a Child in Need of Protection?* (2007) Australian Institute of Family Studies.

12 R Price-Robertson and L Bromfield, *National Child Protection Clearinghouse Resource Sheet No 6—What is Child Abuse and Neglect?* (2009) Australian Institute of Family Studies.

13 The different thresholds for intervention are considered in Ch 13.

terms of the powers and obligations that parents have for their children under the broad umbrella of 'parental responsibility', which is defined as meaning 'all the duties, powers, responsibilities and authority which, by law, parents have in relation to children'.[14]

12.17 As noted in Chapter 8, parenting orders may deal with a range of matters including with whom a child should live, spend time or communicate; the allocation of parental responsibility; maintenance of a child; steps to be taken before applying to the court to vary a parenting order; the process for dispute resolution; and any aspect of the care, welfare and development of a child.[15]

12.18 Notions of parental responsibility also appear in state and territory child protection laws that provide for decisions to be made about who shall have continued care and responsibility for a child. The language and content of individually expressed concepts varies—some legislation using terms such as 'guardianship' and 'custody',[16] others using terminology to reflect the *Family Law Act*.[17]

Child protection history

12.19 The history of child protection involves a consideration of the inherent jurisdiction of the court, the family and the state, the introduction of child welfare legislation in the states and territories as well as the emergence of federal jurisdiction. That child protection law exists on several levels necessarily leads into the question of the interaction between the various laws which is one of the focuses of this Inquiry.

Parens patriae

12.20 The Supreme Court of each state and territory has a very wide power to make orders to protect the welfare of children, known as the *parens patriae* ('parent of the country') jurisdiction. The jurisdiction has been described as 'a nebulous, historic doctrine',[18] the underlying premise of which is that the children in question have no other, or no other suitable, guardian.

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14 *Family Law Act 1975* (Cth) s 61B.

15 Ibid s 64B(2).

16 *Children, Youth and Families Act 2005* (Vic) ss 4 and 5; *Child Protection Act 1999* (Qld) ss 12 and 13(c) and Sch 3 (Dictionary). A note to the definition refers to Pt VII Div 2 of the *Family Law Act 1975*; *Children's Protection Act 1993* (SA) s 6; *Children, Young Persons and Their Families Act 1997* (Tas) ss 3, 5 and 6.

17 *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 38, 69(2) and 149; *Children and Community Services Act 2004* (WA) ss 3 and 42; *Children and Young People Act 2008* (ACT) ss 17 and 18; *Child and Protection of Children Act* (NT) (in force at 16 September 2009) ss 22 and 123(1)(d) provides for the making of long-term parental responsibility directions.

18 M Donaldson, *The King, the Courts and 'Incompetent' Children: The Welfare Jurisdiction of the Family Court of Australia, Research Note No 17 2004–05* (2004) Parliament of Australia <www.aph.gov.au/library/Pubs/> at 14 April 2010at 31 March 2010.

12.21 When the jurisdiction of Chancery became vested in the Supreme Courts of the states and territories, the *parens patriae* jurisdiction was included as part of the inherent jurisdiction of the court.[19]

The family and the state

12.22 The state, as *parens patriae*, and the family intersect in the arena of child protection. More particularly, in the contemporary context, the question is when a parent or parents may 'lose' their children to the state. In the report, *Seen and Heard: Priority for Children in the Legal Process*, the ALRC and the Human Rights and Equal Opportunity Commission (HREOC) considered the various theories about how the family and the state ought to relate with respect to children.

12.23 The perspectives of intervention range from minimalist to interventionist, and include ideas about the role of the biological family. The minimalist position is reflective of the period of 'father-right',[20] and ideas of the 'private sphere' of the family.[21] Historically, children were considered essentially as the property of their father. The construction of children as property lingers in the use of the pronoun 'it' often used to refer to a child—which renders the child even without gender.[22] For example, in the late 19th century case, *Re Agar-Ellis*, Bowen LJ remarked that

> To neglect the natural jurisdiction of the father over the child until the age of twenty-one would be really to set aside the whole course and order of nature, and it seems to me it would disturb the very foundation of family life.[23]

12.24 The interventionist approach seeks to ensure that 'all children are provided with a right to caring adults who meet their needs'.[24] It reflects a stronger notion of children's rights.

> In this model, the state makes the decisions as to whom those adults should be. While the focus of this model is the child rather than the adults in the family, this model of intervention may overlook the strength of bonds between parent and child, even when

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

20 Historically the father was the master of his household and, by the common law, had an 'absolute right' to his children: H Radi, 'Whose Child' in J Mackinolty and H Radi (eds), *In Pursuit of Justice—Australian Women and the Law 1788–1979* (1979) 119, 119. He had custody and guardianship and all other rights in relation to children and even on his death he could determine questions of guardianship in relation to the children of his marriage: *Eyre v Shaftesbury* (1722) 2 P Wms 103, 107. See further: A Powell and S Murray, 'Children and Domestic Violence: Constructing a Policy Problem in Australia and New Zealand' (2008) 17(4) *Social Legal Studies* 453.

21 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [3.6]. See Ch 2 in relation to international conventions concerning the family.

22 See, eg, the following discussion of the position of the child in Roman Law: J Tobin, 'The Development of Children's Rights' in G Monahan and L Young (eds), *Children and the Law in Australia* (2008) 23, [2.2].

23 *Re Agar-Ellis* [1883] 24 Ch D 317, 336.

24 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [3.7].

> the parent may be considered unsatisfactory. It also places too much faith in the value of state intervention, assuming that the agents of the state, such as social workers and judges, are capable of making sound and appropriate judgments that provide better outcomes for children.[25]

12.25 The importance of maintaining the biological family wherever possible is a third perspective:

> State intervention is reserved for responding to problems within families, attempting to redress these so that the child can remain at home or at least in close contact with the family. Critics argue that this view may place too much emphasis on biological ties and that it does not differentiate between the interests, feelings and welfare of children and those of parents.[26]

12.26 Each of these perspectives is evident in different ways in the multiple facets of interaction between families and the state—articulated expressly or impliedly as 'father right', 'parents' rights', or 'children's rights', which may be in conflict with each other.

> There are basic personal interests at stake here, which may sometimes conflict, such as the interest of parents to have guardianship and custody of their children, and the interests of children to be safe and protected from certain types of harm. These conflicts raise difficult questions for child protection professionals, legislators, policymakers and courts. Within the broader questions are finer ones such as the unequal and possibly unfair application of certain provisions and outcomes to specific population groups, such as single parents, and parents with an intellectual disability or mental illness. As well, compounding these contentious problems are practical problems such as one of the most daunting issues facing all jurisdictions: the adequate supply and funding of service providers.[27]

12.27 The dynamics of child protection involve not only the question of parental responsibility as between parents, but also the question of when it is appropriate for the state to intervene into the historically 'private' space of the family—when children need to be rescued even from their own parents through the intervention of the state.

Child welfare

12.28 From the mid-19th century, all Australian governments legislated to secure the welfare of children by defining the circumstances in which children needed to be protected from neglect or abuse, and the ways in which young people might be treated

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25 Ibid.

26 Ibid, [3.8].

27 B Mathews, 'Protecting Children from Abuse and Neglect' in G Monahan and L Young (eds), *Children and the Law in Australia* (2008) 204, [10.32]

as criminals.[28] By the end of the 19th century an 'increasingly pervasive protective attitude to children' was evident.[29]

12.29 The 'child rescue movement' initially took the form of charitable and philanthropic endeavours, following upon the interest in the prevention of cruelty to animals.[30] It then led to the introduction of child protection legislation and the establishment of children's courts, representing a large shift in the approach to children.

> These developments were often motivated by revelations of severe cases of abuse or neglect, which spurred child welfare activists in the late 1800s and early 1900s to form rights and advocacy bodies including societies for the prevention of cruelty to children.[31]

12.30 Starting with South Australia in 1890, then following with all states by 1918, dedicated children's courts were established throughout Australia.[32] Children's courts had two principal functions: child care and protection; and exclusive jurisdiction with respect to child offenders. They were required to sit separately, either in specially designated premises, or by arranging for segregated court time, when other business was not being transacted.[33]

12.31 By the 1970s all states and territories had introduced legislation to protect children,[34] although the language differed.

> Changing perceptions of childhood among professionals and the public impacted on organisations established to protect children from child maltreatment. These perceptions have continued to evolve resulting in elevated standards of what constitutes appropriate care, a broadened concept of where childhood starts and ends, and a growing awareness of child welfare and child rights.[35]

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

29 H Radi, 'Whose Child' in J Mackinolty and H Radi (eds), *In Pursuit of Justice—Australian Women and the Law 1788–1979* (1979) 119, 125. The difficulties a woman experienced in relation to custody cases with respect to her children are illustrated in, eg, *Ex parte Richardson* (1874) 12 SCR Eq 99.

30 L Bromfield and P Holzer, *A National Approach for Child Protection—Project Report* (2008) National Child Protection Clearinghouse, 12.

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

32 Seymour details the legislation establishing the first Children's Courts: J Seymour, *Dealing with Young Offenders* (1988), 76–87.

33 Ibid, 83.

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

35 L Bromfield and P Holzer, *A National Approach for Child Protection—Project Report* (2008) National Child Protection Clearinghouse, 12.

> References were made to the need to employ preventive and corrective measures rather than punitive ones and hence to 'reclaim those boys and girls who are now under temptation and on the downward path'.[36]

12.32 The ALRC identified the importance of sharpening the distinction between care proceedings and prosecutions for criminal offences in its report on *Child Welfare* in 1981.[37] The evolution of the child protection system into one with a very wide reach has prompted, in part, current reviews of child protection services. A central and recurring theme is when it is appropriate for the state to intervene, and, further, what is the role of child protection services:

> Child protection was originally set up to provide a crisis response to cases of severe abuse in which the state needed to intervene to protect the child. However, the crisis response is not appropriate for the majority of families who are referred to child protection departments as they are typically in need rather than in crisis. There will always be a role for a 'forensic' tertiary response in cases where there are serious protective concerns. However, the challenge facing the sector is to devise service responses that are better suited to addressing family support needs. Recognition of this fact is slowly bringing about change to the delivery of child protection and child and family welfare services both nationally and internationally.[38]

Child protection overview

12.33 In this Inquiry the Commissions seek to focus on the range of interaction issues through the eyes of the participants in the system. As noted in Chapter 1, the material has been somewhat artificially divided to focus the discussion on a range of areas of specific interaction. However, the Commissions consider that to achieve the best outcomes for the safety of women and children—indeed for all participants—in the legal framework for dealing with issues of family violence, it is necessary to keep returning to the standpoint of viewing the issues through the eyes of the participants. In this part of the Consultation Paper the Commissions are concerned to see child protection issues through the eyes of the children—their experiences; their protection.

12.34 This section of the chapter provides a brief overview of the engagement of the child protection system to set the scene for the two chapters to follow in this part. It considers the place of legal responses in the child protection continuum, the process of triggering child protection intervention and the types of orders that may be made.

A continuum—from primary to tertiary intervention

12.35 The Commissions acknowledge that the interactions under review comprise only a part of a much bigger picture, and one that is very much of a 'tertiary' kind as

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36 J Seymour, *Dealing with Young Offenders* (1988), 70.

37 Australian Law Reform Commission, *Child Welfare*, ALRC 18 (1981). The outcome of this and other work was a series of proposals to provide children with increased safeguards—a need to adopt a 'justice model': J Seymour, *Dealing with Young Offenders* (1988), 167.

38 L Bromfield and P Holzer, *A National Approach for Child Protection—Project Report* (2008) National Child Protection Clearinghouse, 15.

legal framework issues sit a long way along the child protection continuum from the first point, or primary end, of coming to the notice of child protection services. Leah Bromfield and Prue Holzer of the National Child Protection Clearinghouse, Australian Institute of Family Studies (AIFS), emphasise the importance of the primary and secondary service responses, using a public health focus:

> According to a public health model of disease prevention, tertiary services are one platform in a well functioning service system. The public health model is comprised of three service platforms: primary services, secondary services, and tertiary services. This model can also be used in a child protection context. Primary services provide services for all children (eg, education and health). Secondary services are targeted at families at higher risk or in need of additional support. Tertiary child protection services are a last resort, and the least desirable option for families or the state. Families that require a tertiary response to ensure the safety of their children form the 'tip of the iceberg'. Consequently, the primary and secondary service domains are larger than the tertiary domain representing the need for more services in these areas.[39]

12.36 Bromfield and Holzer have identified the 'multiple strategies' being implemented across Australia to meet the current challenges in child protection, and the emphasis in reviews on 'creating an integrated service system instead of focusing on "the child protection department"'.[40]

12.37 In identifying areas of interaction in practice of the various laws under consideration and raising questions about, or proposing options for, reform, the Commissions are conscious of the overall constraints of focusing on legal framework questions towards the goal of improving the safety of women and children in the family violence context. Moreover, legal frameworks—of themselves—cannot go far to break into the cycle of violence referred to above.

12.38 The Commissions also note that there is considerable work that has been undertaken, and is continuing, in relation to child protection, including in relation to the legislative framework and the child protection services sector.[41] The focus of this Inquiry—on interactions of child protection and certain other laws—complements such intra-jurisdictional reform work.

Triggering intervention

12.39 As noted in Chapter 2, each state and territory has its own system of child protection laws and supporting agencies. In each jurisdiction there are thresholds for

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

40 Ibid.

41 Prominent examples include: J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008); Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children are Sacred: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007); Ombudsman Victoria, *Own Motion Investigation into the Department of Human Services Child Protection Program* (2009). At the time of writing the VLRC is conducting a review of Victoria's child protection legislative arrangements.

intervention by child protection authorities to protect children and to assist parents and families.[42] Each year the Australian Institute of Health and Welfare (AIHW) undertakes a comprehensive review of state and territory child protection and support services. The summary information and statistics in these reports provide useful background in relation to child protection across Australia.[43] The 2008–09 report on child protection in Australia by the AIHW reported that while 'the processes used to protect children are broadly similar',[44] there are 'significant differences' in how jurisdictions deal with and report child protection issues.[45]

12.40 Child protection intervention is triggered first by a report of concern to a child protection or support service. Reports could come from community members, professionals, organisations, the child, parents or relatives, and may relate to abuse and neglect or 'broader family concerns such as economic problems or social isolation'.[46] Reports are then assessed against the relevant criteria and classified either as a family support issue or warranting a child protection notification.

12.41 An investigation involves an assessment of the degree of harm or risk of harm for the child and will either be 'substantiated' or 'not substantiated' and the assessment questions may differ according to the relevant jurisdiction:

> States and territories differ somewhat in what they actually substantiate. All jurisdictions substantiate situations where children have experienced significant harm from abuse and neglect through the actions of parents. Some jurisdictions also substantiate on the basis of the occurrence of an incident of abuse or neglect, independent of whether the child was harmed, and others substantiate on the basis of the child being at risk of harm occurring.[47]

12.42 The relevant child protection agency may apply to the court in each jurisdiction for a care and protection order, but such action is usually taken 'only as a last resort in situations where the child protection agency believes that continued involvement with the child is warranted'.

> This may occur in situations where the family resists supervision and counselling, where other avenues for resolution of the situation have been exhausted, or where removal of a child into out-of-home care requires legal authorisation.[48]

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42 Australian Institute of Health and Welfare, *Child Protection Australia 2008–09* (2010), ch 1. See also B Mathews, 'Protecting Children from Abuse and Neglect' in G Monahan and L Young (eds), *Children and the Law in Australia* (2008) 204.

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

44 Australian Institute of Health and Welfare, *Child Protection Australia 2008–09* (2010), 1.

45 Ibid, 1. Appendix 4 of the report provides extracts from the relevant legislation of the 'in need of care and protection' threshold.

46 Ibid, 2.

47 Ibid, 3.

48 Ibid.

12.43 The level of reporting has increased significantly. The AIHW noted that in the reporting period 2008–09, the number of children subject to a notification of child abuse or neglect; the number under care and protection orders and the number in out-of-home care all rose; and that Indigenous children were over-represented in all areas.[49] The increase is in part due to a broadening over time of the definition of what constitutes child abuse and neglect.[50] Also noted are differences between jurisdictions in policies and practices in relation to child protection, which affect data collection. A major project to solve this problem is part of the *National Framework for Protecting Australia's Children*[51] based on the development of a unit record data collection.[52]

12.44 Some notifications may give rise to prosecutions, as considered in Chapter 13. The police and Director of Public Prosecutions in the relevant jurisdiction may be involved in making an assessment of whether a matter should proceed further down the criminal justice pathway. If not, the matter falls back within the overall umbrella of child protection concern.

12.45 The AIHW report includes the following diagram to illustrate the main processes used in child protection systems across Australia.[53]

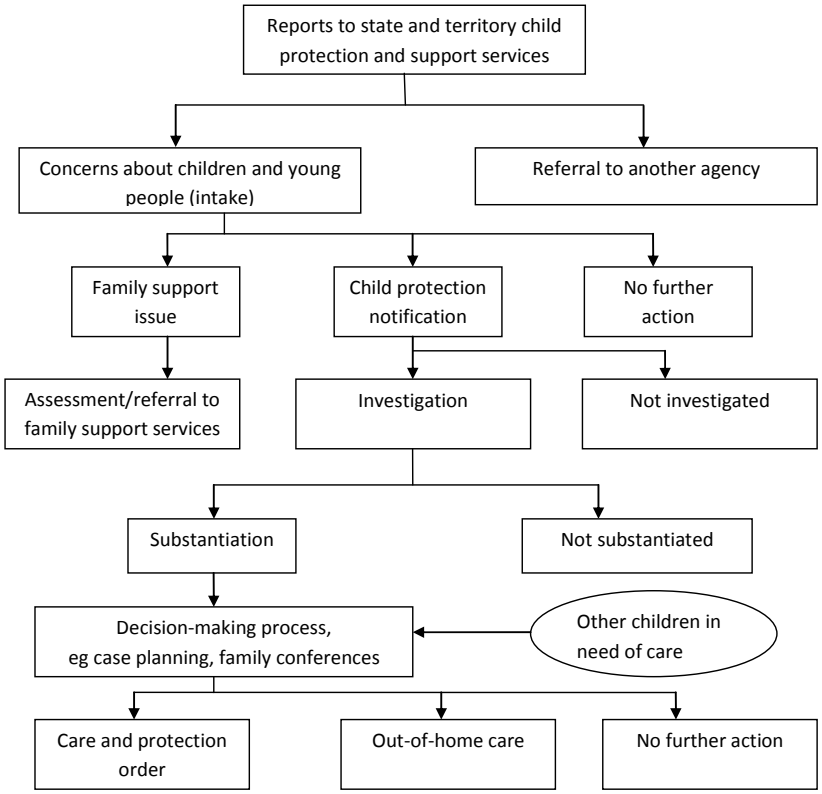
49 Ibid, vii.

50 Ibid, 5. L Bromfield and P Holzer, *A National Approach for Child Protection—Project Report* (2008) National Child Protection Clearinghouse, App 5, provides a summary of policy and practice differences in states and territories.

51 Australian Institute of Health and Welfare, *Child Protection Australia 2008–09* (2010), 6–7; Council of Australian Governments, *Protecting Children is Everyone's Business—A National Framework for Protecting Australia's Children 2009–2020* (2009).

52 Australian Institute of Health and Welfare, *Child Protection Australia 2008–09* (2010), [1.4].

53 Ibid, 2, Figure 1.1.



The child protection process in Australia

Types of orders

12.46 The kinds of orders in the child protection system are described in the AIHW report:

> Guardianship orders are sought through the court. They involve the transfer of legal guardianship to an authorised department or to an individual. By their nature, these orders involve considerable intervention in the child's life and that of the child's family, and are sought only as a last resort. Guardianship orders convey to the guardian responsibility for the welfare for the child (for example, regarding the child's education, health, religion, accommodation and financial matters).
>
> Custody orders generally refer to care and protection orders that place children in the custody of a third party. These orders usually involve child protection staff (or the person who has been granted custody) being responsible for the day-to-day requirements of the child while the parent retains guardianship.[54]

54 Ibid, 24.

12.47 The differences with respect to particular orders are usefully summarised:

> Care and protection orders are legal or administrative orders or arrangements which give community services departments some responsibility for a child's welfare. The level of responsibility varies with the type of order or arrangement. These orders include guardianship and custody orders; third-party parental responsibility arrangements, supervision and other finalised orders as well as interim and temporary orders; and administrative arrangements. The involvement might take the form of total responsibility for the welfare of the child (for example, guardianship); or responsibility for overseeing the actions of the person or authority caring for the child; responsibility for providing or arranging accommodation; or reporting or giving consideration to the child's welfare. Jurisdictions can also engage in administrative arrangements as an alternative to seeking protection orders from a court. Administrative arrangements are interventions where an agreement is reached with families to meet the protection and care needs of the child by working on a voluntary basis.[55]

12.48 Guardianship or custody orders in the context of child protection are different from the range of orders under the *Family Law Act*, which now uses the language of 'parental responsibility' and 'the time a child is to spend with another person'.[56] The interaction with the federal system is considered next.

Child protection in a federal system

A fragmented system

12.49 The division of power between the Commonwealth and the states and territories is considered in Chapter 2. State and territory laws concerning child protection and family violence intersect and overlap with federal family law—in the *Family Law Act.* Matters in relation to children, and arguments over contact, may arise as a dispute between parents and the state in a children's court—where care and protection proceedings are initiated with respect to a child or children—or as a dispute between parents in a court with jurisdiction under the *Family Law Act*.[57] The following diagram illustrates the child protection process and the interactions between state and territory and federal laws:[58]

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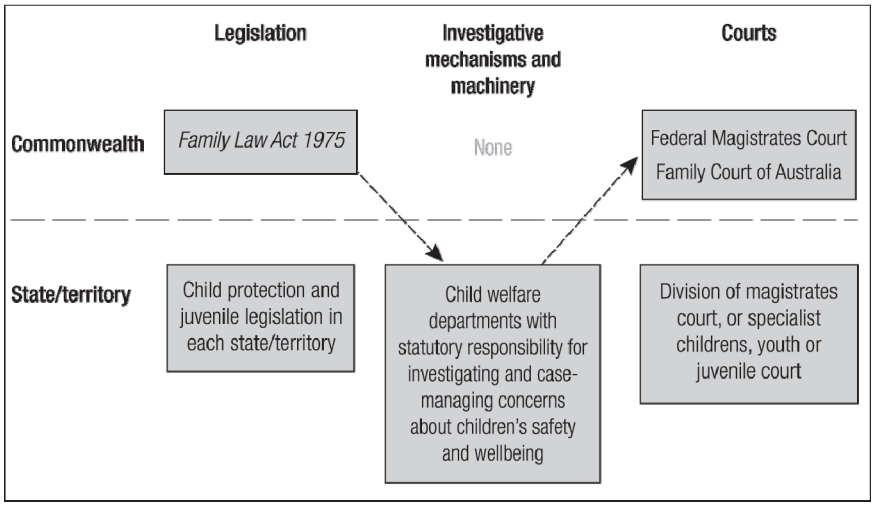
55 Ibid, 3–4.

56 *Family Law Act 1975* (Cth) pt VII div 2 and div 5 respectively. See Ch 8.

57 Note that a parenting order may be made in favour of a parent or 'some other person': Ibid s 64C.

58 D Higgins and R Kaspiew, '"Mind the Gap…": Protecting Children in Family Law Cases' (2008) 22 *Australian Journal of Family Law* 235, 251.

Figure 1. The legal and investigatory gap in family law / child protection issues



12.50 As noted in the Family Law Council's advice to the Commonwealth Attorney-General in December 2009:

> The reality for a separating family experiencing contentious issues in respect of parenting capacity is that there is no single judicial forum that can provide them with a comprehensive response to address their disputes, particularly where there are underlying issues of family violence and/or child abuse.[59]

12.51 Problems arise when allegations of child abuse and neglect are made in proceedings under the *Family Law Act*. For example, as the diagram above illustrates, there is no investigative arm of family courts. Hence the problem of the abuse or neglect of a child may be dealt with under two different pieces of legislation—the *Family Law Act* and the relevant state or territory child protection legislation. The problems caused by jurisdictional overlap in the area of child protection are compounded by the fact that the family law system is federal, while the child protection and family violence protection order systems are the province of the states and territories. However, as Professor Richard Chisholm has noted, 'to some extent the issues would arise in any system which had a child protection system that is separate from the system of the adjudication of family disputes relating to children'.[60]

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59 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), [7.2].

60 R Chisholm, *Protecting Children—The Family Law Interface* (2009), 6.

12.52 The result, as noted in Chapter 2, is a fragmented system with respect to children:

> At a Commonwealth Family Law Act level, the referral of powers has certainly minimised the disorderliness and complexity of jurisdiction in relation to Australian children. Regrettably, however, fragmentation characterises child protection issues. Child protection issues are frequently raised in Family Court proceedings, even though the Family Court does not have jurisdiction. How has this situation arisen? On one view, it is consistent with the ideology of liberalism ... Disputes about the care and protection of children are regarded as public disputes with the state acting as an applicant, but disputes under the Family Law Act are regarded as private disputes between parents or family members. The states have been far less reluctant to legislate in ways which directly affect the family, or redefine the family, for example, the Property (Relationships) Act 1984 (NSW) and the Children and Young Persons (Care and Protection) Act 1998 but ... the Commonwealth has been far more reluctant.[61]

12.53 Western Australia is in a different position. As noted in Chapter 2, when the *Family Law Act 1975* (Cth) was introduced, Western Australia opted instead to establish its own family law system. The court exercises federal jurisdiction under the *Family Law Act* as well as state jurisdiction for matters under the *Adoption Act 1994* (WA), *Surrogacy Act 2008* (WA) and the *Children and Community Services Act 2004* (WA).

The welfare jurisdiction of the *Family Law Act*

12.54 In 1983 the *Family Law Act* was amended to include provisions expressly dealing with the welfare of children in Part VII of the Act. The impact of these provisions, according to Dr Anthony Dickey QC, is to supersede 'virtually all of the *parens patriae* jurisdiction of the Supreme Courts', with the exception of Western Australia.[62] This conclusion is based upon the 'combination of two factors':

> The first is the fact that in respect of almost all children, proceedings for most *parens patriae* relief can now be commenced under Pt VII of the *Family Law Act*, and particularly under s 67ZC(1), where the power of the court to make an order relating to the 'welfare' of children is virtually equivalent to the power possessed by a Supreme Court pursuant to its *parens patriae* jurisdiction.
>
> The second factor is the circumscribing effect of s 69B(1) of the 1975 Act. This provided that if proceedings can be instituted under Pt VII of the Act, they must be instituted under this Part. Only if proceedings cannot be instituted under Pt VII (and only if they do not otherwise constitute a 'matrimonial case' as defined in s 4(1)) can they be commenced in a Supreme Court or other court exercising State or Territorial jurisdiction.[63]

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61 T Altobelli, *Family Law in Australia–Principles and Practice* (2003), 55.
62 A Dickey, *Family Law* (4th ed, 2002), 395.
63 Ibid.

12.55 An example of residual power is where children have been placed in care under the state's child welfare legislation, as matters concerning the guardianship and custody of children in care are outside the scope of the family law powers that were referred to the Commonwealth Parliament by the states.[64]

12.56 Western Australia did not refer powers with respect to children and, accordingly, state law still applies, although the provisions of Pt VII of the *Family Law Act* have been substantially reproduced in Pt 5 of the *Family Court Act 1997* (WA).[65]

12.57 The welfare jurisdiction under Pt VII is not an 'at large' jurisdiction.[66] Decisions involving the welfare jurisdiction include:

- *Marion's* case [(1992) 175 CLR 218], where the High Court authorised the performance of a hysterectomy on an intellectually disabled, 14-year-old girl who was unable to care for herself [The Court's authorisation was required to avoid committing an unlawful assault under state law]
- *In the matter of the welfare of A (a child)* (1993) FLC 92-402, where the Family Court granted an application for a female child with an extreme degree of masculinisation (because of an adrenal gland abnormality) to undergo female to male sex reassignment surgery
- *In the matter of P and P* (1995) FLC 92-615, where the Full Court of the Family Court permitted the parents of an intellectually disabled child (who also suffered from epilepsy) to consent to a hysterectomy being performed on the child—however, the Court was of the view that neither sterilisation to prevent pregnancy nor the issue of menstrual management would (by itself) provide sufficient ground to authorise sterilisation, but were relevant considerations among many, and
- *In the matter of GWW and CMW* (Hannon J, 21 January 1997), where the Family Court authorised the harvest of bone marrow cells and/or blood from a child for transplant to the child's aunt.[67]

12.58 Other examples include the decision in *Re Alex: Hormonal Treatment for Gender Identity Dysphoria*, in which the welfare jurisdiction was used to authorise reversible medical treatment as a pre-cursor to irreversible treatment;[68] and *Re Angela (Special Medical Procedure)*, in which the court gave approval for a hysterectomy on an eleven-year old girl suffering from Rett Syndrome.[69]

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64 A Dickey, *Family Law* (5th ed, 2007), 395–6; and see A Dickey, *Family Law* (5th ed, 2007), 288.
65 Ibid, 396.
66 *Northern Territory of Australia v GPAO* (1999) 196 CLR 553, [142], Gaudron J.
67 M Donaldson, *The King, the Courts and 'Incompetent' Children: The Welfare Jurisdiction of the Family Court of Australia, Research Note No 17 2004–05* (2004) Parliament of Australia <www.aph.gov.au/library/Pubs/> at 14 April 2010at 31 March 2010.
68 *Re Alex: Hormonal Treatment for Gender Identity Dysphoria* [2004] Fam CA 297.
69 *Re Angela* [2010] FamCA 98.

One family, multiple systems

12.59 That families may be involved in proceedings in more than one jurisdiction is a recurring theme of the interactions in practice under review in this Inquiry. Not only does this increase the possibility of inconsistent orders—particularly in relation to children—but also of 'putting family members at risk of further violence and abuse and exacerbating an already strained situation':

> The jurisdictional divide has also perpetuated a culture of separation between States and Territories as administrators of public aspects of family law and the federal family courts as adjudicators of [private] disputes. There is inadequate communication, coordination or information sharing between courts and authorities despite significant overlap.[70]

12.60 How can a bifurcated system overcome this fundamental problem? The Family Law Council in its advice to the Commonwealth Attorney-General in December 2009 signalled that a referral of powers should be given so that federal family courts can have concurrent jurisdiction with state and territory courts 'to deal with all matters in relation to the children including where relevant family violence, child protection and parenting orders' and that '[a]chieving this goal would be the best outcome for people experiencing family violence and may circumvent the disparity between children's, state and family courts'.[71]

12.61 The Family Law Council referred to consultations undertaken by Family Pathways and the support expressed for an integrated court—'one court that would deal with criminal proceedings, protection orders, child protection and family law issues'.[72] The Council noted, however, that implementation of such an approach required constitutional amendment or a further referral of powers by the states and territories in relation to child welfare and family violence orders. The former has proved, historically, very difficult. In this Inquiry, as noted in Chapter 1, the Commissions consider a number of strategies for achieving the sense of seamlessness that the 'one court' idea implies.[73]

One family, competing discourses

12.62 As noted throughout this Consultation Paper, family violence may trigger multiple interventions with a family and multiple engagements of the family—in particular women and children—with the legal system. In Chapter 3 the Commissions consider the various conceptualisations of family violence across family violence legislation, the *Family Law Act*, the criminal law, and other types of legislation such as

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70 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), [7.7], 60. The word in brackets is incorrect in the original, where it appears as 'public': R Sexton, *Correspondence*, 25 March 2010.

71 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), 61, [7.7].

72 Ibid, 61.

73 See, eg, Ch 19.

victims' compensation legislation and migration regulations. The different purposes of the different legislative regimes are explored in order to facilitate discussion of a common interpretative framework for family violence in such laws. When the child protection system is added into the mixture of legal frameworks another dimension emerges—what has been described as 'contradictory practices and discourses'.[74]

12.63 In examining how child protection laws interact in practice with the *Family Law Act* and with criminal laws, understanding and acknowledging the dynamics inherent in the different legislative regimes provides an instructive backdrop against which to consider any options for reform. Arguments for change—and options for reform—may reflect different, often competing, dynamics. Recognising the dynamic, or propelling discourse within the argument enables a fuller assessment of the merit of any proposal and an ability to weigh up competing dynamics on a principled basis.

Different planets

12.64 Marianne Hester, describing the experience in the United Kingdom, refers to the different cultural histories of what she describes as the three 'planets' of domestic violence, child protection and child contact. Her observations have been echoed in the work undertaken in this Inquiry to date:

> Domestic violence work in the UK (and many other countries) has been influenced by feminist understanding of domestic violence as gender based, and tends to see the problem as (mainly) male perpetrators impacting on (mainly) female victims or survivors. The work of child protection services in the UK has a very different history to that of domestic violence, with the family, and in particular 'dysfunctional' families, as central to the problem. Within this approach the focus is on the child and her or his main carer, usually the mother. These structural factors, with domestic violence and child protection work on different 'planets', have made it especially difficult to integrate practice, and have resulted in child protection work where there is a tendency to see mothers as failing to protect their children rather than as the victims of domestic violence, and where violent male perpetrators are often ignored. These difficulties are made even more complex where both child protection and arrangements for child visitation post separation of the parents intersect. Within the context of divorce proceedings, mothers must be perceived as proactively encouraging child contact and must *not* be attempting to 'aggressively protect' their children from the direct or indirect abuse of a violent father. The child protection and child visitation/contact planets thus create further contradictions for mothers and children: there may be an expectation that mothers should protect their children, but at the same time, formally constituted arrangements for visitation may be implemented that do not adequately take into account that in some instances mothers and/or children may experience further abuse.[75]

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74 M Hester, 'Comment on H Douglas and T Walsh, "Mothers, Domestic Violence and Child Protection"' (Paper presented at Key Centre for Ethics, Law, Justice and Governance Seminar, Griffith University, 22 April 2009), 50.

75 Ibid, 50–51.

12.65 In an Australian study to consider how community workers who work with mothers perceive the response of child protection workers to cases where family violence is a key risk factor, similar perceptions and juxtaposed dynamics were evident. The study, conducted by Dr Heather Douglas and Dr Tamara Walsh of the University of Queensland provides another snapshot of the competing discourses at play, strongly echoing the observations quoted above.[76]

Competing dynamics

12.66 Douglas and Walsh conclude that the ways that mothers are perceived by child protection workers 'are often pivotal in determining the approach to be taken':

> if mothers are perceived as unprotective, they may not receive appropriate support. Further, an approach that blames a mother's failure to protect her child from domestic violence is unlikely to address the perpetrator's violence, meaning that a violent cycle of domestic abuse is more likely to continue. It has been argued elsewhere that parent blaming and the adoption of a child rescue framework by child protection agencies can be a negative approach as it reduces the possibility of a 'therapeutic alliance' between workers and parents that may help to resolve safety issues. This is a particularly important issue in domestic violence situations where work with both parents is important if the cycle of abuse is to be stopped.[77]

12.67 The competing dynamics can be summarised as:

- the 'interpersonal conflict' misunderstanding—failing to recognise the particular dynamics associated with family violence, with 'ramifications for the way in which child protection workers respond to abused mothers and their children';[78]
- the 'protective parent' dilemma—if a mother is not perceived as acting protectively, she may be seen as 'part of the reason for the dangerous environment' and removal from her care becomes more likely;[79]
- 'the mother is to blame' phenomenon—the focus of child protection authorities on the woman and her capacity to protect the children, and not on the father's 'capacity to cease using violent or abusive behaviour';[80]
- the 'leave' ultimatum—a choice between moving 'to accommodation away from the domestic violence perpetrator and continue to care for the children, or stay with their abuser and lose the children';[81]

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76 H Douglas and T Walsh, 'Mothers, Domestic Violence and Child Protection' (Paper presented at Key Centre for Ethics, Law, Justice and Governance Seminar, Griffith University, 22 April 2009).
77 Ibid, 9.
78 Ibid, 6.
79 Ibid, 7.
80 Ibid, 8.
81 Ibid, 13. This is described by the authors as a 'binary ultimatum to stay or leave', which, without significant support, 'misunderstands the complexity of many mothers' situations': 19.

- the 'tightrope' women walk—between admitting they need care to deal with family violence and yet being seen to be able to care for their children, so long as they are supported.[82]

12.68 Such dynamics, moreover, are compounded by other factors, for example where the mother suffers an intellectual disability, as illustrated in the following case study provided to the Commissions:

> Parent A has three children and lives in a very violent relationship with the father (who is 30 years older and doesn't have an intellectual disability) of the third child. She attends a women's counselling service and discloses the high levels of violence experienced by herself and, at the same time she discloses sexual abuse of her children but doesn't understand what is happening as sexual abuse.
>
> A report is made to child protection. The mother is denied access to the children because of her failure to protect the children but the father continues to have weekly access to the children.
>
> The father applies for full time care of the children. The mother does not qualify for legal aid and is left alone throughout the family law process. She attends the final family law hearing alone, doesn't understand the process of the case and leaves the court unaware that the father has full time care of the children and she has not been access to them for the next 18 years.[83]

12.69 Further compounding factors are experienced in the context of Indigenous and migrant women:

> For many Aboriginal people the intervention of child protection services is a common experience that often goes back several generations. Recently it was reported that child protection workers in Australia have begun removing the fifth generation of Aboriginal children from their parents, meaning that some Aboriginal families have an eighty year history of child protection intervention. ... Many scholars have observed that as a result of the intersecting factors of poverty, race and gender, Aboriginal women, and women who are recent immigrants, are particularly disadvantaged and discriminated against in their engagements with institutional processes.[84]

12.70 The accuracy of such observations is evidenced in the following example provided to the Commissions in the Family Violence Online Forum of the conflicting dynamics experienced by Indigenous women and the difficulty of breaking out of the cycle of violence:

> First of all our clients find it difficult to communicate with police and child protection authorities because of the past 'removal' policies and practices. Some of our women feel that to do their jobs properly the departments should be assessing placements

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82 Ibid, 23.

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

84 H Douglas and T Walsh, 'Mothers, Domestic Violence and Child Protection' (Paper presented at Key Centre for Ethics, Law, Justice and Governance Seminar, Griffith University, 22 April 2009), 20–21. See also the comment in the online forum quoted at the beginning of this Chapter.

working on the 'best interests of the child'. While our Solicitors' cases are very straightforward—with DVOs and separations etc—the other staff are dealing with domestic violence court cases, family support areas such as finding homes, furniture and visiting doctors and family meetings etc.

In saying this we would like to start with a common problem of a woman fleeing her home because of a violent situation. He is belting her, not the children, but she fears for their safety so takes them with her. In the instance that she has a male child over ten years of age she has the choice of going into a safe house and leaving the male child on the street or keeping all the children together and living in the car if she has one otherwise she moves in with a friend and puts both of them in jeopardy of losing children because the house is crowded—especially if it is a housing commission home.

If she has young children and goes into a home there is a real possibility of the safe house staff reporting the incident or in one case the safe house arranged for the children to be taken into respite care to give her a break and not being able to get them back because she has no home to go to.

So now she has no home and no children. Centrelink put her back onto Newstart payments of $450-ish per fortnight way less than her parenting payment. This means she has to abide by the Newstart program in trying to get a job and do training to build her abilities if she has been on the parenting payment for several years. She cannot (a) afford to rent a home big enough for the family; (b) apply for a large home in the hope of getting her children back as she is single; (c) buy white goods and linen as is a requirement to get children back; (d) handle the stress alone and starts drinking or taking drugs for depression as she cannot afford to go to the doctor and be diagnosed as being depressed. In which event she gets a black mark against her when she is picked up for sleeping in the street.

If she is pressured into taking out a DVO by the department who says this will give her a better chance in getting her children back—or the police put one in place against her wishes—it then goes to court and the records show she is drinking and maybe taking drugs and she has been picked up on the streets so she is automatically proven to be an unfit mother and the children are placed in the care of the father who has started this all by beating her in the first place.

Our women usually have lots of community support to look after their children—it is how that support is seen by the department that is sometimes to the detriment of our women. Non-indigenous women find some of our cultural practices hard to understand. For instance if a women is fleeing from her husband a sister or aunty will often take her in—move out of their double bed into the lounge so the fleeing family has a space of their own. If the agency sees that sister or aunt sleeping on the lounge room floor with her young child they see that as neglect to her child not assistance to the other family.

Sometimes the taking of children is just another form of violence to our women. It is like the man belts the hell out of her and because she flees with the children the department think 'well hey, let's knock her down some more!'.[85]

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

Legal versus services response

12.71 Professor Cathy Humphreys considers that the 'same stories, dominant patterns, tales of mistrust and poor practice are depressingly consistent' throughout the research into the relationship between child protection services and their interaction with women living with family violence.[86]

> They include: the failure of child protection to understand the dynamics of domestic violence; holding women living with domestic violence responsible for the protection of children rather than the perpetrator of violence; lack of education and training for child protection workers; providing inappropriate ultimatums to women to leave and keep their children or stay and lose their children; and the lack of sensitivity and understanding of the position of newly arrived migrants and Indigenous women. These are but a few of the many listed failings. The repetitive nature of these with previous research findings which take a lens to the relationship between child protection and domestic violence specialist services point to the structural nature of the problem which clearly goes beyond the intentions and practice of individual workers.[87]

12.72 The conflicting dynamics described above have been identified particularly in the service field, for example 'the disconnect between various services—police, child protection, housing services and women's services', which has 'serious implications for ensuring the safety of mothers and children'.[88] Bromfield and Holzer identify the 'two highest ranked challenges for enhancing the protection of children' as being

> to respond to pressure at the 'front end' of child protection and to build prevention and early intervention (secondary) services. From a public health approach there should be more primary than secondary services, and in turn, more secondary than tertiary services. Families should be referred directly to the most appropriate service to meet their needs. A public health approach to child protection would comprise system reforms to provide more secondary services to reduce demand on tertiary services—addressing the two highest ranking key challenges for enhancing the protection of children.[89]

12.73 One element of concern is the level of information provided to mothers by child protection workers, and how being provided a report outlining the investigation by child protection authorities and substantiation of abuse 'would be helpful for women engaging with the family law system' and also useful to assist women to become informed and understand the nature of relevant child protection interventions and the

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86 C Humphreys, 'Comment on H Douglas and T Walsh, "Mothers, Domestic Violence and Child Protection"' (Paper presented at Key Centre for Ethics, Law, Justice and Governance Seminar, Griffith University, 22 April 2009), 3.

87 H Douglas and T Walsh, 'Mothers, Domestic Violence and Child Protection' (Paper presented at Key Centre for Ethics, Law, Justice and Governance Seminar, Griffith University, 22 April 2009), 63.

88 Ibid, 27.

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

expectations of the relevant child protection authority'.[90] Developments in the child protection field may begin to address such concerns.[91]

12.74 There are also issues which engage legal frameworks—such as the way that family violence is defined and the thresholds for mandatory reporting of concerns in relation to children. Where these involve interactions of various laws they fall within the Terms of Reference for this Inquiry. As Professor Leigh Goodmark commented, the focus of reform cannot merely be on 'changing the institutional culture of child protection', but rather 'the law and legal system need to reflect an understanding of domestic violence'.[92]

> Obviously, the ideal is clear legislation that is both practical and sensitive to the needs of the various target groups, supported by an assessment tool that is evidence-based and reflective of our shared knowledge regarding the challenges and opportunities faced by those within the system, coupled with the deployment of experienced workers who welcome the opportunity to work with all parties involved towards the achievement of protective outcomes for children. Until this is achieved, we must continue to advocate around these issues, regardless of how 'repetitive' our arguments might seem.[93]

Best interests of the child

Children and human rights

12.75 The intervention of legislatures in relation to preventing the exploitation of children—particularly in the context of working hours and conditions—was elevated to the international context when, in 1929, the League of Nations adopted the Declaration on the Rights of the Child, prompted by the suffering experienced by children during and subsequent to World War I. Following World War II, the United Nations set a common standard on human rights with the adoption of the Universal Declaration of Human Rights in 1948, discussed in Chapter 2. With respect to children the key instrument is the 1989 United Nations Convention on the Rights of the Child (CROC),

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90 H Douglas and T Walsh, 'Mothers, Domestic Violence and Child Protection' (Paper presented at Key Centre for Ethics, Law, Justice and Governance Seminar, Griffith University, 22 April 2009), 89, summarising C Humphreys, 'Comment on H Douglas and T Walsh, "Mothers, Domestic Violence and Child Protection"' (Paper presented at Key Centre for Ethics, Law, Justice and Governance Seminar, Griffith University, 22 April 2009).

91 H Douglas and T Walsh, 'Mothers, Domestic Violence and Child Protection' (Paper presented at Key Centre for Ethics, Law, Justice and Governance Seminar, Griffith University, 22 April 2009), 90 – refer to the development of a code of conduct from child protection workers – provision of detailed information to parents by child protection authorities – Ainsworth 2009.

92 Ibid, 92, referring to L Goodmark, 'Comment on H Douglas and T Walsh, "Mothers, Domestic Violence and Child Protection"' (Paper presented at Key Centre for Ethics, Law, Justice and Governance Seminar, Griffith University, 22 April 2009).

93 H Douglas and T Walsh, 'Mothers, Domestic Violence and Child Protection' (Paper presented at Key Centre for Ethics, Law, Justice and Governance Seminar, Griffith University, 22 April 2009), 93.

setting out the civil, political, economic, social and cultural rights of children.[94] The principal provision in this respect is art 3(1):

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

12.76 The concept of the 'best interests of the child' is now the dominant principle in dealings with children in both the family law and child protection systems.

Primary consideration

12.77 That the best interests of the child must be a primary consideration in all actions concerning children is central to CROC.[95] It is also a principle that is firmly entrenched in the *Family Law Act*.[96] The expression 'best interests' was specifically incorporated into the Act in 1995 to bring the terms of the previous 'welfare' principle into line with the wording of CROC.[97]

12.78 As noted in Chapter 2, a number of other provisions of CROC sit alongside the principal provision:

- art 9—ensuring that children will not be separated from their parents, unless this is in the best interests of the child, for example where there is abuse or neglect of the child by the parents, but also respecting the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests;

- art 12—assuring to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child and, in particular, a right to be heard in proceedings affecting the child;

- art 19—ensuring that all appropriate legislative, administrative, social and educational measures will be taken to protect children from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child;

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94 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990).

95 Ibid, art 3(1).

96 *Family Law Act 1975* (Cth) s 60B, subdiv BA—Best interests of the child, for example. See discussion in A Dickey, *Family Law* (5th ed, 2007), ch 20.

97 A Dickey, *Family Law* (5th ed, 2007), 291. Explanatory Memorandum, Family Law Reform Bill 1994 (Cth), 18 and 37.

- art 34—ensuring protection from sexual exploitation and sexual abuse;

- art 39—concerning the promotion of physical and psychological recovery from, amongst other things, any form of neglect, exploitation or abuse.

Role of a rights framework

12.79 The central dynamic in both child protection under state and territory law, and parenting orders under the *Family Law Act* is that the best interests of the child are paramount.[98] But the state legislation also provides that, subject to this principle, the legislation is to be administered so that where intervention is ordered it must be the least intrusive intervention possible, including keeping the child with his or her family whenever possible.[99] Ben Mathews argues that 'there is a fundamental conflict here between the rights of the child to safety, and the interests of parents in keeping custody and guardianship of their children'.[100] Such a conflict is also evident within CROC itself. Anastasia Powell and Susan Murray argue that the right under art 12, and other rights under CROC,

> are inherently in contradiction for those children who are living with or experiencing domestic violence. For instance, while Article 19 specifies children's right to be protected from abuse and neglect, Article 16 also protects children's right to 'protection from interference with privacy, family and home'. These rights themselves reproduce particular meanings about children and families, namely the sanctity of the family home as a haven for children, while ignoring that the home is most often the site of abuse and neglect. [It has been noted] that the sanctity of the home has indeed been used to justify non-interference in cases of domestic violence.[101]

12.80 As this Inquiry focuses upon the interaction of laws involving children in a number of ways, and where determining 'the best interests' of the child or children is of central concern, the appropriate role of a rights framework for children is problematic. John Tobin describes the debate concerning the use of children's rights 'as a tool for both academic analysis and advocacy at the international and domestic levels' as 'detailed and complex'.[102] He summarises the principal arguments of concern advanced in opposition to the relevance of children's rights, including that:

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

99 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 9(d); *Children, Youth and Families Act 2005* (Vic) s 10(3)(a); *Child Protection Act 1999* (Qld) s 5(2)(e); *Children and Community Services Act 2004* (WA) s 9(f); *Children's Protection Act 1993* (SA) s 4(4); *Children, Young Persons and Their Families Act 1997* (Tas) s 8(2)(b); *Children and Young People Act 2008* (ACT) s 12(1)(d); *Care and Protection of Children Act 2007* (NT) s 8(3).

100 B Mathews, 'Protecting Children from Abuse and Neglect' in G Monahan and L Young (eds), *Children and the Law in Australia* (2008) 204, [10.37].

101 A Powell and S Murray, 'Children and Domestic Violence: Constructing a Policy Problem in Australia and New Zealand' (2008) 17(4) *Social Legal Studies* 453, 458 (references omitted).

102 J Tobin, 'The Development of Children's Rights' in G Monahan and L Young (eds), *Children and the Law in Australia* (2008) 23, [2.4].

> Rights are individualistic and only serve to undermine the family structure by creating an adversarial climate and legitimising intervention by the state within the family.
>
> ...
>
> Rights are excessively legalistic and do not operate to challenge the structures and processes that undermine or threaten children's needs. Alternative models, therefore, provide a more appropriate political and moral paradigm by which to respond to children's needs. These models include a focus on the obligations of parents, teachers and other persons involved in children's lives; or an ethic of care which would emphasise responsibilities over rights and provide a more effective response to children's needs.
>
> ..
>
> The autonomy of children is misguided as their dependence is a reality. Moreover, the liberation of children is a dangerous objective which raises the very real risk of harm to children.[103]

12.81 Despite such arguments, Tobin suggests that the very discourse around children's rights as a response to children's needs elevates the status of children and 'render[s] them visible'.[104]

A fluid principle

12.82 The best interests principle in the context of family law has been criticised on the basis that it has no objective standard. As Dickey remarked,

> This is undoubtedly so. The decision ultimately depends upon the judge's personal perception of where the best interests of a child lie in light of the particular facts and circumstances of the case. In the modern case of *CDJ v VAJ* [(1998) 197 CLR 172], the majority of the High Court observed that in cases depending upon the best interests principle, the same body of evidence may produce opposite but nevertheless reasonable conclusions from different judges. They summarized this point by observing that best interests are values, not facts.[105]

12.83 The principle has been criticised 'on the grounds of its alleged indeterminacy and inherent subjectivity'.[106] John Tobin argues, however, that:

> Such criticisms, however, suffer from the common problem of reading the articles of [CROC] in isolation. While the best interests principle remains a fluid and flexible concept, it is not unfettered. Rather it remains informed and constrained by the rights and principles provided for under [CROC].[107]

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103 Ibid, [2.4].

104 Ibid, [2.6]. It is also 'a testament to the changing understandings of children as social agents'.: A Powell and S Murray, 'Children and Domestic Violence: Constructing a Policy Problem in Australia and New Zealand' (2008) 17(4) *Social Legal Studies* 453, 458.

105 A Dickey, *Family Law* (5th ed, 2007), 292.

106 J Tobin, 'The Development of Children's Rights' in G Monahan and L Young (eds), *Children and the Law in Australia* (2008) 23, [2.22].

107 Ibid.

12.84 Tobin also points to the appropriation of the best interests principle 'to coincide conveniently with, or justify the personal whims, preferences and prejudices of, individuals who invoke the best interests principle to serve their own agendas', citing as examples,

> the move to amend the *Family Law Act 1975* (Cth) to create a presumption of 50/50 shared parenting and the subsequent, though somewhat different, amendments aimed at promoting mandatory shared parenting were couched as being necessary to secure the child's best interests, as were the measures of the then Liberal Government's intervention in the Northern Territory ... In each of these contexts, an assessment of the best interests of children should have been informed by the empirical evidence, rather than the subjective interpretation, or calculated misappropriation of this principle, by those seeking to pursue their own agendas under the guise of children's best interests. If such an approach had been adopted it would have revealed that the *Family Law Act* amendments may well expose children to greater risk of harm while the report of Wild and Anderson, *Little Children are Sacred*, suggests that a far more consultative, holistic and culturally sensitive approach than that currently being adopted is required if the best interests of Indigenous children are to be secured.[108]

12.85 Balancing the various principles, and rights, expressed in international conventions, together with the competing pressures of 'parent's rights' and 'children's rights' create points of tension that are reflected in the interaction issues under consideration in this Inquiry. The next two chapters consider specific sites for such interactions—namely, child protection and criminal law; and child protection and the *Family Law Act*.

108 Ibid, [2.22].

13. Child Protection and the Criminal Law

Contents

Introduction

13.1 The interaction of child protection laws with state and territory criminal laws is one of the areas under consideration in this Inquiry.[1] The focus of this chapter is on some specific areas of practice where the child protection and criminal justice systems intersect. In particular, the Commissions examine how notification provisions under child protection laws affect the number and type of instances of child maltreatment that are brought to the attention of the child protection agency and the police. The chapter then considers how each responds to notifications and the systems and laws in place which facilitate, or obstruct, their joint efforts to address safety concerns for children. Other areas of interaction include the responsibility of the child protection agency for a young person in the juvenile justice system where care and protection issues arise. The Commissions consider what improvements can be made to the relevant legislative frameworks in order to address safety concerns.

13.2 Child sexual abuse arises for consideration in this Inquiry both as an example of potential interaction under the first Term of Reference and also expressly under the second Term of Reference. Issues relating to child sexual abuse are considered in Part D of this Consultation Paper.

Duties of parents to children

13.3 Consistently with international conventions,[2] Australian law recognises the primacy of a parent's responsibilities and authority, as against the rest of the world, over his or her child, if that child is below the age of 18.[3] For the most part, the law respects parents' authority to raise their children according to their own values and beliefs, and to make decisions relating to their religion, schooling, discipline, where they live and medical treatment without undue interference. The law has also made clear, however, that parents' authority over their children is not absolute, that such authority derives from their parental duties, and they must therefore act for the benefit of the children, not for themselves.[4]

13.4 The law is also clear about the duties of parents, caregivers and those with parental responsibility to provide their children with the 'necessities of life', which include providing financial support, food, clothing, accommodation, healthcare and access to education.[5] The duty to provide the 'necessities of life' normally extends to

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1 The Terms of Reference are set out at the front of this Consultation Paper; and see Ch 1 for a discussion of their scope.

2 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990), art 5. See also discussion in Ch 12.

3 See *Family Law Act 1975* (Cth) ss 61B, 61C. See also *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218, 235 which identified the predecessor of these provisions of s 63A of the *Family Law Act 1975* (Cth) s 63E, as defining a young person's guardian as the person with responsibility for that young person, as against the rest of the world.

4 *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218, 237.

5 See, eg, *Crimes Act 1900* (NSW) s 43A(2); *Criminal Code* (Qld) s 364; *Criminal Law Consolidation Act 1935* (SA) s 30; *Criminal Code* (Tas) ss 144, 145; *Criminal Code* (NT) s 183. Parents also have a primary

children up to the age of 16 years, but may be extended to older children where they have a disability. Parents and caregivers also have a duty to protect children in their care from harm, including harm that is caused as a result of abuse or neglect.

13.5 Governments support and assist parents to fulfil their parental duties by, for example, providing social infrastructure such as schools, childcare and health services and through the development of programs such as subsidised housing and income support for needy families. Governments otherwise respect family autonomy and accept that, in most cases, children are best brought up with their families. However, sometimes government intervention in the family, even against the wishes of a parent or family member, is necessary to protect children's rights. Nowhere is this more evident than when it is necessary to protect a child from abuse and neglect.

13.6 The failure of a parent or caregiver to provide a child with the necessities of life or to protect children in their care from harm as a result of abuse or neglect gives rise to certain consequences under both child protection and criminal laws.

13.7 First, where the failure satisfies the legislative grounds for state intervention under child protection legislation, a statutory child protection response may be activated. This may entail a formal application by the child protection agency to the children's court for a care order under child protection legislation. A care order can range from a supervision order to permanent removal of the child from the family in extreme cases.[6]

13.8 Secondly, the failure to provide for children's basic needs or to protect them from harm may constitute an offence under general criminal law or under child protection laws, thus exposing the parent or caregiver to criminal proceedings and the consequences of a criminal conviction.

13.9 Although they are based on distinct principles, both child protection laws and criminal laws intersect with the private domain of the family when the safety and wellbeing of the child are at risk. As Cummins J has remarked:

> The criminal law is not coextensive with parental duty. The criminal law should not overreach itself. Much parental duty is at a higher level than the reach of the criminal law. Much State function—the provision of education, of health care, of social welfare—is at a higher level than the reach of the criminal law. The criminal law is concerned with the bedrock of society—safety. Where the criminal law and the duty of parents coalesce is at the base—the duty to protect children. If the law fails there, the law fails. If the law is inadequate there, the law is inadequate. The protective mantle of the criminal law applies especially to children.[7]

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duty to house, educate and provide for their children under s 3 of the *Child Support (Assessment) Act 1989* (Cth).

6 See Ch 12.

7 *DPP v Farquharson* [2007] VSC 469, [5]. The decision has been overturned by the Victorian Court of Appeal but not in a way that affects these remarks: see *R v Farquharson* [2009] VSCA 307.

The protective role of the state

13.10 The state discharges its protective role over children in two ways. The first is by exercising its statutory powers under child protection laws to seek a protective order over a child who is in need of care and protection. The second way, often additional to the first, is by initiating a criminal justice response.

13.11 Child protection laws operate within a child welfare paradigm. Their primary purpose, as outlined in Chapter 12, is to ensure the care and protection of children by permitting the state to intervene where it is necessary to do so in order to protect the safety, health and wellbeing of children and young people.

13.12 A consistent theme across all child protection laws—and one which is shared with the family law jurisdiction, considered in Chapter 14—is that the welfare and best interests of the child are the paramount consideration.[8] In a child welfare context, central to determining the best interests of a child is the importance of preserving the integrity of the family unit and promoting children's positive relationships with their family by offering support and assistance to families. Consistent with this philosophy is the obligation on the state to limit its intervention in the relationship between a child and parent to that which is necessary to secure the safety and wellbeing of the child.[9]

13.13 When determining what is in the best interests of the child, decision makers are also required to take into account, among other matters:

- the views of children and young people (to the extent that their age and maturity allow) concerning issues which affect them;
- the importance of maintaining a child's cultural identity and connectedness with his or her community by taking into account the culture, disability, language, religion, ethnicity and sexuality of children and young people, and where relevant, of their families;
- the importance of protecting and promoting the cultural and spiritual identity and development of Indigenous children, by, wherever possible maintaining and building their connections with their family and community; and
- the desirability of continuity and stability in the child's care.[10]

13.14 These principles are founded on the set of international obligations and children's rights expounded in the *Convention on the Rights of the Child* (CROC),

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

9 See, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 9(2)(c); *Children, Youth and Families Act 2005* (Vic) s 10(3)(a). See also Ch 12.

10 See, eg, *Child Protection Act 1999* (Qld) s 5(2); *Children and Community Services Act 2004* (WA) s 8; *Children's Protection Act 1993* (SA) s 4.

which are discussed in Chapter 12. For example, art 12 provides that a child who is capable of forming his or her views, is entitled to express those views and be heard. CROC also requires that in the consideration of options for a child temporarily or permanently deprived of his or her family environment, regard must be paid to the desirability of continuity in the child's upbringing and to the child's ethnic, religious and linguistic background.[11]

13.15 The state also plays a protective role through the criminal justice system. A range of policy objectives underpin the criminal justice system, as discussed in Chapter 4. These include, but are not limited to, affirming fundamental standards of behaviour, holding offenders accountable for violations of these standards, and achieving justice for victims.

13.16 Proceedings or actions taken under criminal law that protect children and young people are important parts of the child protection system and, depending on the success of proceedings, may lead to access to mandated treatment programs for offenders and community supervision.

13.17 Key child protection advocates argue that it is critical that child abuse and neglect be treated not only as a child welfare issue, but also as a violation of children's rights, and as a crime.[12] Professor Chris Goddard and Dr Joe Tucci, from the Australian Childhood Foundation and Child Abuse Prevention Research Australia, respectively, propose that any national framework for child protection should contain a focus on the development, implementation and evaluation of uniform national criminal legislation that strengthens the criminal justice system's response to child abuse and neglect, and better recognises the need for strong joint police and child protection action in relation to child abuse and neglect.[13]

Grounds for a child protection intervention

13.18 The main purpose of child protection laws is to provide measures to assist and support children and young people who are in need of care and protection. A child protection intervention, described in Chapter 12, is authorised where a court believes, on the balance of probabilities, that a child or young person[14] is in 'need of care,' 'in need of protection,' 'in need of care and protection,' 'at risk,' or 'at risk of harm' as variously described in the legislation of the states and territories. Assistance and support for these children and young people may be offered on an informal basis, by

11 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990), art 20.

12 Australian Childhood Foundation and Child Abuse Prevention Research Australia, *Responding to Child Abuse in Australia: A Joint Submission to the Australian Government Responding to Australia's Children: Safe and Well—A National Framework for Protecting Australia's Children* (2009), 15.

13 Ibid, 16. See also Council of Australian Governments, *Protecting Children is Everyone's Business—A National Framework for Protecting Australia's Children 2009–2020* (2009).

14 Some child protection laws distinguish between a child and a young person. For example, in the *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 3, a child is a person under 16 years and a young person is one between 16 and 18 years. In the ACT, a child is a person under 12 years and a young person is a person between 12 and 18 years: *Children and Young People Act 2008* (ACT) ss 11–12.

way of agreement with families, or by means of care proceedings initiated by the relevant child protection agency in special courts for children.

13.19 The legislative grounds for a child protection response are prescribed in the child protection statutes of each of the states and territories. Essentially, these define the circumstances under which the child protection agency can and must intervene to protect a child.

13.20 These grounds are broadly similar across all the jurisdictions, and include circumstances where the child or young person has been or is at risk of being abused or neglected.[15] Although there is some variation in how each jurisdiction defines abuse, the term ordinarily covers:

- physical abuse or injury;[16]
- psychological and/or emotional abuse (to such an extent that it has caused, or is causing significant harm to the child's wellbeing and development);[17] and
- sexual abuse and exploitation.[18]

13.21 The legislation in some states and territories refers to specific types of abuse separately, while other legislation, like the Northern Territory and Western Australian laws, use overarching terms, which encompass various forms of abuse and neglect. The legal definitions of abuse and neglect 'set the legal threshold at which suboptimal parenting becomes abuse or neglect'[19] and form the basis of decisions about whether reports of alleged abuse or neglect are substantiated.[20] Dividing child abuse into separate types of abuse has been criticised by child advocates for failing to recognise that child abuse and neglect often co-exist, and for drawing attention away from the impact of abuse and neglect on the child's development and wellbeing.[21]

13.22 Some, but not all, of these statutory grounds for intervention may constitute an offence under criminal laws or child protection laws themselves. For example, as is

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15 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 23(1)(c); *Children, Youth and Families Act 2005* (Vic) s 162(1)(c)–(f); *Child Protection Act 1999* (Qld) ss 9–10; *Children and Community Services Act 2004* (WA) s 28(2)(c); *Children's Protection Act 1993* (SA) s 6(2); *Children, Young Persons and Their Families Act 1997* (Tas) s 4; *Care and Protection of Children Act 2007* (NT) ss 14–16, 20; *Children and Young People Act 2008* (ACT) ss 151, 156.

16 See, eg, *Children, Youth and Families Act 2005* (Vic) s 162(1)(c); *Children and Community Services Act 2004* (WA) s 28(2)(c).

17 See, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 23(1); *Children and Community Services Act 2004* (WA) s 28(2)(c)(iii), (iv); *Children, Young Persons and Their Families Act 1997* (Tas) ss 3(1), 4.

18 *Child Protection Act 1999* (Qld) s 9(3)(b); *Care and Protection of Children Act 2007* (NT) ss 4(3), 16; *Children and Young People Act 2008* (ACT) s 156(2)(d)(iii).

19 L Bromfield and P Holzer, *A National Approach for Child Protection—Project Report* (2008) National Child Protection Clearinghouse, 28.

20 The term 'substantiation' refers to whether, on assessment, the allegations contained in the report are found to be prima facie true, thus requiring further investigation.

21 Australian Childhood Foundation and Child Abuse Prevention Research Australia, *Responding to Child Abuse in Australia: A Joint Submission to the Australian Government Responding to Australia's Children: Safe and Well—A National Framework for Protecting Australia's Children* (2009), 8.

noted below, it is an offence for someone with parental responsibility to abandon a child, but not if that abandonment is a result of the child being orphaned by the tragic death of his or her parents.

13.23 There is also some variation in relation to the thresholds that must be met before abuse and neglect become grounds for intervention. In some jurisdictions, it is enough that the conduct has occurred,[22] or that harm has resulted.[23] In most jurisdictions, the threshold is satisfied where there is a combination of both acts and consequences (caused as a result of those acts). That is, the child or young person must have suffered or be at risk of suffering 'harm' or 'significant/serious harm' or a 'detrimental effect of a significant nature' on the wellbeing of the child or young person.[24]

13.24 Furthermore, some jurisdictions provide that the harm suffered by a child can arise from either a single event or episode of abuse or neglect, as well as from a series of acts, omissions or circumstances.[25] Extending the definition in this way recognises the cumulative impact of certain behaviour which may seem trivial on its own, but when considered together, can amount to significant harm to a child or young person—for example, persistent belittling and verbal abuse.[26] As Dr Leah Bromfield and Robyn Miller articulate:

> The unremitting daily impact of these experiences on the child can be profound and exponential, and diminish a child's sense of safety, stability and wellbeing.[27]

13.25 Other grounds for intervention in child protection legislation include:

- where the parents are dead or have abandoned the child or young person and cannot be located;[28]
- where the parents are unwilling to maintain or adequately supervise a child or young person;[29]

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22 *Children and Young People Act 2008* (ACT) s 156; *Children, Young Persons and Their Families Act 1997* (Tas) ss 3(1), 4.

23 *Child Protection Act 1999* (Qld) s 10. But note s 9 defines harm as 'any detrimental effect of a significant nature on the child's physical, psychological or emotional wellbeing'.

24 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 23(1); *Children, Youth and Families Act 2005* (Vic) s 162(1); *Children and Community Services Act 2004* (WA) s 28(1); *Children's Protection Act 1993* (SA) s 6; *Care and Protection of Children Act 2007* (NT) s 4(3).

25 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 23(2); *Children, Youth and Families Act 2005* (Vic) s 162(2); see also definition of harm in *Criminal Law Consolidation Act 1935* (SA) s 21.

26 L Bromfield and D Higgins, 'National Comparison of Child Protection Systems' (2005) 22 *Child Abuse Prevention Issues* 1; L Bromfield and P Holzer, *A National Approach for Child Protection—Project Report* (2008) National Child Protection Clearinghouse, 7.

27 L Bromfield and R Miller, *Specialist Practice Guide: Cumulative Harm* (2007).

28 See, eg, *Children, Youth and Families Act 2005* (Vic) s 162(1)(a)–(b), *Children's Protection Act 1993* (SA) s 6(2)(c); *Care and Protection of Children Act 2007* (NT) s 4(2)(a)–(b).

29 See, eg; *Children's Protection Act 1993* (SA) s 6(2)(c); *Children, Young Persons and Their Families Act 1997* (Tas) s 4(1)(c)(i), (iii).

- where the child or young person is being sexually or financially exploited or those with parental responsibility are not willing or able to protect him or her from sexual or financial exploitation;[30]
- where there is a risk of female genital mutilation;[31]
- where a child or young person is living with a person who has previously killed, or who threatens to kill the child or another person living in the household;[32]
- where the child or young person persistently fails to attend school (although this is more likely to be an indicator of other risk factors than to be a ground for intervention on its own);[33] or
- where there is a risk of harm to an unborn child.[34]

13.26 A child or young person who is exposed to family violence may also be considered to be 'at risk' or in 'need of care and protection' justifying an intervention by the child protection agency. New South Wales and Tasmania prescribe 'domestic violence' as an express ground for intervention.[35] In other jurisdictions, intervention on the basis of family or domestic violence is permitted where the child or young person is at risk of being, psychologically or emotionally abused as a result of his or her exposure to the violence.[36] For example, in the ACT, abuse is defined to include:

> (d) emotional abuse (including psychological abuse) if—
>
> (i) the child or young person has seen or heard the physical, sexual or psychological abuse of a person with whom the child or young person has a domestic relationship, the exposure to which has caused or is causing significant harm to the wellbeing or development of the child or young person; or
>
> (ii) if the child or young person has been put at risk of seeing or hearing abuse mentioned in subparagraph (i), the exposure to which would cause significant harm to the wellbeing or development of the child or young person.[37]

13.27 Generally, the persons responsible for the conduct which results in the child being found to be 'at risk' or 'in need of care and protection' are the child's parents or persons acting in their place. Typically, a child is defined as being in need of protection

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30 *Children and Young People Act 2008* (ACT) s 345(2)(c).
31 *Children's Protection Act 1993* (SA) s 26B; *Care and Protection of Children Act 2007* (NT) s 4(3)(e)(ii).
32 *Children and Young People Act 2008* (ACT) s 156(2)(a); *Children, Young Persons and Their Families Act 1997* (Tas) s 4(1)(b); *Children's Protection Act 1993* (SA) s 6(2)(b).
33 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 23(1)(b1); *Children's Protection Act 1993* (SA) s 6(2)(d).
34 See, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s23(1)(f); *Children, Young Persons and Their Families Act 1997* (Tas) s 14(2)(c).
35 *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 23(1)(d), 71(1)(e); *Children, Young Persons and Their Families Act 1997* (Tas) s 4(ba).
36 See, eg, *Care and Protection of Children Act 2007* (NT) s 4(3)(b).
37 *Children and Young People Act 2008* (ACT) s 342((d).

only if they do not have a parent or other adult carer who is 'able and willing' to protect them.[38]

Grounds for bringing criminal proceedings

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

13.29 The criminal legislation in force in Queensland, South Australia, the ACT and the Northern Territory contain offences against children relating to their welfare whereas in Victoria and Western Australia, similar offences are found in their child protection statutes. In NSW and Tasmania, the same conduct may give rise to offences against children under both criminal and child protection legislation. These offences generally complement other provisions in crimes legislation relating to assaults and other acts endangering life or causing bodily harm.

Offences under child protection legislation

13.30 In Western Australia, a person with the care and control of a child must not do an act, or fail to do an act, knowing (or recklessly disregarding) that the conduct may cause significant harm[39] to a child from abuse (physical, sexual, emotional or psychological) or neglect.[40] It defines 'neglect' to include the failure by the child's parents to provide adequate care or effective medical, therapeutic or remedial treatment for the child.[41] The penalty is imprisonment for up to 10 years.

13.31 In Victoria and Tasmania, it is an offence for a person who has a duty of care to a child to take, or fail to take, an action that has either resulted in harm to the child, or has the potential to cause harm.[42] However, the penalty in Tasmania is lower.[43] Furthermore, in both these jurisdictions, proceedings for these offences cannot be brought without first consulting the relevant head of the child protection agency.[44]

13.32 In NSW, it is an offence for any person—not just one who has care of a child—to do an act intentionally that causes or appears likely to cause injury or harm to a child or young person.[45] Only a person who has care of the child or young person may be

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38 See, eg, *Children, Youth and Families Act 2005* (Vic) s 162(1)(ii); *Child Protection Act 1999* (Qld) s 10(b); *Children and Young People Act 2008* (ACT) s 345(1)(b).

39 Harm is defined as any detrimental effect of a significant nature on the child's wellbeing: *Children and Community Services Act 2004* (WA) s 28(1).

40. Ibid s 101.

41 Ibid s 28(1).

42 *Children, Youth and Families Act 2005* (Vic) s 493; *Children, Young Persons and Their Families Act 1997* (Tas) s 91(1).

43 The applicable penalty in Tasmania is 50 penalty units and/or up to two years imprisonment; in Victoria, the penalty is 50 penalty units or imprisonment of not more than 12 months.

44 *Children, Youth and Families Act 2005* (Vic) s 493(2); *Children, Young Persons and Their Families Act 1997* (Tas) s 91(2).

45 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 227.

held accountable for failing to provide the child or young person with adequate and proper food, nursing, clothing, medical aid or accommodation.[46] Both these offences attract a maximum penalty of 200 penalty units.

13.33 A number of child protection laws also make it an offence for a person who has care and control of a child to leave a child unattended and unsupervised either in a motor vehicle,[47] or more generally.[48] In NSW, the offence is framed more broadly to apply to any person, not only one who has care and control of a child.[49] Again, the penalties for these offences vary substantially across the jurisdictions—from 200 penalty units in NSW to a term of up to five years imprisonment in Western Australia.[50]

13.34 Other offences contained in child protection legislation include removing a child or young person from the care of a person who has protection and care responsibility under the relevant Act,[51] and offences concerning tattooing, branding and body piercing.[52]

Offences under general criminal law

13.35 In Queensland, South Australia, the ACT and the Northern Territory, offences relating to children and their welfare are contained in general criminal laws. The criminal laws of NSW and Tasmania also contain some offences relating to the abuse and neglect of children.

13.36 Under the criminal legislation of NSW, Queensland, Western Australia, South Australia, Tasmania, the ACT and the Northern Territory, it is an offence for a person with parental responsibility to fail to provide a child (generally defined as a child under the age of 16 years) under his or her care with the 'necessities of life'—generally defined as the provision of accommodation, food, clothing and access to healthcare, and education.[53] In NSW, the maximum penalty is imprisonment for five years; in the ACT, a maximum penalty of 200 penalty units and/or imprisonment for two years applies. In Queensland, South Australia and Tasmania, maximum penalties of three years imprisonment apply where the neglect endangers the child's health.

13.37 In Queensland, it is an offence for any person who has the care and control of a child to cause harm to a child aged below 16 years by reason of failing to provide for

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46 Ibid s 228.

47. Ibid s 231; *Children and Community Services Act 2004* (WA) s 102.

48. *Children, Youth and Families Act 2005* (Vic) s 494; *Children, Young Persons and Their Families Act 1997* (Tas) s 92.

49 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 231.

50 *Children and Community Services Act 2004* (WA) s 102. The penalty for summary conviction is three years imprisonment and a fine of $36,000.

51 See, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 229; *Children, Youth and Families Act 2005* (Vic) s 496.

52 See, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 230–230A; *Children and Community Services Act 2004* (WA) s 103.

53 *Crimes Act 1900* (NSW) s 43A; *Criminal Code Act 1899* (Qld) ss 177, 286; *Criminal Law Consolidation Act 1935 (SA)* s 30; *Criminal Code* (WA) s 263; *Criminal Code* (Tas) ss 144–152; *Crimes Act 1900* (ACT) s 39; *Criminal Code* (NT) ss 149, 183.

the child, deserting the child or leaving the child without means of support.[54] In a number of jurisdictions it is also a crime to abandon or expose a child where that act endangers the life of the child or may cause serious injury, although the provisions vary in terms of the age of the child.[55] In the Northern Territory, for instance, the offence relates to a child aged under two years whereas in NSW and Queensland, the offence applies to a child aged under seven years. These offences attract maximum penalties ranging from five to seven years imprisonment, some depending on the age of the child.

13.38 The criminal laws of each state and territory also create a number of sexual offences against children,[56] which are dealt with in Part D of this Consultation Paper.

Issues of interaction

13.39 A number of issues arise in relation to provisions dealing with offences against children. One of the most significant is whether the way in which the offence provisions are currently drafted—which varies across all the jurisdictions—is appropriate or whether practical difficulties arise for law enforcement agencies, and how such problems affect decisions to bring prosecutions. Of relevance to this issue is whether the offence provisions are more appropriately placed in child protection statutes or in the general criminal laws of the states and territories. Another issue that arises is what range of penalties should be available to the court in relation to these offences.

Framing offence provisions

13.40 Offences of abuse and neglect of children—under either child protection or crimes statutes—complement other criminal provisions relating to assaults and other acts endangering life or causing bodily harm. In the most grave cases of child abuse or neglect, which result in permanent or fatal injury to a child, offenders are more likely to be charged with serious offences under general criminal laws, including assault, murder or manslaughter. Sexual abuse is likely to result in proceedings being brought under sexual assault offences, which are discussed in Part D of this paper.

13.41 In the past, child neglect offences outlined in child protection statutes could be distinguished from those outlined in criminal law in terms of what was required to be proved by the prosecution. These differences are more obscure today. Criminal neglect offences often required the prosecution to prove that the accused not only did something that put a child in danger, but also wilfully intended to cause harm to the

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54 *Children and Community Services Act 2004* (WA) s 364. In Tasmania, it is an offence to ill-treat a child aged below 14 years: *Children, Young Persons and Their Families Act 1997* (Tas) s 178.

55 *Crimes Act 1900 (NSW)* s 43; *Criminal Code* (Qld) s 326; *Criminal Code* (NT) s 184. Also note the *Criminal Code* (WA) s 344 makes it an offence for a parent (who is able to maintain a child) to desert a child under the age of 16 years.

56 See, for example, *Crimes Act 1900* (NSW) ss 66A–66D; *Crimes Act 1958 (Vic)* ss 45–49A; *Criminal Code* (Qld) ss 210, 215; *Criminal Code* (WA) s 320–322; *Criminal Law Consolidation Act 1935 (SA)* ss 49, 58; *Criminal Code* (Tas) ss 124–125A; *Criminal Code* (NT) s 127.

child. These requirements placed an onerous burden on prosecuting authorities, which often proved too difficult to discharge.

13.42 In recognition of the need to strengthen the criminal justice system's response to child neglect, a number of jurisdictions have amended their criminal laws to relax the prosecutorial burden in child neglect offences, thus enabling relevant authorities to pursue prosecutions in appropriate circumstances. For example, s 43A of the *Crimes Act 1900* (NSW) was inserted in 2004 to provide that a person with parental responsibility for a child who intentionally or recklessly fails to provide the child with the 'necessities of life', without reasonable excuse, is guilty of an offence if the failure causes a danger of death or serious injury to the child.[57] The offence provision in the South Australia criminal code is even more liberal. It does not require the prosecution to show harm caused as a result of the offender's neglect.[58]

13.43 Offences outlined in child protection statutes also similarly require the prosecuting authority to prove only that the offender intentionally committed an act (or failed to do an act) that has either resulted in the child suffering harm or has the potential to cause harm.[59]

13.44 A function of the criminal justice system is, as noted above, to define acceptable standards of behaviour. Prosecuting a person when those standards are breached is an essential part of a criminal justice response. It sends a clear message to the community denouncing abusive or neglectful conduct, punishes the offender and acts as a deterrent to prevent others from committing the same violations. The main focus of child protection legislation, on the other hand, is to identify and support families to address risk factors for abuse and neglect of children before the child suffers harm. A question arises about the appropriateness of placing offence provisions in child protection statutes and whether bringing proceedings is compatible with this goal.

Location of offence provisions

13.45 A major difference between offences created under child protection legislation and those created in general criminal law is the application, in the former, of objects and principles specific to child protection legislation. Hence, unless specifically excluded, actions taken or decisions made concerning the investigation or institution of proceedings in relation to conduct giving rise to offences under child protection law should be made having paramount regard to the best interests of the child. So, for example, in addition to other matters it ordinarily considers when deciding whether to prosecute matters, a law enforcement agency should take into account the impact on the child of bringing proceedings against a parent, and whether that would be in the

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57 See, eg, *Crimes Act 1900* (NSW) s 43A inserted by *Crimes Amendment (Child Neglect) Act 2004* (NSW). This is distinct from the similar offence in s 228 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) which does not require the prosecution to prove that the failure by a person with parental responsibility to provide adequate care and support to the child has caused harm.

58 *Criminal Law Consolidation Act 1935* (SA) s 30.

59 See *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 227, 228; *Children, Youth and Families Act 2005* (Vic) s 493; *Children, Young Persons and Their Families Act 1997* (Tas) s 91(1). Cf *Children and Community Services Act 2004* (WA) s 101.

child's best interests. This may be an argument for including offence provisions in the child protection statutes.

13.46 On the other hand, placing offence provisions in child protection statutes place (at least some) responsibility for bringing proceedings under those provisions on the child protection agency. This raises a question as to the compatibility of a law enforcement function with the child protection agency's main function of working with families to ensure the safety of children.

Commissions' views

13.47 The focus and thrust of modern child protection legislation is about strategies for prevention and intervention and working with families when there are allegations of risk of harm and neglect. Although responsibility for the protection of children is increasingly recognised as a responsibility of the whole community, ultimately responsibility to intervene in the family when mandated to do so under child protection legislation is a matter for the child protection agency, and, in emergency situations, the police. Similarly, the child protection agency remains responsible, together with the police and other law enforcement agencies, for the proper and timely investigation and prosecution of alleged offences against children. The Commissions are aware that, in practice, it is the police rather than the child protection agency that initiates (and handles) prosecutions against parents or caregivers, although it may be a decision that they make jointly. One reason for the division of functions may be, in some cases, to disassociate the child protection agency from the prosecution so that it does not jeopardise its relationship with the child and the family. Another reason may simply be to allow each agency to focus on its areas of expertise.

13.48 The Commissions are interested to hear views about the appropriateness of current offence provisions, what problems arise from the way in which they are currently drafted, and whether the offences are more appropriately placed in child protection statutes or crimes acts.

Question 13–1 Should offences against children for abuse and neglect be contained in child protection legislation or in general criminal laws?

Question 13–2 In practice, what issues, if any, arise from the way in which the offence provisions are currently drafted?

Question 13–3 In those jurisdictions where the same conduct may give rise to an offence under both child protection or criminal legislation, what factors are taken into account in practice when determining whether to bring an action against an alleged offender under child protection or criminal legislation?

Penalties under child protection legislation

13.49 In NSW, questions have been raised about the appropriateness and adequacy of the penalties prescribed for offences under the *Children and Young Persons (Care and Protection) Act 1998* (NSW), which currently attract maximum fines of up to $22,000.

It has been argued that a monetary penalty, regardless of how substantial, does not adequately reflect the seriousness of the offence, does not sufficiently denounce child abuse and neglect strongly enough and does not provide an effective deterrent. The question is whether, as is the case under other state and territory legislation, the offences under the NSW statute should be punishable by a period of imprisonment, either in addition to, or as an alternative to the monetary penalty.

13.50 The issue was considered by Justice James Wood in the *Report of the Special Commission of Inquiry into Child Protection Services* (Wood Inquiry).[60] It noted that, in a submission to a previous inquiry, NSW Police had suggested amending the provision to allow a term of imprisonment to be imposed of up to six months. However, the Wood Inquiry concluded that allowing the offences to be punished by a term of imprisonment was not in the best interests of the child, at least in relation to the prosecution of parents, because to do so would be likely to exacerbate underlying risk factors.[61] NSW Police have the option of bringing proceedings for similar offences under the state's criminal legislation, which do provide for imprisonment.

13.51 Another issue that arises is the appropriateness of a monetary fine for persons convicted of these offences who have limited financial means and whether, in such situations, there ought to be alternative penalties available to the court. One of these could be, for example, the making of a community service order. Another sentencing option may be a bond, including a supervised bond imposing conditions which address relevant issues.

13.52 An advantage of making alternative sentencing options available to the court for these offences is the capacity for courts to impose conditions, including requiring offenders to participate in community-based offender rehabilitation programs designed to address risk factors associated with the offender's conduct, such as alcohol and substance abuse. They are therefore more likely to produce an effective outcome, in terms of rehabilitation, retribution and deterrence, than the imposition of a fine.

13.53 Community service orders and other non-custodial sentencing options are widely available in all Australian jurisdictions, generally as an alternative to a sentence of imprisonment,[62] although in some jurisdictions they are also available as an alternative to a fine. In Victoria, for example, a court may impose a range of community-based orders when a person has been convicted of an offence punishable by imprisonment or a fine of more than five penalty units.[63] Community-based orders are also generally available to offenders who have defaulted on paying their fines, prior

60 J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), [15.96].

61 Ibid.

62 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 8.

63 *Sentencing Act 1991* (Vic) s 36. See also Judicial College of Victoria, *Victorian Sentencing Manual* (2009), [14.2].

to imprisonment,[64] and may be imposed as a primary penalty where they are a specific penalty for a particular offence, such as for offensive language.[65]

Commissions' views

13.54 As noted in a leading criminal law text:

> [I]f the political objective is to obtain substantial behavioural compliance, criminal law … relies on a link between prohibition and sanction. But if this is to be a feasible connection we need to ask serious questions about the level of resources and techniques available to enforcement agencies.[66]

13.55 The Commissions acknowledge that the jailing of a parent offender may adversely affect the child and the family—in terms of loss of income and loss of contact with the parent (notwithstanding the abuse). It may also cause resentment of the child by the parent, thereby potentially increasing the risk of abuse.[67] While hardship on an offender's family is a factor which courts may consider when determining whether to jail the offender, the current practice is for sentencing courts to consider hardship only in exceptional circumstances.[68]

13.56 Criminal sentencing options have moved away from sentences of imprisonment in recognition of a substantial body of research which shows that imprisonment neither rehabilitates offenders nor acts as an effective deterrent.[69] There is a trend towards community-based sentencing modules with built-in offender programs, supervised by the government corrective services body. The incentive for offenders to comply with court orders to attend offender programs is the risk of being imprisoned.

13.57 Although a number of community-based sentencing options are framed as alternatives to imprisonment, they may also be primary sanctions, as noted above. Where they are a primary penalty, the issue of what is an appropriate sanction for breach of the order inevitably arises, and in this regard, imprisonment may be stipulated.

13.58 The Commissions are interested to hear views about what sentencing options are currently imposed by courts when sentencing offenders for offences against children, and what range of penalties should be available for offences under child protection legislation.

Question 13–4 What range of penalties should be available to courts for offences under child protection legislation?

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64 See, eg, *Fines Act 1996* (NSW) s 78; *Sentencing Act 1991* (Vic) ss 62, 63.

65 *Summary Offences Act 1988* (NSW) ss 4, 4A(3).

66 D Brown and others, *Brown, Farrier, Neal and Weisbrot's Criminal Laws—Material and Commentary on Criminal Law and Process in New South Wales* (4th ed, 2006), 27.

67 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), Ch 29.

68 Ibid, [6.121]–[6.127]. The Australian Law Reform Commission supported a more liberal approach to be taken by the courts when considering the impact of sentencing on the offender's family: see [6.126].

69 Ibid, [7.114]–[7.115].

Question 13–5 In practice, what range of penalties are most regularly imposed, and if conditional, what are the most usual conditions imposed by the court?

Identifying child abuse and neglect

The hidden nature of abuse

13.59 By their very nature, child abuse and neglect are often 'hidden'. They occur in the privacy of people's homes, at the hand of the child's own parents or other family members or persons known to the family. They can happen when parents are stressed and lack support. All children are vulnerable, but perhaps younger children and children with disabilities are especially vulnerable because they have fewer connections with the community outside of the family, such as by attending school.

13.60 It is therefore important for the community as a whole to be vigilant about child abuse and neglect. An appropriate response to address safety concerns for children, both from a child welfare/public health perspective and from a law enforcement perspective, depends largely on reports being made by professionals and ordinary members of the community when they are worried about the safety of a child or young person.

13.61 Unless the police have been called first, a significant prelude to any criminal investigation or prosecution of child abuse or neglect is the 'trigger' created by a notification to the relevant child protection agency. Anyone may make a voluntary report to a child protection agency where they believe or suspect that a child is suffering, has suffered, or is at risk of suffering harm, as a result of abuse or neglect. For certain people, there is an obligation to report.

Mandatory reporting laws

13.62 Since the 1960s in the United States and the 1970s in Australia,[70] members of selected occupational groups who deal with children on a regular basis are required to report known or suspected cases of child maltreatment in relation to a child[71] where their knowledge or suspicion arises in the course of their employment.[72] The motivations for this kind of trigger for government agency intervention in appropriate cases were twofold:

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70 B Mathews, 'Protecting Children from Abuse and Neglect' in G Monahan and L Young (eds), *Children and the Law in Australia* (2008) 204, [10.19].

71 Except in NSW, which limits the mandatory reporting duty to children aged under 16 years, the obligations elsewhere in Australia cover all children and young people up to 18 years.

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

> [The] goal of child protection ... was driven by growing awareness of the existence and consequences of different forms of abuse, beginning with physical abuse. It was also motivated by the recognition that, without some form of mandated reporting by persons outside the child's family, many and perhaps most cases would not come to the attention of authorities or helping agencies.[73]

13.63 There are legislative mandatory reporting schemes in all states and territories except Western Australia, which have targeted legislative requirements for a limited class of people.[74] Although the reporting duties are broadly similar, there are some significant differences between them, and even within the same state or territory in terms of:

- the mandatory reporters;
- the type and extent of the harm which triggers the reporting duty; and
- the extent of the duty in terms of whether it applies only to past or present instances of harm, or whether it extends to future likelihood of harm.

13.64 The only mandatory reporting scheme that applies consistently across all the states and territories is that prescribed by s 67ZA of the *Family Law Act 1975* (Cth) which obliges Family and Federal Magistrates Court personnel and family dispute resolution professionals to report any reasonable suspicion that a child has been, or is at risk of being, abused. 'Abuse' is defined more narrowly than in comparable definitions under child protection legislation, and is essentially confined to physical and sexual assault, and sexual exploitation.[75]

13.65 However, s 67ZA(3) of the *Family Law Act* also includes a provision that authorises—rather than requires—those same reporters to notify a child welfare authority of any reasonable suspicion they have that a child:

> (a) has been ill treated, or is at risk of being ill treated; or
>
> (b) has been exposed or subjected, or is at risk of being exposed or subjected, to behaviour which psychologically harms the child.

13.66 In this way, the Act expressly recognises the negative impact on a child's safety by being exposed to family violence.[76]

13.67 The different thresholds of child abuse, neglect and harm in mandatory reporting provisions both between and within the states and territories, has an impact on the types and extent of abuse, neglect or harm that is reported to the child protection agency and subsequently referred to police for investigation.

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73 B Mathews, 'Protecting Children from Abuse and Neglect' in G Monahan and L Young (eds), *Children and the Law in Australia* (2008) 204, [10.19].

74 In WA, mandatory reporting obligations are targeted to licensed providers of child care services or outside school hours care services; and to court personnel, including mediators, counsellors and lawyers, at the Family Court of Western Australia: *Family Court Act 1997* (WA) s 160.

75 *Family Law Act 1975* (Cth) s 4.

76 See Ch 14.

Mandatory reporters

13.68 The legislative mandatory reporting schemes in NSW, Tasmania, the ACT and South Australia impose reporting obligations broadly on people who work in organisations that provide health, welfare, education, child care or residential services to children.[77] However, in some jurisdictions, only those employed in government or government-funded organisations, or who work in the frontline of service delivery—that actually deliver, or manage the delivery of, services to children—have mandatory reporting obligations.[78] Reporting obligations do not extend to volunteers except in Tasmania and South Australia.[79] In the ACT, mandatory reporters are only required to make a report where they reasonably believe that the child or young person has experienced, or is experiencing, sexual abuse or non-accidental physical injury.[80]

13.69 Typically, mandatory reporters include law enforcement officers (police and probation officers), doctors, nurses and providers of children's services. Teachers are also mandatory reporters across all of Australia, but in Queensland they are only required to report suspicions of sexual abuse of a student by another employee of the school.[81] In some states and territories, psychologists,[82] dentists[83] and ministers of religion (or volunteers and employees of religious organisations)[84] are also mandatory reporters.

13.70 In all of these cases, the duty is only to report reasonable suspicions of child abuse that have arisen in the course of the reporter's work.[85]

13.71 The Northern Territory child protection legislation casts the net much wider, by making *every* person a mandatory reporter and imposing additional reporting obligations on registered health professionals.[86]

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

78 *Children, Young Persons and Their Families Act 1997* (Tas) s 14; *Children and Young People Act 2008* (ACT) s 356. Cf *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 27(1) and *Children's Protection Act 1993* (SA) s 11(2)(j) which extend obligations to those also working in the non-government sector.

79 *Children's Protection Act 1993* (SA) s 11(2); *Children, Young Persons and Their Families Act 1997* (Tas) s 14(1)(k).

80 *Children and Young People Act 2008* (ACT) s 356. Note, an exception applies where the non-accidental physical injury is caused by another child or young person and the person with parental responsibility for the injured child or young person is willing and able to protect the injured person from further injury: s 357(2).

81 *Education (General Provisions) Act 2006* (Qld) ss 365–366.

82 See, eg, *Children's Protection Act 1993* (SA) s 11(2); *Children, Young Persons and Their Families Act 1997* (Tas) s 14(1); *Children and Young People Act 2008* (ACT) s 356(2).

83 See, eg, *Children's Protection Act 1993* (SA) s 11(2); *Children, Young Persons and Their Families Act 1997* (Tas) s 14(1); *Children and Young People Act 2008* (ACT) s 356(2).

84 *Children's Protection Act 1993* (SA) s 11(2)(ga).

85 See, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 27(2)(b); *Children's Protection Act 1993* (SA) s 11(1)(b).

Type and threshold of harm triggering the reporting duty

13.72 In all the states and territories, the mandatory reporter's knowledge, belief or suspicions of child abuse or neglect must be upon 'reasonable grounds', but the type and threshold of abuse or neglect which activates the duty differs between, and within, the states and territories.

13.73 The rationale for setting thresholds is to ensure that only those acts or omissions which are harmful to a child's health, safety, wellbeing and development are reported and to prevent authorities being inundated with reports of 'trivial incidents of less than ideal parenting practice'.[87] The thresholds appear to be based on different policy considerations as they are customised to the type of harm, albeit not always consistently across state and territory child protection legislation.

13.74 So, for physical abuse, a number of jurisdictions require that the physical injury result in 'significant' harm or 'detriment to wellbeing' whereas the ACT requires all reports of physical abuse without qualification.[88] In relation to psychological (or emotional) abuse, most states and territories require the reporter to believe on reasonable grounds that there is a risk of 'serious' or 'significant' harm to the child's health, wellbeing or development.[89]

13.75 In relation to neglect, the reporting threshold is expressed in broad terms, as failing to provide 'basic', 'adequate', 'proper' or 'necessary' care,[90] which are reflected in offences under criminal law and under child protection statutes.

13.76 In some jurisdictions, a child is considered at 'risk of harm' if he or she is exposed to incidents of family violence, and as a consequence is at risk of suffering serious physical or psychological harm.[91] Other jurisdictions have also incorporated harm caused to a child or young person by their exposure or risk of exposure to family violence in their definitions of psychological abuse of a child or young person.[92]

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86 *Care and Protection of Children Act 2007* (NT) s 26.

87 B Mathews, 'Protecting Children from Abuse and Neglect' in G Monahan and L Young (eds), *Children and the Law in Australia* (2008) 204, [10.25].

88 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 23(c); *Children and Young People Act 2008* (ACT) ss 342, 356.

89 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 23(1)(d); *Children, Youth and Families Act 2005* (Vic) s 162(1)(e); *Child Protection Act 1999* (Qld) s 9; *Children and Community Services Act 2004* (WA) s 28(1); *Children's Protection Act 1993* (SA) s 6(1)(b); *Children, Young Persons and Their Families Act 1997* (Tas) s 3; *Children and Young People Act 2008* (ACT) s 342(c), (d); *Care and Protection of Children Act 2007* (NT) s 13.

90 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 23; *Children, Youth and Families Act 2005* (Vic) s 162(1)(f); *Child Protection Act 1999* (Qld) s 9; *Children and Community Services Act 2004* (WA) s 28(1); *Children's Protection Act 1993* (SA) s 6(1)(b); *Children, Young Persons and Their Families Act 1997* (Tas) s 3; *Children and Young People Act 2008* (ACT) s 343; *Care and Protection of Children Act 2007* (NT) s 15.

91 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 23(d).

92 See, eg, *Children and Young People Act 2008* (ACT) s 342.

13.77 In the Northern Territory and, until recently also in NSW, police operating procedure requires police officers to make a child protection notification every time they respond to a family violence incident where there were children present.[93]

Commissions' views

13.78 The formal recognition of the impact of family violence on children in the child protection context can be a double-edged sword.[94] The legislative reforms have resulted in an increase in notifications of psychological or emotional abuse caused by exposure to family violence.[95] A large number of these notifications come from police responding to incidents of domestic violence.

13.79 A policy requiring child protection notification every time police respond to an incident of family violence may, moreover, have unintended consequences in that it may discourage women from reporting violence. Numerous studies have established that one of the greatest barriers for women to reporting violence or breaches of protection orders is the fear of state intervention and the removal of children.[96] This fear is particularly acute for Indigenous women, as a recent study by Professor Chris Cunneen into family violence issues in Indigenous communities in Queensland illustrates:

> The reason I haven't reported is my kids, my babies. I'm worried about them being taken. I had four children. Because police are brought to a house where there is violence, the kids get taken straight away. The Stolen Generation I reckon is coming back. ...
>
> I think the extra dimension for Indigenous women which is onerous is Child Safety. All of these veiled threats that if you do this you will lose the kids …That sort of dynamic was driving people underground and they weren't reporting because they knew Child Safety would get involved.[97]

Therefore, a police directive to make automatic reports to child protection authorities—even though well-intentioned—could be counter-productive.

13.80 Cunneen found that many people, including police officers themselves, questioned the usefulness of mandatory reporting by police where a child is present (or usually resident) at the scene of a domestic violence incident:

> We are reporting on incidents but who's investigating them? We are just generating reports. Police should make the decision. Police get paid to do a job—if you can't make a decision in relation to a four-year-old child, you shouldn't be in the job. Police

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93 The Commissions note the policy has been revised in NSW since the implementation of the reforms recommended by the Wood Inquiry which raise the threshold for reporting to risk of 'significant harm'.

94 C Humphreys, 'Problems in the System of Mandatory Reporting of Children Living with Domestic Violence' (2008) 14(2–3) *Journal of Family Studies* 228.

95 Australian Institute of Health and Welfare, *Child Protection Australia 2008–09* (2010), 13.

96 C Humphreys, 'Problems in the System of Mandatory Reporting of Children Living with Domestic Violence' (2008) 14(2–3) *Journal of Family Studies* 228, 232; L Laing, *'No Way to Live': Women's Experiences of Negotiating the Family Law System in the Context of Domestic Violence—Interim Report* (2009), 7.

97 C Cunneen, *Alternative and Improved Responses to Domestic and Family Violence in Queensland Indigenous Communities* (2009), [6.2.4].

> have the power to deprive people of their liberty, they should be able to use their discretion to make a decision as to whether a child is at risk.[98]

13.81 The report concluded:

> Perhaps there is a need for greater flexibility by police in reporting, rather than a mandatory policy. Should it only be reported when children are present rather than usually resident, or present and at risk? Certainly some of the police interviewed indicated that a more sensible policy would provide for better use of police discretion on this issue.[99]

13.82 The Commissions are interested in hearing views as to when it is appropriate for police to make child protection notifications when responding to incidents of family violence.

Question 13–6 In what circumstances is it appropriate for police to make child protection notifications when responding to incidents of family violence?

The impact of mandatory reporting duties on criminal law

13.83 Mandatory reporting laws are a valuable mechanism for ensuring that cases of child abuse and neglect are made public so that protective responses by both the child protective agency and the police are activated.

13.84 The introduction of mandatory reporting duties has increased the community's awareness of child abuse, and, consequently, has contributed to a large increase in the number of reports made to child protection agencies, most of which, however, are not substantiated. Reviews in a number of jurisdictions have shown that child protection services have been strained as a result of this increase in demand.[100]

13.85 The dangers of overloading the child protection system, according to Dr Dorothy Scott, are that:

- children who are at serious risk may be overlooked because assessments are done too superficially or cases closed prematurely;
- children who fall below the threshold for legislative intervention but who may be at risk of abuse or neglect may be overlooked because they are not referred to family support services which could help prevent future abuse and neglect;
- the inappropriate reporting and investigation of low-risk families invades people's privacy and may increase parental stress, itself a risk factor of child abuse and harm;

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98 Ibid, 104.
99 Ibid, 124.
100 See, eg, J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008).

- resources are diverted away from children already in state care who need services;
- relationships between child protection agencies and other agencies making the notifications (such as the police) may be strained because of the large gap between the thresholds for reporting and for statutory intervention; and
- high staff turnover as a result of increased stress levels.[101]

13.86 The effect can be detrimental from a criminal justice perspective if there are insufficient resources for a child protection agency to deal with the increased demand, leading to cases either being closed too quickly and appropriate cases not being referred to the police. Alternatively, cases may be referred after some delay, affecting the ability of the police to conduct a proper investigation.

13.87 In NSW, the Wood Inquiry also concluded that:

> the threshold for reporting should be raised so that families and children do not have the stigma of being 'known to DOCS' in circumstances where the risk of harm does not warrant its attention.[102]

Commissions' views

13.88 Despite the differences in the child protection legislation in the various jurisdictions, each Act has a common concern in protecting the safety of children. To ensure the highest level of protection for children, however, the Commissions consider that the reporting thresholds need to be clear and sufficiently wide to ensure that children's circumstances are not hidden. They also need to be sufficiently finely tuned so that those subject to a mandatory reporting duty are clear about their responsibilities, and knowing what matters are covered by their duties.

13.89 The Commissions acknowledge that mandatory reporting requirements are a valuable tool in the child protection system. They make a strong public statement about the seriousness of child abuse in the community, and they reinforce the moral responsibility of citizens to report suspected cases of child abuse and neglect. They also overcome the reluctance of some professionals to become involved in suspected cases of child abuse by imposing on them a public duty to do so. As noted in the Wood Inquiry:

> mandatory reporting has the useful effect of overcoming privacy and ethical concerns by compelling the timely sharing of information where risk exists and of raising awareness among professionals working with children and young persons. There are other mechanisms by which professionals such as health workers and teachers are obliged to report, with the failure to do so sometimes carrying with it disciplinary consequences. To abolish mandatory reporting may leave such people obliged to report, but without the protections

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101 D Scott, 'Towards a Public Health Model of Child Protection in Australia' (2006) 1 *Communities, Children and Families Australia*, 9, 11.

102 J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), [6.79].

> in the current Care Act, and could also weaken the opportunity for interagency collaboration which the Inquiry considers essential for an effective child protection system.[103]

13.90 This increased awareness of child abuse both within the community and among professionals who are obliged to report has led to higher notifications to child protection agencies. However, this has also led to mandatory reporting laws being criticised as diluting critical reports with a large number of less urgent cases, making it difficult to identify children in the most danger.

13.91 The Commissions note that some significant reforms have taken place in a number of the states and territories to address this criticism of mandatory reporting laws. One reform has been an increase in the reporting threshold in all jurisdictions but the ACT. The convergence of the majority of jurisdictions in setting a higher reporting threshold for most types of child abuse has left the ACT out of step with other jurisdictions. While the problems of mandatory reporting laws may not be as marked in the territory, the ACT Government may wish to review its legislative thresholds in light of reforms elsewhere in Australia.

Permitting disclosure of identity of mandatory reporters

13.92 The legislation in each jurisdiction contains a number of provisions to encourage compliance with mandatory reporting duties, including:

- protecting reporters from civil liability for breaches of duties or defamation, among other things, where the reports are made in good faith; and
- provisions protecting the identity of reporters.

However, some of these features can hinder the investigation and prosecution of serious offences against children.

13.93 Reports made to child protection agencies are confidential. Except to the extent that disclosure is required for the proper investigation of the report, a reporter's identity cannot be disclosed unless the reporter has given his or her consent, or unless a court permits it.[104] For example, the Northern Territory allows a court to grant permission for the identity of the reporter and the contents of the report to be disclosed only if:

> (a) the report, evidence or record is of critical importance to the proceedings; and
>
> (b) the failure to grant the leave would prejudice the proper administration of justice.[105]

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103 Ibid, [6.65].

104 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 29(1); *Children, Youth and Families Act 2005* (Vic) s 190; *Child Protection Act 1999* (Qld) s 186; *Children and Community Services Act 2004* (WA) s 240; *Children's Protection Act 1993* (SA) s 13; *Children, Young Persons and Their Families Act 1997* (Tas) s 16; *Children and Young People Act 2008* (ACT) s 857; *Care and Protection of Children Act 2007* (NT) s 27(2).

105 *Care and Protection of Children Act 2007* (NT) s 27(2).

13.94 The general prohibitions on disclosure have substantial implications for the capacity of agencies to share information about a child or young person for the purpose of investigating allegations of abuse and neglect. Requiring the police to seek a court order to authorise a child protection agency to disclose protected information is an obstacle to the timely and effective investigation of allegations of child abuse and neglect.

13.95 Recent amendments in NSW,[106] implementing recommendations made by the Wood Inquiry, now permit information from which a reporter's identity may be revealed to be shared with a law enforcement agency where:

- the information is disclosed in connection with the investigation of a serious offence alleged to have been committed against a child or young person; and
- the disclosure is necessary for the purpose of safeguarding or promoting the safety, welfare and wellbeing of any child or young person, whether or not the victim of the alleged offence.[107]

13.96 Importantly, to address cross-border issues, the statute defines a law enforcement agency to include not only NSW police, but also the Australian Federal Police and the police force of other states and territories.

13.97 Certain safeguards have been built in to protect the reporter. First, the request for information must be made by a senior officer of a law enforcement agency who must certify that it is impractical, or would prejudice the investigation of a serious offence, to ask for the reporter's consent.[108] Secondly, except where it would prejudice the investigation of a serious offence, the legislation requires the agency which provides the information to advise the reporter that their identity is to be released.[109]

Commissions' views

13.98 The Commissions accept that protecting the confidentiality of reporters is fundamental to encourage the disclosure of suspicions of abuse and neglect to the attention of authorities. The reporter is generally entitled to maintain his or her privacy and to be immune from retaliatory action. However, a general prohibition on disclosure of the reporter's identity or, more importantly, of information contained in the report (because the reporter's identity could be deduced from it) may hinder the proper conduct of an investigation or prosecution of an offence against a child or young person.

13.99 In the Commissions' preliminary view, all states and territories should permit a law enforcement agency to request, and receive, information contained in a report notwithstanding that it may result in the reporter's identity being disclosed, where it is

106 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 29(1)(f)(ii).
107 Ibid s 29(4A).
108 Ibid s 29(4B).
109 Ibid s 29(4C).

necessary for a proper investigation and subsequent prosecution of offences against children.

13.100 As a matter of good practice, the reporter's consent should always be sought in the first instance. But where it is impractical to obtain consent, or where obtaining consent would prejudice the investigation of a serious offence, a court should be able to permit disclosure where it is satisfied that disclosure of the information is critical for the investigation or prosecution of a criminal offence against a child or young person.

13.101 Given that families may move across jurisdictions, sometimes to avoid the reach of the law, the provisions should permit the information to be shared with police in other states and territories, including the Australian Federal Police.

Proposal 13–1 State and territory child protection legislation should contain an exemption from the prohibition on the disclosure of the identity of the reporter, or of information from which the reporter's identity could be deduced, for information disclosed to a law enforcement agency where:

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

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

Proposal 13–2 State and territory child protection legislation should also provide that the exemption in Proposal 13–1 does not apply unless a senior officer of the law enforcement agency to which the disclosure is made has certified in writing beforehand that:

(a) obtaining the reporter's consent would prejudice the investigation of the serious offence concerned; or

(b) it is impractical to obtain the consent.

Proposal 13–3 State and territory child protection legislation should define law enforcement agency to be the police force of the relevant state, the Australian Federal Police and the police force of any other state and territory.

Proposal 13–4 State and territory child protection legislation should provide that the person or body that discloses the identity of a reporter—or the information in a report from which the reporter's identity can be deduced—should notify the reporter of the disclosure unless it is impractical to do so, or would prejudice the investigation of the serious offence concerned.

Responding to reports of child maltreatment

13.102 Whilst mandatory reporting obligations define the type of situations that must be reported to child protection agencies, the legislation defines the circumstances and the threshold at which the state may legally intervene to protect a child.[110] The two are not aligned, although there is some support for aligning both thresholds.

13.103 In addition, not every report that justifies a statutory child protection intervention will warrant a criminal justice response. That determination is one to be made by the police, or in more serious cases of abuse or neglect, the office of the director of public prosecutions, where different considerations apply. The principal factor is whether the evidence would support a successful prosecution.

13.104 A number of the states and territories have established inter-agency models to deliver coordinated services to children and young people (and their non-offending families) who have been abused, or who are at risk of abuse. Each state and territory has developed specific investigative models based on its own child protection legislation and discrete definitions of abuse and neglect. These deal with the way in which abuse of children and young people is reported to the government, referrals are made to other agencies, information is exchanged between agencies, investigations and interviews are conducted, and how services are delivered—and vary between jurisdictions.

13.105 While some of these processes are legislatively based, practical guidance to reporters and agencies (both government and community-based) is often provided through a variety of protocols, inter-agency guidelines and memoranda of understanding between particular agencies. Risk assessment tools have also been developed in some jurisdictions to assist reporters to know when they need to make a report,[111] and to assess reports made to child protection agencies for appropriate action.

Intake process

13.106 In several jurisdictions including South Australia, the ACT and the Northern Territory, reports of child abuse are directed to a centralised intake service or hotline.[112] In Victoria, Queensland and Western Australia, reports are directed to the district child protection department office closest to the child's location, from which they are then referred to the police and/or an inter-agency team.[113]

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110 L Bromfield and D Higgins, 'National Comparison of Child Protection Systems' (2005) 22 *Child Abuse Prevention Issues* 1, 7.

111 Children's Research Centre, 'The Structured Decision Making® System: New South Wales Mandatory Reporter Guide' (2009)

112 See, eg, South Australia Government Department for Families and Communities, *Reporting Child Abuse* (2010) <www.dfc.sa.gov.au/pub/default.aspx?tabid=485> at 12 April 2010; Tasmania Government Department of Health and Human Services, *Making a Notification to the Child Protection Intake* (2010) <www.dhhs.tas.gov.au/service_information> at 12 April 2010 although in Tasmania, reports may also be made to community based Gateway Services.

113 See, eg, Queensland Government Department of Communities, Child Safety Services, *Reporting Child Abuse* (2010) <www.childsafety.qld.gov.au/child-abuse/report/index.html> at 12 April 2010.

13.107 For example, in Victoria, reports can either be made to the child protection agency or the community-based Child and Family Information Referral Support Teams (Child FIRST). Where the initial assessment reveals safety concerns for the child, the matter is referred to the child protection agency. Where the concerns are more about a child's wellbeing, the matter will be referred to Child FIRST (or another community service organisation).[114] A similar community-based intake model has recently been adopted in Tasmania.[115]

13.108 In NSW, mandatory reporters who work in one of the six government agencies where there is a Child Wellbeing Unit (CWU)[116] may make a report to their CWU. With the assistance of the specially trained staff at the CWU, the reporter will apply the Mandatory Reporters Guidance (MRG) assessment tool to determine whether their concerns for the safety of the child meet the new legislative threshold. Where the tool indicates that there is a 'risk of significant harm', the CWU will make a report to the Child Protection Helpline. If, on the other hand, the tool indicates that the matter does not satisfy the threshold, and the CWU does not have concerns about accumulated harm, CWU staff and the reporter will work together to determine where best to refer the child and the family for appropriate support and assistance.

Initial assessment and referral to police

13.109 The systems in place for an initial assessment of a report and its referral to the police and/or the inter-agency team differ in each state and territory. In a number of jurisdictions, there is a positive obligation on the child protection agency to refer a report immediately to the police where the report contains allegations of harm that may involve a criminal offence.[117]

13.110 Generally, the initial assessment involves obtaining more detailed information about the child who is the subject of the report, and making an assessment of the degree of harm that the child has suffered, or the degree of risk of harm, to determine whether the report satisfies the reporting threshold. The criteria for referring cases to the police vary between jurisdictions, and sometimes even within jurisdictions. A criticism of some child protection systems has been the inconsistency of assessing reports between district offices or different entry points. For example, in a recent review of the Victorian child protection service, the Victorian Ombudsman states:

> Evidence obtained during my investigation shows that the degree of tolerance of risk to children, referred to as the 'threshold', varies across the state according to the local

114 Victorian Government Department of Human Services, Children, Youth and Families, *Reporting Concerns about Children or Young People: A Guide for Professionals* (2007) <www.cyf.vic.gov.au> at 12 April 2010.

115 *Children, Young Persons and Their Families Act 1997* (Tas) pt 5B, as amended by *Children, Young Persons and Their Families Amendment Act 2009* (Tas).

116 These have been created within NSW Health (Area Health Services, the Children's Hospital at Westmead), NSW Police Force, the Department of Education and Training, the Department of Housing, the Department of Ageing, Disability and Home Care and the Department of Juvenile Justice.

117 See, eg, *Child Protection Act 1999* (Qld) s 14(2).

> office's ability to respond. I located many examples of cases where I consider that the risk of harm to children was unacceptable and the department had not intervened.[118]

13.111 To address this issue, a number of jurisdictions have developed and implemented diagnostic assessment tools to ensure that assessments are performed accurately and consistently across the various entry points.[119]

Police responses

13.112 The police must investigate allegations of abuse or neglect when there is a reason to believe that a criminal offence may have been committed. Invariably this involves interviewing the child or young person. The process through which police approach the issue has to be sensitive to the needs and wellbeing of the child or young person.

13.113 The child or young person must also usually submit to an interview by community services caseworkers to assess whether there are legislative grounds for making an application to the court for a care and protection order, and to determine what family, social support and medical services should be provided.

Models of police responses

13.114 Across the states and territories, there are different models of police responses to reports of child abuse and neglect. Essentially these can be divided into three model types:

- inter-agency teams, involving police and other agencies;
- joint investigations between police and other agencies; and
- specialised police units.

13.115 Five states and territories have inter-agency teams, as follows:

- New South Wales—the Joint Investigation Response Team (JIRT);
- Queensland—the Suspected Child Abuse and Neglect (SCAN);
- Western Australia—the ChildFirst Assessment and Interview Team (CAIT);
- Northern Territory—the Child Abuse Taskforce (CAT); and
- Victoria—the Sexual Offences and Child Abuse Investigation Unit (SOCIT).

13.116 All inter-agency teams include, as core members, the child protection agency and the police in each state and territory, but some jurisdictions also include other agencies or persons. For example:

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118 Ombudsman Victoria, *Own Motion Investigation into the Department of Human Services Child Protection Program* (2009), [170].

119 See, eg, NSW Health, NSW Police, NSW Department of Community Services, *NSW Joint Investigative Response Team (JIRT) Review*, unpublished (2006), [7.2].

- JIRT comprises the health department as a core team member (although it is not co-located with the others);
- SCAN comprises the health and education departments as core team members, and Indigenous representatives and other agencies as required;
- CAIT has included the health and justice departments in training programs;
- CAT includes Indigenous representatives and other agencies as required;
- SOCIT includes sexual assault counsellors as core team members, and forensic medical officers as required.

13.117 The differences in interagency team membership affect how investigations are conducted and how the case is managed. For example, it may increase the types of services and support that the victims receive in addition to child protection and police assistance; and it allows access to greater information and resources by the child protection agency and the police.

13.118 Some inter-agency teams, such as SCAN in Queensland, are legislatively based. Part 3 of the *Child Protection Act 1999* (Qld) sets out the membership and responsibilities of the core members of SCAN and states that its purpose is to enable a coordinated response to the protection needs of children, by facilitating:

- information sharing between members;
- planning and coordination of actions; and
- responding in a holistic and culturally responsive way to children's protection needs.[120]

13.119 The JIRT program operating in NSW is policy-based. It provides services exclusively to children and young people aged under 18 years. The roles and responsibilities of each of the agency members are outlined in a memorandum of understanding between them, which provides:

> The role of the NSW Police is to detect and investigate alleged child abuse and neglect. Where appropriate they are to initiate legal proceedings against identified offenders.
>
> The role of [Community Services] is to receive and assess reports of risk of harm to children and young people. [Community Services] also ensure the safety of children and their ongoing care. Where appropriate they initiate Children's Court proceedings.
>
> The role of Health is to identify and report risk of harm to children and young people. They provide treatment, crisis and ongoing counselling as well as medical examinations.[121]

120 *Child Protection Act 1999* (Qld) s 159J.

121 The original memorandum of understanding was signed in 1997 and was revised in August 2006 following an inter-agency review of JIRT in 2006: see NSW Health, NSW Police, NSW Department of Community Services, *NSW Joint Investigative Response Team (JIRT) Review*, unpublished (2006).

13.120 Caseworkers with the NSW child protection agency and police officers, who are specially trained in interviewing child victims, are jointly responsible for investigating allegations of abuse to determine whether a care and protection order is warranted and whether a criminal offence may have been committed.

13.121 A joint response from the three agencies means that a victim is interviewed once and the information is shared among the agencies so that appropriate services are provided to the child or young person and their non-offending family members. Not having to repeat his or her story to officers from different agencies significantly reduces trauma and distress to the abuse victim.

13.122 Queensland and Victoria on occasions also organise joint investigations, sometimes between the child protection agency and the police or, in Victoria, between the child protection agency and the Sexual Offences and Child Abuse (SOCA) units.

13.123 There are specialised police units in the Australian Capital Territory known as the Sexual Abuse and Child Abuse Team (SACAT). In South Australia, there are three specialised police units—the Child and Family Investigation Unit, the Child Exploitation Section, and the Sexual Assault Unit.

Commissions' views

13.124 The Commissions have heard in consultations that, even though there are cooperative arrangements in place, the police may not always understand the importance of their actions in providing evidence of abuse when matters of family violence or child abuse are raised in family law proceedings. For example, in a response to the ALRC's family violence e-newsletter, a mother commented with respect to the interview process conducted with her three-year-old son who had made disclosures to his mother about sexual abuse by his father that, notwithstanding that the 'policeman and woman were well intentioned good people',

> I had the impression they were just going through the motions—the process itself was intended to fail—it was so cruel and horrible. They did not understand Family Law—the policeman later said to me that although he couldn't say if abuse had happened, 'If it was my child, I would err on the side of caution'. They did not know that I had no choice. The only evidence that would be believed in the Family Court would be statements made by my son to independent police and/or [the child protection agency]. They did not appreciate the importance of their role. They were only interested in having enough evidence for criminal conviction—which I have learnt is almost impossible for young children.[122]

13.125 The Commissions are interested in hearing whether the current inter-agency protocols and memorandums of understanding presently in existence are effective in practice to ensure that children are protected and that professionals in each part of the system understand the consequences of their actions for other parts of the system. The Commissions are also interested in hearing what changes are required in law to facilitate effective relationships between agencies.

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122 *Comment in response to ALRC Family Violence Inquiry E-newsletter* (January 2010), 13 January 2010.

Question 13–7 In practice, are the inter-agency protocols and memorandums of understanding between key agencies involved in child protection—such as the police and child protection agencies—effective to ensure that professionals in each part of the system understand the consequences of their actions for other parts of the system?

Question 13–8 What legal changes are required to facilitate effective relationships between agencies to ensure that evidence is obtained in a way that is appropriate not only for child protection purposes but also for family law purposes?

Deciding whether to initiate proceedings

13.126 The decision whether to initiate proceedings for an offence against a child is generally a matter for police—largely based on whether there is enough evidence to support a conviction.

13.127 A South Australian study in the late 1990s demonstrated how few child abuse and neglect cases that are substantiated at the welfare or health level are prosecuted and result in convictions.[123] The study tracked 500 referrals made to the Women's and Children's Hospital Child Protection Services through the system from initial filtering, substantiation by the child protection agency, police involvement, the decision to prosecute and criminal proceedings.[124] The data showed that police investigated only 29% of the original 500 cases, and fewer than half of these were considered suitable for prosecution. Of those prosecutions, 62% resulted in a conviction, but this included a significant number of guilty pleas. Only 17 of the original 500 referrals resulted in a conviction after a criminal trial.

13.128 The authors of the study noted that :

> The interaction between the child-focused welfare/health agencies and the individual adult rights and state justice focused criminal court system has at times been problematic.[125]

13.129 Of those that were prosecuted, allegations of physical abuse led to more convictions than allegations of sexual abuse. The report concluded that factors which made it difficult to prosecute child abuse cases included the age and developmental ability of the child, the credibility of the child's word against an adult's, the lack of

123 M Hood and C Boltje, 'The Progress of 500 Referrals from the Child Protection System to the Criminal Court' (1998) 31 *The Australian and New Zealand Journal of Criminology* 182.

124 In South Australia, offences relating to child abuse and neglect are contained in the *Criminal Law Consolidation Act 1935* (SA) ss 14, 29–30.

125 M Hood and C Boltje, 'The Progress of 500 Referrals from the Child Protection System to the Criminal Court' (1998) 31 *The Australian and New Zealand Journal of Criminology* 182, 190.

concrete physical evidence and fear of the court process by victims and their families.[126]

13.130 However, the prospect of a conviction is perhaps not the only matter that ought to be taken into account when deciding whether to bring proceedings. As noted by the ALRC in its report, *Child Welfare*, a decision to initiate a prosecution can have a signification impact on the family:

> When a parent has abused his child the prosecution of the parent can have devastating effects on parent and child and on their relationships. Prosecutions should therefore be initiated only after careful deliberation. The police should be encouraged to consult representatives of welfare agencies before a decision to prosecute is taken. Further, when a prosecution has been initiated, procedures should be introduced which will facilitate the withdrawal of the proceedings when this is desirable.[127]

Consulting with child protection agency

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

13.132 In Queensland and Tasmania, the police are statutorily required to consult with the child protection agency before investigating an offence against a child who is suspected to be in need of care and protection, or before initiating proceedings.[128] The stated purposes are to ensure that police and the child protection agency agree on the best strategy to proceed with an investigation and to determine whether initiating proceedings would be in the child's best interests.

13.133 These provisions recognise that the child protection agency has an interest in decisions to initiate proceedings against a parent where such action may conflict with their work with the family to address the underlying risk factors that have given rise to the abuse or neglect.

13.134 Anecdotal evidence suggests that some child protection caseworkers may consider reporting cases to the police to be incompatible with their professional role to help the child and his or her family. Consultation with the child protection agency may alleviate these concerns.

13.135 The Commissions are interested in hearing whether child protection legislation should be amended to require police to consult with the relevant child protection agency before deciding whether to investigate an alleged offence against a child.

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126 Ibid, 193.
127 Australian Law Reform Commission, *Child Welfare*, ALRC 18 (1981), xxii.
128 *Child Protection Act 1999* (Qld) s 248B; *Children, Young Persons and Their Families Act 1997* (Tas) s 91(2).

Question 13–9 Should child protection legislation be amended to require police to consult with the child protection agency before deciding to investigate an alleged offence against a child where the child is suspected of being in need of care and protection?

Question 13–10 Should child protection legislation be amended to require police to consult with the child protection agency before initiating proceedings in relation to an alleged offence against a child?

Role of criminal law when care proceedings not warranted

13.136 In its report on *Child Welfare*, the ALRC stated that 'criminal provisions have a legitimate, though limited, part to play in the protection of children'.[129] In particular, it said that where the action has not caused injury or harm, or where care proceedings are inappropriate, the situation may best be dealt with by taking legal action against the parent.

13.137 An example may be where a parent leaves a child unattended in a motor vehicle, but the child does not suffer serious harm. Although the circumstances do not justify an intervention by the child protection agency, the criminal law may be useful to send a message to the community that the law will be enforced, and thus ensure its effectiveness. Failure to enforce legislation, conversely, renders it ineffective.

Information sharing

13.138 A central feature of an inter-agency response is the capacity of member agencies to share relevant information about the child so that a joint and complementary strategy is agreed to provide services that the child needs.

13.139 From a child welfare perspective, with its focus on attending to the health and development needs of the child and family support, the benefits of information sharing include enhanced capacity to:

- protect and promote the health, safety and wellbeing of all children and young people for whom there are concerns about possible abuse or neglect, or are in state care or custody;
- develop appropriate interventions based on a holistic assessment of the child or young person's circumstances and level of risk;
- facilitate early intervention and practice for children and young people at risk in order to prevent, or reduce the likelihood of, increased statutory intervention; and

129 Australian Law Reform Commission, *Child Welfare*, ALRC 18 (1981), [306].

- facilitate regular inter-agency dialogue to protect and promote the best interests of children and young people.

13.140 Information sharing is also advantageous to police in terms of:

- gathering evidence of the alleged abuse or neglect, particularly where the alleged offence is not related to an isolated incident but relates to a pattern of behaviour which has resulted in cumulative harm;
- making sound determinations as to whether the circumstances warrant, and the evidence supports, the commencement of criminal proceedings against the alleged perpetrator; and
- determining whether interim protective orders need to be sought.

13.141 In its recent report on privacy, *For Your Information: Australian Privacy Law and Practice* (2008), the ALRC noted that a number of bodies have identified instances where a child has been 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.[130] Reviews into child deaths have also highlighted the need for increased collaboration through information sharing in order to protect children from serious harm and death through abuse and neglect.[131]

The operation of privacy laws

13.142 Privacy laws operate to protect an individual's personal information by restricting its collection, use and disclosure by private and public sector agencies. Privacy laws prevent information being shared between government and non-government agencies unless a specific exemption applies. Generally, an exemption does apply for law enforcement purposes.

13.143 However, it appears from some reviews of child protection systems in Australia that there is some confusion about the privacy obligations that agencies have and this has created an obstacle to information sharing. This was particularly evident in those jurisdictions where agencies relied on informal mechanisms to collaborate, but where there were no information sharing guidelines.

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130 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108 (2008), [69.103].

131 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.

13.144 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.[132]

13.145 The application of privacy laws, or rather, their non-application in child protection in certain circumstances, ought to be made clear in legislation and reinforced in guidelines. Information sharing guidelines have been recommended as a way to support, formalise and clarify information sharing procedures between the relevant departments.[133] 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 when.[134]

Information sharing between the police and the child protection agency

13.146 Currently, each state and territory child protection law provides for the exchange of information between police and the child protection agency, and between the police and other nominated persons or agencies.[135] However, the laws differ in terms of:

- whether they allow a two-way exchange of information or whether they are confined to permitting one agency to give and/or request information from other agencies;
- the situations in which the information can be shared;
- the type of information that can be shared; and
- other prescribed persons with whom the police can share information.

13.147 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 when it is for the purpose of exercising a function under the Act.[136] There are a number of avenues

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

133 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].

134 NSW Health, NSW Police, NSW Department of Community Services, *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.

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

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

by which the police and the child protection agency can share information in the ACT. For instance, under s 25, information must be provided where the department requests assistance from a 'territory agency'. Alternatively, the child protection agency can divulge 'protected information' to ACT Policing under certain conditions,[137] or can share 'safety and wellbeing information' as 'information sharing entities' or as members of a Declared Care Team. As an 'investigative entity', ACT Policing can also divulge protected information if certain conditions outlined in s 867 of the *Children and Young People Act 2008* (ACT) are met.

13.148 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:[138]

- the safety, welfare and wellbeing of a particular child or young person or class of children or young persons;[139]
- 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 which is the subject of a pre-natal report.[140]

13.149 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,[141] including the Family Court, the Federal Magistrates Court, Centrelink and the Department of Immigration and Citizenship.

13.150 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.[142] A prescribed body therefore cannot refuse to release information to the child protection agency on the basis that the privacy law prohibits it from disclosing the information.

13.151 In NSW and the Northern Territory, police and the child protection agency have a mutual obligation to share the requested information 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

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137 Ibid, ss 847–856.

138 *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.

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

140 Ibid s 248(1A).

141 Ibid s 245I.

142 Ibid s 248(5).

territories. The police are only compelled to give information at the request of the child protection agency in Queensland, South Australia, Tasmania and the ACT. And, except for NSW and the Northern Territory, the child protection agency in other jurisdictions retains discretion as to whether to supply information to the police.

Information sharing between the police and other agencies

13.152 A major 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 between those agencies and non-government agencies, to share information directly without needing to use the child protection agency as a hub.[143]

13.153 This has been addressed by the addition of a new Chapter 16A into the *Children and Young Persons (Care and Protection) Act 1998* that allows prescribed bodies to share information relating to the safety, welfare or wellbeing of children and young persons.[144] 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.[145]

13.154 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.[146] 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

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

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

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

146 Ibid s 245A(1).

or young person or class of children or young people.[147] 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.[148] Where there are inconsistencies between the Act and other legislation governing privacy, the provisions contained in ch 16A take precedence.[149] 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.[150]

Police and other prescribed persons

13.155 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.[151] 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.[152]

13.156 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's request.[153]

Shared database

13.157 A number of reviews have identified the need for a shared information and data collection system between police and the child protection agency.[154] Several models exist both in Australia, such as the Client Relationship Information System (CRIS) in Victoria,[155] and overseas.

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147 Ibid s 245D(2).
148 Ibid s 245D(3).
149 Ibid s 245H.
150 Ibid s 245D(4).
151 *Children, Young Persons and Their Families Act 1997* (Tas) s 53B. An information sharing entity is defined broadly under s 3(1). See also Tasmania Department of Health and Human Services, *Guidelines: Information Sharing for Providers of Family and Disability Support* (2010) <www.dhhs.tas.gov.au> at 14 April 2010.
152 *Child Protection Act 1999* (Qld) s 159M.
153 *Care and Protection of Children Act 2007* (NT) s 34.
154 NSW Health, NSW Police, NSW Department of Community Services, *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.
155 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.

13.158 As part of its 'Every Child Matters' program, the United Kingdom, for example, 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 work together as a team and deliver more timely and coordinated support, and thus decrease service delivery duplication.[156] 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.[157] 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.

13.159 A common database called 'Wellnet' has been established in NSW to improve sharing information about at-risk children between the new CWUs, and to provide limited information about children and young people known to the child protection agency. It allows staff of CWUs to search for a child and 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 helps staff better support vulnerable children and young people who do not meet the new threshold, allows cumulative risk to be recognised and reported, and will record information about services required and/or provided to families, thereby assisting in the identification of service gaps.

Information sharing guidelines

13.160 While information sharing should be expressly provided for in legislation, the availability of information sharing guidelines is a desirable complementary tool. As the NSW Ombudsman has noted:

> It is ... important to recognise that the formal arrangements being developed in relation to information exchange present only part of the challenge. Both the 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.[158]

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156 *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).

157 *Children Act 2004 Information Database (England) Regulations 2007* (UK).

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

13.161 Information sharing guidelines provide a practical mechanism for explaining how the legislative provisions operate to support, formalise and clarify information sharing procedures between the relevant agencies.[159] They can set down processes for requesting and giving 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.[160]

Commissions' views

13.162 It is now widely recognised in both Australia and abroad, that the best outcomes for children and young people—in terms of their health, development and safety needs—are achieved by adopting a collaborative interagency response. The advantages of the major players—namely the police, the child protection agency and possibly the department of health—collaborating are many, and include:

- the ability of agencies to combine the information that they have about a child or young person so that they can appreciate the full context of the circumstances of the child;
- requiring a child or young person to submit to one investigation and interviewing process only rather than having to repeat the same information to different agency staff, thereby reducing the trauma and distress on the victim; and
- ensuring that the child or young person receives the services that are needed, and that those services complement each other.[161]

13.163 The Commissions' preliminary view is that all jurisdictions should ensure that its legislative and administrative frameworks facilitate a collaborative and cooperative approach between human service and justice agencies. At a minimum, all child protection legislation should contain express provisions permitting information about a child and his or her family to be shared between the police and prescribed bodies where the information relates to the safety, welfare and wellbeing of a child, and where such information is needed for the investigation and prosecution of alleged offences against children. To facilitate information sharing, consideration should be given to establishing a shared database containing basic information which intra-state agencies can access readily.

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159 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].

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

161 See also Ch 19.

Proposal 13–5 States and territories should ensure that best practice features of collaborative models of child protection are adopted, including:

(a) legislative provisions that allow agencies (including federal agencies) to share relevant information about children and families to make accurate assessments of the needs of children and families and to ensure that appropriate programs relative to those needs are delivered in a timely and coordinated way;

(b) the establishment of a shared database which contains basic information about a child or family and that authorised agencies can access to see quickly which other agencies may be dealing with a particular child or family; and

(c) the development of guidelines to assist agencies to clarify their respective roles and functions, to assist them when performing functions under the legislation, and to assist them to resolve any issues that may arise.

Protection of children from family violence

13.164 Protection orders under family violence legislation can name children or young people as an aggrieved family member, and in some jurisdictions, applications for a protection order can be brought by, or on behalf of, a child or young person.[162]

13.165 Applications for protection orders are generally heard in a local or magistrates court. However, where the respondent or the person in need of protection from family violence is aged under 18 years, some jurisdictions permit the application to be heard, and an order made, by the children's court. The ACT, for example, gives jurisdiction to the Children's Court to make a protection order in favour of the child against a parent or other person where it believes it is necessary to protect the child from psychological abuse arising from the child's exposure to family violence.[163] The Children's Court may make such an order either on its own motion or on application by a party or at the request of the public advocate, pending final orders for the care and protection of the child.[164] However, it may only make such an order where there are care proceedings on foot.

13.166 In NSW, the Children's Court is only able to make a protection order in its criminal jurisdiction *against* a child or young person, in order to protect other children or adults. It has no power to make a protection order against an adult. It also lacks power in its care jurisdiction to make an order against a parent or other adult to protect a child or young person, pending final care and protection orders. It submitted to the Wood Inquiry that it should have such a power as it would provide 'a handy weapon in

162 See Ch 4.

163 *Children and Young People Act 2008* (ACT) s 459. A protection order is defined as a final or interim protection order as defined under the *Domestic Violence and Protection Orders Act 2008* (ACT): s 458.

164 *Children and Young People Act 2008* (ACT) s 459.

its child protection armoury'.[165] It submitted that other benefits could be gained by giving the court power to make protective orders, as follows:

> If AVOs or orders of a similar vein were to be seen as part of the care regime, they would be a useful tool for preserving peace and the absence of violence and might quite often be seen as a useful alternative to an emergency care and protection order or an interim care order with all the disruption which they may involve in terms of children and young persons being removed from their homes and often from the care of an innocent but powerless parent. It is not suggested that [emergency care and protection orders] and interim care orders not be available in suitable cases but rather tha[t] an additional option be offered to the Director-General.[166]

13.167 It further submitted that protective orders may be better sought in the care regime by the child protection agency rather than the police, although police ought to enforce them in the same way that protection orders made by local courts are enforced.[167]

Commissions' views

13.168 There is no question that a child who is exposed to family violence may be at risk of serious physical or psychological harm by virtue of his or her exposure to the violence. Allowing a children's court to make a protection order in favour of that child, when the child or young person is already subject to care proceedings before the court, and final care orders are pending, gives the court another tool to protect children from harm. It is also consistent with the broad goal of this Inquiry of providing a more seamless system for victims of family violence, including children. The Commissions are interested to hear views on this issue.

Question 13–11 In care proceedings under child protection legislation, where final orders are pending, should children's courts in all states and territories be given power to make protection orders in favour of the child who is the subject of proceedings before it, where the court considers a protection order necessary to protect the child from serious harm arising from the child's exposure to family violence?

Question 13–12 Should a children's court be able to make protection orders in favour of siblings of the child who is the subject of care proceedings before it? If so, should it be able to make such an order of its own motion or should it be by application by a party to the proceedings or an advocate for the child?

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165 NSW Children's Court, *Submission to the Special Commission of Inquiry into Child Protection Services in NSW* (2008), [88].

166 Ibid, [89].

167 Ibid, [90].

Children and young people at risk and juvenile justice

13.169 There is a strong correlation between juvenile participation in crime and rates of reported neglect or abuse,[168] and, in particular, between juvenile involvement in criminal activity and neglectful parenting.[169] There is also a significant correlation between young offenders and poverty, homelessness, mental health issues, substance misuse and poor school achievement, truancy and early school leaving age.[170] Dr Don Weatherburn and Bronwyn Lind found that an offending child or young person is more likely to have a history of abuse or neglect. They argue that policies aimed at reducing socio-economic stress and early intervention policies designed to reduce the risk of child neglect have an important role to play in crime prevention in the long term.[171]

13.170 A NSW survey of young people in detention and on community orders showed that between 20% and 49% had been in out-of-home care in the child protection system.[172] In Victoria, a study of all young people given sentences of imprisonment by the Children's Court over a period of eight months in 2001 also illustrates the link between abuse and youth offending. It identified 94 young people, 88% of whom had been subject to a total of 386 prior notifications, or an average of 4.6 notifications each. Almost a third had been the subject of six or more notifications. The study also found that 86% had been in out-of-home care (excluding kinship care), and that over half of these had had five or more care placements.[173]

13.171 The high number of young people in the juvenile justice system who have had extensive involvement in the c6are and protection system was highlighted as a matter of great concern by the ALRC and Human Rights and Equal Opportunity Commission in the report *Seen and Heard: Priority for Children in the Legal Process* (1997).[174] The findings suggested that the risk factors of past abusive parental behaviour in youth offending may have been exacerbated by the system which was intended to protect them.

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168 D Weatherburn and B Lind, *Social and Economic Stress, Child Neglect and Juvenile Delinquency* (1997).

169 P Salmelainen, *Child Neglect: Its Causes and its Role in Delinquency* (1996), 3–4.

170 D Kenny and others, *NSW Young People on Community Orders Health Survey 2003–2006: Key Findings Report* (2006), 11 cited at J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), [15.2]. See also J Baker, *Juveniles in Crime—Part 1: Participation Rates and Risk Factors* (1998) NSW Bureau of Crime Statistics and Research, [1.2.2].

171 D Weatherburn and B Lind, *Social and Economic Stress, Child Neglect and Juvenile Delinquency* (1997), 47–48.

172 D Kenny and others, *NSW Young People on Community Orders Health Survey 2003–2006: Key Findings Report* (2006), 11 cited at J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), [15.2].

173 Victorian Government Department of Human Services, *An Integrated Strategy for Child Protection and Placement Services* (2002), 52–53.

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

When welfare and justice collide

13.172 The Children's Court in Victoria has two divisions, one which deals with care matters and the other with criminal matters involving children and young people. Justice Linda Dessau has observed of this:

> Whilst cases in the different divisions are heard separately, it is an artificial separation given that the children about whom there are protective concerns in the Family Division are frequently the same children who are charged with offences in the Criminal Division.[175]

13.173 There is also concern that the same child who is a 'victim' in one jurisdiction, and for whom the state shows great protective concern, is a 'villain' in the other and is seen to be less 'deserving' of protection.[176]

13.174 One specific area where the child protection system crosses the path of the criminal justice system, and where poor outcomes for children and young people may result, is in relation to bail. Statistics show that more young people are being held in detention on remand for longer periods of time, and in part this is because, quite simply, there is nowhere else for them to go.[177] As was noted in the Wood Inquiry:

> One problem which was repeatedly brought to the notice of the Inquiry has been the difficulty in securing accommodation for young people who might otherwise have been released on bail, but cannot be released because they do not have stable accommodation or are unable to return home because of family breakdown or safety or neglect risks.[178]

Release on bail

13.175 Young people aged between 10 and 17 years are usually dealt with by the juvenile or youth justice system, where detention is considered a last resort and the emphasis is on diversion and rehabilitation in order to break offending cycles.[179] However, the special problems that many young people face when applying for bail tend to undermine these principles.

13.176 To be released on bail, a young person must generally have a responsible adult (usually a parent or carer) to sign their bail papers and ensure they appear at court when required. Where the young person is homeless, or cannot go home because of dysfunctional family relationships or because of safety risks, a court will often impose a condition on bail that they 'reside as directed by the [child protection agency]'. However, there is no obligation on the child protection agency to do so except where it

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175 L Dessau, 'Children and the Court System' (Paper presented at Children and Crime: Victims and Offenders Conference convened by the Australian Institute of Criminology, Brisbane, 17–18 June 1999.

176 G Murray, 'Victims and Villains—The Same Young Person' (Paper presented at Children and Crime: Victims and Offenders Conference, Brisbane, 17–18 June 1999.

177 M Dumbach, 'Homes for Homeless Children' (2007) 32(3) *Alternative Law Journal* 170.

178 J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), [15.8].

179 Cf *Children (Criminal Proceedings) Act 1987* (NSW) ss 17–18 which excludes serious children's indictable offences from being determined in the NSW Children's Court.

has parental responsibility for the child or young person.[180] Therefore, the effect of such a condition is that the child or young person is detained in custody because the child protection agency is frequently unable to find suitable accommodation.

13.177 The Wood Inquiry noted that high remand rates were a significant problem in NSW, where up to 60% of young people in NSW detention centres are on remand. Of those who were on remand because they were unable to meet a condition of bail, the most common condition they could not meet was to 'reside as directed by the Department of Community Services'.[181]

13.178 The high rate of remand is not solely a problem in NSW. The Australian Institute of Criminology has found that, across all states and territories, about 50% of young people in detention (at any one point in time) were on remand awaiting trial or sentencing in 2002, and that this had increased to almost 60% in 2007.[182]

Commissions' views

13.179 The detention of children and young people on remand pending trial, where bail would otherwise have been granted, clearly has a disproportionate impact on homeless young people, and on those who have no stable family home to go to. It is contrary to the prevailing policies and principles in the juvenile justice arena of diversion and rehabilitation, and may exacerbate existing risk factors for that class of children and young people.

13.180 It was observed in the Wood Inquiry that:

> Coming within the juvenile justice or criminal justice system should not exclude a young offender from long-term services from [child protection agency] and other human service agencies. Nor should a shortage of refuges or other forms of accommodation result in young people who cannot live safely with their families, being remanded in custody unnecessarily, pending trial.[183]

13.181 The solution recommended by the Wood Inquiry was an administrative one, namely the establishment in NSW of an after-hours bail and assistance service to help children and young people access bail when they are at risk of being remanded in custody.[184] Residential bail programs have also been suggested by advocacy bodies and service providers.[185] Some of these services and programs already exist in other

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180 *Minister for Community Services v Children's Court of NSW* (2005) 62 NSWLR 419 referred to in J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), [15.15].

181 Ibid, [15.12], citing a submission by the NSW Department of Juvenile Justice.

182 N Taylor, *Juveniles in Detention in Australia, 1981-2007* (2009), 39.

183 J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), [15.83].

184 Ibid, Rec 15.1. The recommendation has been approved in principle by the NSW Government, and an after-hours bail hotline, to operate under the auspices of the NSW Department of Juvenile Justice, is expected to be implemented by June 2010.

185 See, for example, National Council of Social Services, *Bail Me Out: NSW Young People and Bail* (2010), Rec 1.4; UnitingCare Burnside, *Releasing the Pressure on Remand: Bail Support Solutions for Children and Young People in New South Wales* (2009); M Dumbach, 'Homes for Homeless Children' (2007) 32(3) *Alternative Law Journal* 170, 171.

jurisdictions including Victoria, Queensland and Western Australia and the Commissions support their availability across all states and territories.

Referring care and protection issues when they arise

13.182 Safety concerns for a child or young person who is a defendant in criminal proceedings in a children's or youth court could be brought to the attention of the child protection agency by giving the court a power to refer the matter formally to the child protection agency for investigation. The NSW Children's Court called for such a power in its submissions to the Wood Inquiry and to a previous review of the NSWLRC in relation to young offenders.[186] However, the Chief Magistrate of the Children's Court did not limit the proposal to the exercise of the court's criminal jurisdiction:

> It is submitted that, where it appears to the Children's Court that a child or young person, not him/herself the subject of care proceedings but mentioned in such proceedings or the subject of criminal proceedings, may be in danger or in need of assistance, the Court should be entitled … to require the Director-General to make a report to it as to care and protection issues regarding such child or young person and as to the steps which the Director-General proposes to take to address those issues and, if he proposes to take no steps, the reasons for his decision. Such a provision would address two problems which frequently arise—firstly where, in the course of care proceedings, it emerges that other children or young persons have been left in the same unsatisfactory or dangerous situation from which the child, the subject of the care proceedings, has been removed and, secondly, where a young person is the subject of criminal proceedings and entitled, on juvenile justice principles, to be released either on bail or on probation but lacks adequate supports and will face serious danger if released and left to his/her own devices.[187]

13.183 The Commissions understand that while magistrates may make reports to the relevant child protection agency in these circumstances, either via the usual notification processes or by special arrangement with the relevant child protection agency, this does not occur often.[188] One of the reasons for the infrequent referral, as noted by the NSWLRC, is the court's lack of power to require the child protection agency to report back to it on the results of its investigation:

> The Children's Court … indicated its frustration with its limited capacity to help a young offender with care and protection issues, beyond reporting the problems to [the Department of Community Services]. The Court receives no assurance that action will flow from its reporting of its concerns and no information as to what action might have been taken. Accordingly, a magistrate cannot build input from [the Department] into any probation plan.[189]

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186 J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), [15.76]; New South Wales Law Reform Commission, *Young Offenders*, Report No 104 (2005), [8.140].

187 NSW Children's Court, *Submission to the Special Commission of Inquiry into Child Protection Services in NSW* (2008).

188 J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), [15.75].

189 New South Wales Law Reform Commission, *Young Offenders*, Report No 104 (2005), [8.140].

13.184 The Wood Inquiry considered this issue and declined to recommend that the Children's Court (in its criminal jurisdiction) should have a power to require a report from Department of Community Services, concluding that:

> this would be inconsistent with its role as a court of law charged with the determination of cases brought before it. To confer upon the court an own motion or supervisory role would cross the appropriate boundaries within which the two institutions, one judicial and the other administrative, need to function.
>
> However, the Inquiry does agree that, if requested by the Court, [Department of Community Services] should provide relevant information within its possession that might assist in the sentencing of young people before the Children's Court in relation to a criminal offence which, it might be expected, would identify any ongoing care and protection issues that might need to be taken into account in the exercise of the court's sentencing discretion. It can exercise its s 248 power for that purpose.[190]

The Victorian model

13.185 In Victoria, the Criminal Division of the Children's Court may refer a matter to the child protection agency for investigation when it believes that grounds exist for the making of a protection order, or a therapeutic order, in relation to a child appearing as a defendant before it.[191] Under section 350 of the *Children, Youth and Families Act 2005* (Vic), the child protection agency is obliged to investigate any such matter referred to it by the Children's Court, and must provide a report of its investigation of the matter to the Court within 21 days of the referral.[192] The report must set out the outcomes of the investigation specifying, in particular, whether the child protection agency has made an application for a protection order, or a therapeutic treatment order in relation to the child or if the investigation reveals that such action is not warranted.

13.186 These provisions were part of a package of reforms of the Victorian legislation designed to address issues relating to children and young people who exhibited sexually abusive behaviour. Care and protection issues arise because these children and young people are likely themselves to have been sexually abused.[193]

13.187 Furthermore, research suggests that early intervention therapeutic programs can help prevent ongoing and more serious sexual offences by children and young people exhibiting sexually abusive behaviour. While the Children's Court has power to require young offenders to participate in these treatment programs on sentencing, that power is only enlivened when the young person makes an admission of guilt or is convicted. As it is often difficult to prove the mental intent required to secure a conviction for younger children, aged between 10 and 15 years, an alternative pathway to treatment was required.

13.188 A formal referral by the Criminal Division to the Secretary provides that alternative pathway. It directs the child protection agency to investigate the issues and,

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190 J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), [15.81].

191 *Children, Youth and Families Act 2005* (Vic) s 349.

192 Ibid s 350(1).

193 See Ch 12.

where the grounds for intervention are met, to seek an order in the Family Division of the Children's Court directing the child or young person to participate in a treatment program. In this way, participation in therapeutic treatment can be arranged when the child does not voluntarily seek help, without the need to rely on a criminal prosecution.

Commissions' views

13.189 The Commissions consider that there may be merit in giving courts a formal power to refer their concerns for the safety of a child or young person, who is a defendant in criminal proceedings before it, to the child protection agency for investigation. Section 349 of the Victorian statute provides a useful model in this regard. Such a power gives the court a clear pathway to take action where it is of the view that action is warranted, rather than relying on court officers to make a report using the notification provisions. It also ensures that an investigation is carried out by the child protection agency.

13.190 As noted by the Wood Inquiry, there is also merit in ensuring the court can request relevant information from a child protection agency in the exercise of its sentencing jurisdiction. This would assist it to identify any ongoing care and protection issues that it ought to have regard to when sentencing young offenders.[194] Presently, in NSW, the court may request this information under s 248 of the *Children and Young Persons (Care and Protection) Act.* The Commissions are interested in hearing from stakeholders about how often, in practice, courts request such information.

13.191 The Commissions' preliminary view is that courts should also be able to make a formal referral (with report back provisions) to the child protection agency when exercising its care jurisdiction, where it has concerns for the safety of other children or siblings of the child or young person who is the subject of care proceedings before it.

Proposal 13–6 State and territory child protection legislation should be amended to allow a court, in the exercise of its criminal jurisdiction where a child or young person who is a defendant before it, to refer a matter to the child protection agency for investigation where it considers that there are legislative grounds for a protection application, or an application for a therapeutic treatment order, to be made.

Proposal 13–7 State and territory child protection legislation should require the child protection agency to provide, within 21 days of the referral, a report to the court setting out the outcomes of its investigation into the matter, and specifying whether a care and protection order or a therapeutic treatment order is being sought, or if the investigation reveals that such an order is not warranted.

194 J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), [15.82].

Proposal 13–8 A court exercising care jurisdiction under state and territory child protection legislation should have a power to refer its concerns for the safety of other children or siblings of the child or young person the subject of care proceedings before it to the child protection agency for investigation, and to require the child protection agency to furnish it with a report of its investigation within a certain time period specified in the legislation.

Question 13–13 In practice, when sentencing young offenders, how often does the court request information held by the child protection agency about the offender to be provided to it?

14. Child Protection and the *Family Law Act*

Contents

Introduction

> Problems of the interface between child protection services and family courts have surfaced in many countries. They are not confined to Australia. No matter what the structure of the various child protection services and of the various family and divorce courts and services, the problems are always the same.[1]

14.1 This chapter addresses the first of the Terms of Reference for this Inquiry, which requires the Commissions to consider the interaction in practice of state and territory child protection laws with the *Family Law Act 1975* (Cth). The principal interaction issues include: the jurisdictional overlap and intersections, and the determination of which courts should deal with parenting disputes that raise serious child protection issues; the communication of information between the child protection

1 T Brown, R Sheehan, M Frederico and L Hewitt, *Resolving Family Violence to Children: An Evaluation of Project Magellan, A Pilot Project for Managing Family Court Residence and Contact Disputes when Allegations of Child Abuse Have Been Made* (2001), 43.

system and the family courts; the participation of child protection agencies in family law matters; and the potential for children to fall into gaps between the two systems.[2]

Shared emphasis

14.2 Child protection issues arise in family court cases and in proceedings under state child protection laws. Both family law and child protection laws share an emphasis on the rights of the child and their best interests as the guiding principle for decision making—as noted in Chapter 12. This shared emphasis on the 'best interests of the child' reflects international covenants to which Australia is a signatory[3] and enables both systems to complement each other to some degree. Another shared emphasis of the two systems is a common respect for the continued connection, culture and community of Aboriginal and Torres Strait Islander peoples.[4]

Divided responsibility

14.3 The division of responsibility for the systems between Commonwealth, state and territory governments means that a degree of cooperation between different courts, agencies and individuals is required. In both systems, different participants are responsible for making decisions concerning the care, protection and welfare of children and each needs to be aware of the role and actions of the others, and their interlocking consequences. The multiplicity of agencies, courts and laws that may be involved has created numerous challenges—and sometimes conflicting decisions—for example about who has parental responsibility for a child.

Prior and ongoing reviews

14.4 The interactions between the family law and child protection systems have been address by the Family Law Council in 2002[5] and in 2009;[6] by the ALRC and the then Human Rights and Equal Opportunity Commission (HREOC) in the report, *Seen and Heard: Priority for Children in the Legal Process* (ALRC 84);[7] and by Professor Richard Chisholm's *Family Courts Violence Review* (Chisholm Review).[8]

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2 Dispute resolution in the context of child protection is discussed in Ch 11.

3 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976), art 27; *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990), art 30. See Ch 2.

4 *Family Law Act 1975* (Cth) ss 60CC(6), 61F; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 13; *Children, Youth and Families Act 2005* (Vic) s 13; *Child Protection Act 1999* (Qld) s 6; *Children and Community Services Act 2004* (WA) s 12; *Children's Protection Act 1993* (SA) s 5; *Children, Young Persons and their Families Act 1997* (Tas) s 9; *Children and Young People Act 2008* (ACT) ss 10, 513; *Care and Protection of Children Act 2007* (NT) s 12. In 2009, compliance with the principle by states and territories ranged from about 85% (NSW) to 25% (Tasmania): Australian Institute of Health and Welfare, *Child Protection Australia 2008–09* (2010), 47.

5 Family Law Council, *Family Law and Child Protection—Final Report* (2002).

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

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

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

14.5 Reviews of specific state and territory child protection systems have also raised practical interaction issues in the context of evaluating the functions of child protection agencies.[9] The problems have also been identified and discussed by government committees,[10] in academic articles and studies[11] and in judicial decisions.[12]

14.6 Nevertheless, these issues have not yet been addressed comprehensively and this 'leaves open the very real possibility that some children's welfare will be jeopardised'.[13] Both the Council of Australian Governments and the Standing Committee of Attorneys-General (SCAG) are also considering issues relating to child protection, and improvements that can be made at a national level to the way government agencies and courts deal with these issues.[14]

Chapter outline

14.7 This chapter begins with a summary of the jurisdictional intersections and overlaps between state and territory child protection laws (the child protection system) and the *Family Law Act* (the family law system) with respect to parental responsibility. It then focuses upon the legal framework for interaction between the two systems: first, how family courts find out about child maltreatment—by notification, screening and intervention; and secondly, the legislative mechanisms for the flow of information between the systems. Finally, this chapter discusses the administrative underpinnings of cooperation, including memorandums of understanding (MOUs) and protocols for information sharing as well as a cooperative case management models, such as the Magellan project.

Jurisdictional intersections

Overview

14.8 Federal family courts determine disputes between separating or separated parents. In contrast, when state or territory child protection agencies consider that a child will not be safe or properly looked after by either parent—whether they are separated or not—they may institute proceedings in children's or youth courts. This

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

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

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

12 See eg, *Re Karen and Rita* (1995) 19 Fam LR 528.

13 Ibid, 556.

14 Council of Australian Governments, *Protecting Children is Everyone's Business—A National Framework for Protecting Australia's Children 2009–2020* (2009); R McClelland (Attorney-General), *Family Violence in Focus Conference, 21 August 2009* (2009) <www.attorneygeneral.gov.au> at 16 April 2010.

process of decision making may result in the state—with the sanction of state or territory children's courts—acting to remove children from their families, and taking parental responsibility from parents.

14.9 Decisions made by parents or child protection agencies may result in concurrent proceedings relating to the same children. For example, a parent may express concern to a child protection agency before parenting orders are made under the *Family Law Act*. The child protection agency may decide to apply for care orders in a children's court, rather than intervening in the family law proceedings. In other cases, a child protection agency may request a parent to act to protect a child by obtaining a family violence order against the other parent.[15] In such cases, if the parent fails to seek a family violence protection order the agency may seek orders from the children's court to remove the child.

The extent of the problem

14.10 A number of studies have considered the frequency with which issues of child maltreatment or neglect arise in family law proceedings.

14.11 In 1994, a study of 294 judgments in defended Family Court matters revealed allegations of sexual abuse of a child were made in 10% of matters, and allegations of physical abuse or neglect were made in a further 11% of matters.[16]

14.12 In 1997, an analysis of over 700 cases awaiting pre-hearing conferences in the Melbourne registry of the Family Court found that over 40% of children's cases involved allegations of some form of child abuse.[17]

14.13 In 1998, a study concluded that matters involving allegations of child abuse were a substantial or core component of the Family Court's workload.[18] The study, which examined a selection of child abuse cases in the Family Court from 1994 to mid-1995, found that one quarter of matters involving children at the final hearing stage involved allegations of child abuse.[19] Those allegations of child abuse in the Family Court tended to be 'serious'—that is, they alleged physical or sexual abuse or both—and the families involved were not generally known to the relevant state or territory child protection service.[20]

14.14 In 2007, a study of 300 court files involving parenting disputes from three registries of the Family Court and the Federal Magistrates Court (FMC) revealed that

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15 See Ch 12 and Part B.

16 P Parkinson, 'Family Law and Parent-Child Contact: Assessing the Risk of Sexual Abuse' (1999) 23 *Melbourne University Law Review* 345, 346.

17 A Nicholson, 'The Approach of the Family Court of Australia to Child Abuse Matters' (Paper presented at 12th International Congress on Child Abuse and Neglect, Auckland, 1 September 1998), cited in P Parkinson, 'Family Law and Parent-Child Contact: Assessing the Risk of Sexual Abuse' (1999) 23 *Melbourne University Law Review* 345, 346.

18 T Brown, M Frederico, L Hewitt and R Sheehan, *Problems and Solutions in the Management of Child Abuse Allegations in Custody and Access Disputes Before the Family Court of Australia* (1998), 431.

19 T Brown, M Frederico, L Hewitt and R Sheehan, 'Child Abuse and the Family Court' (1998) 91 *Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice* 1, 2.

20 Ibid, 3.

allegations of child abuse were raised in 19 to 50% of all cases.[21] Again, those allegations tended to be of 'serious' child abuse. This study also found that more than half of the cases in the sample involved allegations of family violence, many at the severe end of the spectrum.

14.15 The fact that child protection concerns arise in family law proceedings may, but does not necessarily, indicate a problem of overlap. Such overlap is managed in a variety of ways, discussed below.

Section 69ZK of the *Family Law Act*

14.16 The *Family Law Act* and state and territory child protection legislation each enable courts to make orders regulating or displacing parental responsibility for children. As such, parental responsibility for children is a convenient starting place to discuss the family law and child protection systems.

14.17 There is potential for inconsistency between the laws, and the orders obtained, in respect of parental responsibility in different jurisdictions.

14.18 Section 109 of the *Australian Constitution* provides that when a law of a state is inconsistent with a law of the Commonwealth the latter shall prevail, and the state law shall, to the extent of the inconsistency, be invalid. A state law may be directly inconsistent with a Commonwealth law if it is impossible to obey both the state law and the Commonwealth law, or if the state law varies, detracts from, or impairs the Commonwealth law. Alternatively, a state law may be indirectly inconsistent with a Commonwealth law if it relates to a matter in respect of which the Australian Parliament has evinced a legislative intent to 'cover the field'.[22]

14.19 Whether an order made by a court exercising jurisdiction under the *Family Law Act* prevails over a state child protection order was tested in 1980 in *R v Lambert*.[23] In that case a magistrate in Queensland made an order under the *Family Law Act* that a mother have custody of her daughter. Another magistrate later ordered, pursuant to Queensland's child protection legislation, that the girl be placed in the care and protection of the relevant child protection agency. The father then sought custody under the *Family Law Act*. When he was given custody, the child protection agency sought a determination in the High Court that the *Family Law Act* order did not override the state order. The High Court held that the relevant provision of the *Family Law Act* was invalid to the extent that it purported to enable a custody order under the Commonwealth legislation to override a similar order under state child protection legislation—the marriage power did not extend so far. It was not a case of inconsistency that attracted s 109 of the *Constitution*.[24]

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

22 See eg, *Victoria v Commonwealth* (1937) 50 CLR 618.

23 *R v Lambert* (1980) 146 CLR 447.

24 See further Ch 2; A Dickey, *Family Law* (5th ed, 2007), 28–31. The language of 'custody' and 'access' was changed in 1995 to 'residence' and 'contact': *Family Law Reform Act 1995* (Cth).

14.20 This separation of jurisdiction is now contained expressly in s 69ZK of the *Family Law Act*. First, s 69ZK(1) provides that a court having jurisdiction under the Act must not make any order under the Act (other than a child maintenance order) in relation to a child who is under the care of a person pursuant to a state or territory child welfare law,[25] unless:

> (a) the order is expressed to come into effect when the child ceases to be under care; or
>
> (b) the order is made in proceedings relating to the child in respect of which the written consent of a child welfare officer of the relevant State or Territory has been obtained.[26]

14.21 A 'child welfare law' is any law of a state or territory that relates to the incarceration of a child for a criminal offence,[27] as well as any law listed in sch 5 of the *Family Law Regulations 1984* (Cth). Schedule 5 sets out 38 state and territory laws, including those dealing with child protection.[28]

14.22 Secondly, s 69ZK(2) confirms that state and territory courts may make child protection orders, including where a parenting order is in place under the *Family Law Act*, and the child protection order prevails over the *Family Law Act* order so long as it is in force.[29] This expressly preserves the operation of the state and territory child protection system, reflecting the constitutional decision in *R v Lambert*.

14.23 Courts exercising jurisdiction under the *Family Law Act* are unlikely to make orders coming into effect when a child ceases to be under the care of a person under a child protection law, because

> the needs, capacities and other circumstances of the children, of their natural parents … and of any other person interested in the children's welfare, could well change significantly before the state child protection orders ultimately expired.[30]

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

26 However, *Family Law Act 1975* (Cth) s 69ZK(1)(b) has no application in South Australia because there has been no proclamation by the Governor-General declaring that all the child welfare provisions in Part VII apply there under s 69ZF(1). This has the effect of modifying s 69ZK(2) so as to exclude the jurisdiction of a court under the *Family Law Act* to make an order in relation to the maintenance of a child under a child protection law.

27 Ibid s 4; *Family Law Regulations 1984* (Cth) reg 12B(1).

28 It appears that some relevant legislation from a number of jurisdictions has not been prescribed as required by *Family Law Act 1975* (Cth) s 4; *Family Law Regulations 1984* (Cth) reg 12B(2), sch 5. See also *Acts Interpretation Act 1901* (Cth) s 10. The Commissions note that as at 9 February 2010, the list of prescribed laws incorrectly prescribes: (item 6) *Children and Young Persons Act 1989* (Vic), rather than the *Children, Youth and Families Act 2005* (Vic); (item 28) *Community Welfare Act* (NT) rather than the *Care and Protection of Children Act* (NT); (item 32) *Children and Young People Act 1999* (ACT), rather than the *Children and Young People Act 2008* (ACT).

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

30 *Ford & Department of Child Safety* [2007] FamCA 811, [41].

14.24 Instead, the usual course is to terminate or adjourn any proceedings of the federal family court for the period of the child's care under child protection laws.[31]

14.25 The operation of s 69ZK of the *Family Law Act* is demonstrated by the following hypothetical examples which refer to the NSW child protection agency by its former name, the Department of Community Services (DoCS),[32] and the Children's Court of NSW:

- After family law court parenting orders placing a child with X, DoCS brings proceedings in a Children's Court and obtains orders that the child should be removed from X and placed in the care of Y. The Children's Court order would prevail: s 69ZK(2).
- A family law court has ordered that no further medical examinations should be made of a child without the court's permission. DoCS makes arrangements, valid under the child welfare law, for a further medical examination. Despite being inconsistent with the family law court order, the medical examination can be carried out, because the child welfare law prevails: s 69ZK(2).
- While proceedings in a family law court are pending, DoCS obtains Children's Court orders placing the child in care. Unless the Minister consents in writing to the family law court proceedings, the family law court cannot now make any orders relating to the child (even by consent of the parties) except orders that would come into force only when the child leaves care: s 69K(1).
- DoCS intervenes and has a child removed from the mother and placed with the mother's sister. Later DoCS identifies the father as a viable carer, and with his consent withdraws its Children's Court proceedings. The father starts Family Court proceedings and is granted interim residence. Some months later, however, by parental agreement, the mother is granted residence and the child is returned to her. It is open to DoCS to take action under the Care and Protection Act to remove the child.
- A family law court makes a recovery order[33] in relation to a child. Then, before the order is acted upon, the child comes under the state child welfare system. The recovery order remains in force until the family law court revokes it; but it cannot have any effect that is inconsistent with the operation of the child welfare law: s 69ZK(2). If, for example, the child is placed in the care of a foster parent under the child welfare law, the recovery order cannot be put into effect so as to remove the child from the care of the foster parent.
- DoCS intervenes in a proceeding in a family law court, and orders are made that the child should live with X. DoCS later has reason to believe that the child is at risk of abuse from X. Even though it is a party to the family law court proceedings, it seems that DoCS could use its authority under the state law to remove the child from X, notwithstanding the family law court order: s 69ZK(2).[34]

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31 R Chisholm, *Protecting Children—The Family Law Interface* (2009), 25.

32 Now known as 'Community Services': NSW Government Department for Human Services, Community Services, *Homepage* <www.community.nsw.gov.au/welcome_to_community_services.html> at 14 April 2010.

33 That is, an order requiring a person to return the child, and authorising the police or others to assist if necessary: see Ch 9.

34 R Chisholm, *Protecting Children—The Family Law Interface* (2009).

14.26 In practice, s 69ZK of the *Family Law Act* requires federal family courts to work cooperatively with child protection agencies and children's courts to ensure the proper coordination of the child protection efforts of each system, and to avoid unnecessary duplication of proceedings or inconsistency in approach.

The appropriate jurisdiction

14.27 Whether contact with a particular person is in a child's best interests is a key consideration of both child protection and family law systems. By virtue of s 69ZK, where a child protection order is in place, a *Family Law Act* parenting order cannot be made. The appropriate forum to determine who is to have contact with a child is a separate but related issue.

Different purposes

14.28 Despite the shared emphasis of the family law and child protection jurisdictions discussed above, practical issues regarding interaction between the two systems arise because child welfare and safety are relevant for different purposes in each jurisdiction.

14.29 Child protection proceedings determine whether, as a matter of fact, a child is in current need of care or protection, or is at risk of a need of care or protection. Such proceedings—which may address the suitability of the parents to have parental responsibility for the child—is initiated by a child protection agency, which will also have continuing responsibility for any follow-up action required.

14.30 Family law courts determine the competing applications of parents for parental responsibility of a child. Where issues of abuse or neglect arise, they are considered as circumstances relevant to determining parental responsibility and parenting arrangements in the best interests of the child.[35] It is not necessary, for example, for the court to determine whether a child was neglected by a parent but only to determine whether parenting arrangements are in the best interests of the child in all the circumstances, based on the threshold of 'unacceptable risk'.[36]

14.31 Because federal family courts are not charged with the responsibility of investigating allegations of child maltreatment, child protection agencies generally do not join these proceedings. They may do so, however, where they are advised of the family law proceedings and judge the alleged issues of child maltreatment to be serious enough to warrant intervention, or the case is dealt with through the Magellan project—both of which are considered below.

Child protection orders

14.32 State and territory courts may make a range of care and protection orders, including:

- undertakings or recognisances by parents or children, with no further supervision;

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35 See Ch 8.

36 *M v M* (1988) 166 CLR 69.

- supervision by the department, with or without undertakings;
- orders giving parental responsibility and care to other relatives or appropriate people;
- orders giving shared parental responsibility, for different aspects of the child's welfare, to the parents and the minister or child protection agency; and
- orders giving parental responsibility and care to the minister or department.

14.33 These orders may not be available in all jurisdictions, and some may be differently named.[37] Orders may be made in combination so that, for example, a state guardianship order may be made whether the child remains at home or is removed from the family.

14.34 It may be necessary for a court exercising jurisdiction under child protection legislation to determine the extent to which a child would benefit from a continuing relationship with one or both parents as part of its overall determination about whether the child needs state care and protection. Where this is the case, courts exercising jurisdiction under child protection legislation, to the extent permitted, may make orders in relation to parent-child contact, or family violence protection orders in favour of the child or, in some jurisdictions, an adult family member.

14.35 For example, s 86 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) currently empowers the Children's Court to make both interim and final orders concerning contact in all cases. Amendments have recently been passed, following a recommendation made in the *Report of the Special Commission of Inquiry into Child Protection Services* conducted by the Hon James Wood AO QC (Wood Inquiry),[38] to limit this power to the making of:

- interim contact orders; and
- final contact orders only where restoration is a realistic possibility.[39]

14.36 Care orders made by children's courts can be registered with a federal family court.

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37 Australian Institute of Health and Welfare, *Child Protection Australia 2008–09* (2010), 88–91. See also Ch 12.

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

39 *Children's Legislation (Wood Inquiry Recommendations) Act 2009 (NSW)* sch 1 cl 24, which inserts a new subsection (1A) into s 86. Under the amendments, the Children's Court could still stipulate minimum arrangements for contact. It may also require that contact be supervised, subject to the consent of the parent and the proposed supervisor. There are numerous possibilities relating to the duration and frequency of contact, including increasing contact over time. The winding back of the Children's Court's power to make final contact orders is a reversal of a decision taken in 1998 following a major review of the previous legislation: NSW Department of Community Services, *Review of the Children (Care and Protection) Act 1987: Recommendations for Law Reform* (1997), 90, 96.

Family Law Act

14.37 Any person who has a concern for the wellbeing of a child can apply for a parenting order under the *Family Law Act*.[40] A parenting order made by a court under pt VII of the *Family Law Act* can stipulate the content of the parties' parental responsibilities to a very broad extent,[41] and typically determines where the child will live and how much time he or she will spend with each parent. Although proceedings may arise from a dispute between parents about the division of parental responsibility, parenting orders address the welfare of the child, rather than resolve the rights of the parents. For this reason, the court is not limited to a consideration of the parties' submissions.[42]

14.38 Section 69J of the *Family Law Act* provides that each state and territory court of summary jurisdiction can exercise federal family law jurisdiction.[43] Section 69N qualifies this in that a court of summary jurisdiction cannot hear defended proceedings for a parenting order, other than a child maintenance order, without the consent of all the parties.[44] If consent is not given, the court is obliged to transfer the proceedings to the Family Court, the Family Court of Western Australia, the Supreme Court of the Northern Territory, or the FMC, as the case requires.

Expanding jurisdictions

14.39 One question is whether problems caused by the intersection of state and federal systems concerning child protection can be overcome by expanding the jurisdiction of the courts that deal with these matters. Questions of expanding jurisdiction are considered in two directions: first, 'downwards', by expanding the *Family Law Act* jurisdiction conferred on state and territory courts; and, secondly, 'upwards', by expanding the state and territory jurisdiction conferred on federal courts.

14.40 ***Cross-vesting***. Jurisdiction may only be cross-vested in the 'downwards' direction.[45] Each state and territory court of summary jurisdiction is vested with jurisdiction under pt VII of the *Family Law Act* other than proceedings for granting leave for adoption proceedings.[46] Magistrates are generally able to exercise federal family law jurisdiction under s 69J of the *Family Law Act*, but children's court magistrates are not able to do so.[47] In ALRC 84, the ALRC and HREOC considered that, in principle, there is no procedural reason for this limitation on the jurisdiction of

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40 *Family Law Act 1975* (Cth) s 65C. See also A Dickey, *Family Law* (5th ed, 2007), 273.
41 A Dickey, *Family Law* (5th ed, 2007), 257.
42 *Family Law Act 1975* (Cth) ss 69ZT, 69ZM.
43 The exception is proceedings under the *Family Law Act 1975* (Cth) s 60G for leave for a prescribed adopting parent to commence proceedings for the adoption of a child.
44 They may exercise interim or *ex parte* jurisdiction and further jurisdiction by consent.
45 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511. See Ch 2.
46 *Family Law Act 1975* (Cth) s 69J(1). The powers of magistrates to vary or suspend existing contact orders under div 11 of the *Family Law Act* are discussed in Ch 8.
47 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [15.50].

state and territory children's courts and recommended the vesting of federal jurisdiction under s 69J of the *Family Law Act* in children's courts.[48]

14.41 Giving children's courts power to hear parenting disputes may divert the courts' resources away from their core business—determining the protection needs of children—to the detriment of that work. From this practical implication, it follows that the conferral of family law jurisdiction on children's courts ought to be limited to situations where the child protection agency has brought the proceedings, and consents to the court exercising *Family Law Act* jurisdiction.

14.42 The problem nonetheless remains that cases might be brought in either jurisdiction to address child protection concerns. Research suggests that the family law system routinely handles cases that fall into the child protection category, many of which cross the family law, family violence, criminal and child protection jurisdictions.[49] As a consequence, the Family Court has developed the cooperative Magellan project, which is considered below.

14.43 In a report to the Commonwealth Attorney-General in 2002, the Family Law Council recommended that a decision should be taken as early as possible whether a matter should proceed under the *Family Law Act* or under child welfare law with the consequence that there should be only one court dealing with the matter.[50]

14.44 ***Referral of power***. ALRC 84 also considered whether the Family Court should take over the management of care matters.[51] That inquiry found that the jurisdictional divide between federal family law and state care and protection systems resulted in both the over- and under-servicing of families with child protection issues, with many children falling into gaps between the two systems.[52] It should be noted, however, that that Inquiry reported before the High Court's decision in *Re Wakim*, which found that it is not possible to vest state judicial power in federal courts.[53]

14.45 In 2009, the Family Law Council advice recommended:

> The Attorney-General as a member of SCAG address the referral of powers to federal family courts so that in determining a parenting application federal family courts have concurrent jurisdiction with that of State Courts to deal with all matters in relation to

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

49 Family Law Council, *The Best Interests of the Child? The Interaction of Public and Private Law in Australia—Discussion Paper* (2000), 5 and 29–30. See also Ch 20.

50 Family Law Council, *Family Law and Child Protection—Final Report* (2002), Rec 13.

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

52 Ibid. See also Family Law Council, *The Best Interests of the Child? The Interaction of Public and Private Law in Australia—Discussion Paper* (2000).

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

children including where relevant family violence, child protection and parenting orders.[54]

14.46 While the states can refer the power to make laws in relation to a particular subject to the federal Parliament, they cannot simply confer jurisdiction on federal courts. The question arises whether a referral of powers could be narrowly drafted to confer no more legislative competence on the Commonwealth than is necessary to resolve the problems that require such a referral of legislative power. That, in turn, requires clarity about the problems that need to be resolved by expanding the jurisdiction of the federal courts.

14.47 An alternative to creating a unified federal Family Court is to amalgamate the Family Court with the various state courts. The exercise of federal jurisdiction by the Family Court of Western Australia is an example of this approach. Section 36(6) of the *Family Court Act 1997* (WA) provides that where a child, who is the subject of proceedings (between separating parents or parents and extended family members), appears to be in need of protection within the meaning of the *Children and Community Services Act 2004* (WA), the court has, in relation to the child, all the powers of the Children's Court in addition to the powers conferred by the *Family Court Act*.

14.48 The unitary nature of the family law and child protection jurisdictions in Western Australia has received close attention. The Commissions understand that SCAG is considering options for improved cooperation between federal family courts and state and territory child protection agencies, and in doing so has supported a pilot to be conducted by Legal Aid Western Australia to test the integration of family law and child protection systems. The Commissions understand that Western Australia is able to utilise current jurisdictional arrangements and a single court for family law matters, to implement an integrated approach towards the management of children's matters in circumstances where there are child welfare concerns.[55]

Commissions' views

14.49 ALRC 84 criticised legal processes which required a child's persistent and multiple engagement with the legal system as being contrary to the child's best interests.[56] It is also at odds with the goal of seamlessness that the Commissions have identified as a principal aim of this Inquiry.[57] The Commissions' preliminary view is that, wherever possible, matters involving children should be dealt with in one court—or as seamlessly as the legal and support frameworks can achieve in any given case. This was also the outcome recommended by the Family Law Council in 2002 as part of its 'one court principle'—that is, that state and territory courts should have a broad

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

55 P Murphy and L Pike, 'The Columbus Pilot Project: Developing a Model for Cost-Outcome Analysis on Violence and Child Abuse Cases in the Family Court of Western Australia' (2003) 9(2) *Journal of Family Studies* 235.

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

57 See Ch 1.

power to make residence and contact orders under the *Family Law Act* in child protection proceedings so that one court can deal with all substantive matters and ensure the child's best interests and welfare are addressed.[58] It may be, for example, that the first court with which a child comes into contact ought to be the primary court for dealing with the range of legal issues affecting that child, provided that it is capable of operating 'with as little formality and legal technicality and form as the circumstances of the case permit'.[59]

14.50 There are considerable advantages in such an approach, and given increasing specialisation in family violence and family law in the magistrates courts, a question may be whether state and territory courts require or desire all the powers under pt VII of the *Family Law Act*. In ALRC 84, it was suggested that magistrates may not have the training, experience or the time in a busy court list to give proper consideration to all the family law issues, particularly the complex issues which relate to the determination of what is in a child's best interests.[60] This may not be the case today, given the growing development and commitment to specialist training, education and the fact that all courts are now seen as 'busy'. The Commissions are interested in whether there is value in providing local and magistrates courts with expanded jurisdiction under the *Family Law Act*. A practical limitation on the capacity of magistrates courts to hear *Family Law Act* matters is that they do not have the associated counselling services or family dispute resolution processes of the Family Court and there are limited Family Court counselling services in rural areas. The Commissions note however, that magistrates courts regularly make interim children's orders under the *Family Law Act*, particularly in regional areas.

14.51 Ideally, one court should be responsible for exercising jurisdiction in relation to those matters where a substantial or permanent shift of parental responsibility for a child is first raised as an issue for resolution. The first point of engagement should facilitate the resolution of relevant issues as far as possible, or assist in the smooth transition to other parts of the legal or services framework more suited to achieve such outcomes.

14.52 The power of children's courts to make contact orders in proceedings before them appears to complement their care and protection jurisdiction. Such a power is necessary if governments are to adopt the Family Law Council's 'one court principle'.

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58 Family Law Council, *Family Law and Child Protection—Final Report* (2002), 85–86. See Rec 12.

59 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 93. See also NSW Department of Community Services, *Discussion Paper for Review: Statutory Child Protection in NSW—Issues and Options for Reform* (2006).

60 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), [15.64].

Question 14–1 Can children's courts be given more powers to ensure orders are made in the best interests of children that deal with parental contact issues? If so, what powers should the children's courts have, and what resources would be required?

Question 14–2 Should the *Family Law Act 1975* (Cth) be amended to extend the jurisdiction which state and territory courts already have under pt VII to make orders for a parent to spend time with a child?

Question 14–3 When should state and territory children's courts have power to determine contact between one parent and another in matters that are before the court in child protection proceedings?

Question 14–4 What features of the Family Court of Western Australia should be replicated in other jurisdictions?

Question 14–5 Is there any role for a referral of legislative power to the Commonwealth in relation to child protection matters? If so, what should such a referral cover?

Legal framework for interaction between the two systems

14.53 Another issue for this Inquiry is the need to ensure that each system knows about what the other is doing. Matters involving allegations of child abuse or neglect often end up being heard simultaneously in family law and child protection proceedings.[61] This can happen if the fact that there are proceedings in a court in one jurisdiction is not communicated to a court in the other.

14.54 The legal framework for managing the intersection of the child protection and family law systems includes two main elements: how the family courts find out about child maltreatment, and the legislative mechanisms for the flow of information and documents between the systems.

Notification of child maltreatment in Family Courts

14.55 There are two key aspects of notification: disclosure by the parties and screening by family courts. A consequential question is what happens with the information when it is received in a family court. A related, but distinct, issue is the involvement of child protection authorities in family court proceedings.

Notification by parties

14.56 The *Family Law Rules 2004* (Cth) contain a list of forms that must be filed by a person starting a case under the *Family Law Act*.[62] All of the forms dealing with

61 This is quite different from the family courts not having jurisdiction to make a parenting order for a child in care under child protection laws: *Family Law Act 1975* (Cth) s 67ZK, discussed above.

62 *Family Law Rules 2004* (Cth) r 2.01.

applications for parenting orders ask the initiating party to disclose if there are any ongoing child proceedings in another court that involve children involved in the family court proceedings, or whether there are any existing orders, agreements or undertakings about child welfare issues that relate to children involved in the family court proceedings. In addition, forms responding to applications for parenting orders ask the responding party whether, since the filing of the initiating application, any proceedings have been commenced, or orders made, about child welfare issues that relate to children involved in the proceedings. Despite these prompts, parties to family law disputes may not disclose the existence of prior or ongoing child protection proceedings.[63]

14.57 In their study of jurisdictional overlap in the area of child protection and the family law system, Fiona Kelly and Dr Belinda Fehlberg noted a case in which the Family Court was only made aware of the existence of proceedings in the Victorian Children's Court at a pre-hearing conference, resulting in 'duplication, uncertainty and confusion for the participants'.[64]

14.58 The Initiating Application for proceedings in the Family Court, FMC and Family Court of Western Australia requests information about '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' concerning any of the parties or children listed in the application.[65] The purpose of the form is to capture information about procedural, interim or final orders from a federal family court.[66] Its intent is to ensure that the court is aware of the context in which orders are sought—for example, whether the party (and the party's child) is already involved in parallel child protection proceedings, or whether an order is in current effect under a state or territory child welfare law. Contextual awareness enables the court to determine whether to proceed with, adjourn or terminate the proceeding.

14.59 A related document is Form 4—Notice of Child Abuse or Family Violence (Form 4). As noted on the form, it is to be used:

> a) when allegations of child abuse or risk of child abuse are made and a prescribed child welfare authority must be notified of the allegations (section 67Z of the *Family Law Act 1975*), or
>
> b) if, in a case where an application is made to the court for a Part VII order in relation to a child, a person alleges that there has been abuse of a child or family violence or there is a risk of abuse of a child or family violence and the allegation of abuse, family violence or risk of abuse or family violence is

63 See, eg, *Summerby v Cadogen (No 2)* [2009] FMCAfam 1018.

64 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.

65 Family Court of Australia, *Initiating Application (Family Law)* <www.familycourt.gov.au/> at 9 February 2010, 6. See also the discussion in Ch 8.

66 *Family Law Rules 2004* (Cth) r 2.01.

> relevant to whether the court should grant or refuse the application (Rule 2.04A of the *Family Law Rules 2004*).[67]

14.60 Section 60K of the *Family Law Act* establishes Form 4 as the principal means of triggering procedural obligations on family courts to accommodate allegations of family violence and child abuse.[68] In Part F, the applicant is directed to provide details of, amongst other things, 'child abuse', and the definition in s 4(1) is set out:

> Abuse, in relation to a child, means:
>
> (a) an assault, including a sexual assault, of the child which is an offence under a law, written or unwritten, in force in the State or Territory in which the act constituting the assault occurs; or
>
> (b) a person involving the child in a sexual activity with that person or another person in which the child is used, directly or indirectly, as a sexual object by the first-mentioned person or the other person, and where there is unequal power in the relationship between the child and the first-mentioned person.

14.61 There is no current requirement that parties in proceedings under the *Family Law Act* disclose whether state or territory child protection agencies have been in contact with the children in the proceedings. This information could indicate to the federal family court that the relevant agency has, or may, commence child protection proceedings.

14.62 Part G of the Form 4 concerns 'family violence'. Chapter 8 notes that there is no designated space on the form for a party to list any relevant protection orders which have been obtained, or an obligation to do so.

14.63 The Family Law Council considered that Form 4 should remain the key means of notification of child abuse issues in family law proceedings. The Council recommended with some amendments to Form 4 to make it more user-friendly.[69] 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.[70]

14.64 Kelly and Fehlberg 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, there should be greater communication between the relevant courts and child protection agencies.[71]

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67 Family Court of Australia, *Form 4—Notice of Child Abuse or Family Violence* <www.familylawcourts.gov.au> at 9 February 2010. This is also discussed in Ch 8.

68 Strategies for informing family courts about allegations of family violence and child abuse are discussed in Ch 8.

69 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.

70 Ibid, Rec 7.1.

71 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.

14.65 Chisholm also considered the process for identifying family violence and child abuse matters, and, rather than simply amending the forms, preferred a general screening of cases for family violence and child abuse issues:

> Experience has shown that this 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.[72]

Commissions' views

14.66 ***Forms***. A federal family court should not make parenting orders without knowing whether there are child protection proceedings on foot or care orders have been made with respect to the child. Federal family courts should make the forms clear and straightforward for parties to complete. It is in the interests of the courts to know from an early stage whether parenting proceedings ought to be adjourned or terminated. Any reform which improves disclosure of multiple proceedings independently of the parties—who should still be obliged to disclose in the forms—would be a constructive development.

14.67 The *Initiating Application (Family Law)* provides an early opportunity for the parties to family law proceedings to inform the court of the issues relevant to the proceeding. However, as the Chisholm Review identified, the parties have tended not to report child maltreatment and protection issues in the family courts.

14.68 In preliminary consultations the Commissions have heard that the *Initiating Application (Family Law)* could be improved to make it clearer to parties that the court needs to know, and they have a duty to disclose, whether there are child protection proceedings on foot, and whether there is a current care order in relation to the child. It has been suggested that the reference to 'child welfare issues' in Part F of the *Initiating Application (Family Law)* is too opaque, and may lead parties to overlook the function of the form in eliciting information about state or territory child protection proceedings and orders.

14.69 A question which targets significant concerns or fears the party has for their safety, or for the safety of their child, may elicit more detailed information. The purpose of a question with this focus is twofold. First, it would clearly signal to the court the possibility that there are current child protection or family violence concerns in the proceeding which require investigation and assessment. Secondly, the focus on 'significant concerns' raises the bar to approximate state and territory child protection thresholds, so that if an affirmative answer were given, the court has a prima facie trigger at an early stage to inform the relevant child protection agency in relation to child safety concerns, and a longer lead time to enable the concerns to be investigated. This would also facilitate appropriate intervention in the proceedings by the state.

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

14.70 Part F of the *Initiating Application (Family Law)* should be drafted to encourage parties to identify whether there are or have been child protection concerns as early as possible in proceedings. To that end, it may assist parties to be presented with a question which focuses on their safety or their child's safety or wellbeing, rather than upon the notion of 'child abuse' which is the current focus of Form 4. The Commissions are interested in hearing about the practical changes that could be made to the *Initiating Application (Family Law)* to make it clearer that parties are required to disclose current or prior child protection proceedings and current child protection orders. Further, the Commissions seek suggestions as to other ways that child safety concerns may be revealed at the commencement of proceedings under the *Family Law Act* so that they may be drawn to the attention of child protection agencies.

Proposal 14–1 To ensure appropriate disclosure of safety concerns for children, the *Initiating Application (Family Law)* form should be amended by adding an additional part headed 'Concerns about safety' which should include a question along the lines of 'Do you have any significant fears for the safety of you or your child(ren) that the court should know about?'.

Question 14–6 What other practical changes to the applications forms for initiating proceedings in federal family courts and the Family Court of Western Australia would make it clear to parties that they are required to disclose current or prior child protection proceedings and current child protection orders?

Question 14–7 In what other ways can family law processes be improved to ensure that any child safety concerns that may need to be drawn to the attention of child protection agencies are highlighted appropriately upon commencement of proceedings under the *Family Law Act 1975* (Cth)?

14.71 ***Risk assessment***. The Commissions understand that the Australian Government is currently considering options for implementing a family violence screening framework.[73] Screening frameworks are routinely used by family dispute resolution practitioners and by other agencies in the family law system.[74] Multiple screening processes may be burdensome for parties, which raises a general question of where and when screening should take place and how courts and other agencies can respond appropriately to screening carried out by another agency.

14.72 The Commissions' preliminary view is that state and territory child protection agencies should contribute to any screening framework for family violence and child maltreatment. Early and active involvement by child protection agencies provides an

73 When considering the cost of implementation, it may be necessary to assume that every case that comes to a court will need to be screened.

74 See Ch 11.

opportunity for participants in both systems to better understand their respective roles and responsibilities.[75]

14.73 This may best occur if a representative of the child protection agency is actively involved in the screening process. A direct role means that the child protection system would have an immediate stake in dealing with the case. The common family violence risk assessment and risk management tool developed by the Victorian Government may provide useful guidance for this work.[76]

Proposal 14–2 Screening and risk assessment frameworks developed for federal family courts should closely involve state and territory child protection agencies.

Information flow

14.74 Communicating information about child maltreatment between the family law system and the relevant child protection system may be required by statute or occur through administrative arrangement. Statutory mechanisms for communication are considered first, followed by the administrative arrangements between the systems that facilitate the communication.

Information from the family law system to child protection system

14.75 The *Family Law Act* contains two provisions obliging family courts to notify child protection agencies in certain circumstances. First, if a Form 4, discussed above,[77] is filed, the Registry Manager of the court must 'as soon as practicable, notify a prescribed child welfare authority'.[78] Secondly, where an officer or professional in a family court

> has reasonable grounds for suspecting that a child has been abused, or is at risk of being abused, the person must, as soon as practicable, notify a prescribed child welfare authority of his or her suspicion and the basis for the suspicion.[79]

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75 Research in the United Kingdom indicates that allegations of abuse in family law proceedings may be overlooked or downgraded in the child protection system because of contextual and interaction issues relating to perceptions of role and task: see L Trinder, A Firth and C Jenks, '"So Presumably Things Have Moved On Since Then?" The Management of Risk Allegations in Child Contact Dispute Resolution' (2010) 24(1) *International Journal of Law, Policy and the Family* 29.

76 Victorian Department of Human Services, *Family Violence Risk Assessment and Risk Management Framework* (2007). This is also discussed in Ch 11.

77 See also Ch 8.

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

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

14.76 Another provision provides that a person may notify child protection agencies where the person

> has reasonable grounds for suspecting that a child:
>
> (a) has been ill treated, or is at risk of being ill treated; or
>
> (b) has been exposed, or subjected, or is at risk of being exposed or subjected, to behaviour which psychologically harms the child.[80]

14.77 Chisholm has suggested that, while notifications by the court are mandatory under s 67Z, the effect of the notice has less weight than notifications by professionals under s 67ZA of the *Family Law Act* when it comes to a child protection agency deciding whether to investigate an allegation.[81]

14.78 The threshold for taking action and the particular focus of the relevant jurisdiction determines the child protection agency's response. As noted above, in child protection proceedings the focus is on determining whether, as a matter of fact, the child is in current need of care, at risk, or in need of protection. The difference in focus was commented upon in the Wood Inquiry in the context of explaining why allegations of child abuse in family law proceedings do not always trigger investigation by a child protection agency.[82] While evidence of a parent's past abusive behaviour may be relevant in family law proceedings, that evidence does not necessarily assist the child protection agency in determining whether the child is currently at risk of harm:

> The Inquiry understands and accepts that notifications arising out of family law disputes are generally reports of concern about the safety of a child in a family setting, and that this does not necessarily mean that DoCS needs to investigate each notification in order to fulfil its statutory function. There are a number of very valid reasons why DoCS may not investigate a notification received from a family law court. First, the report may not be sufficiently serious to justify its intervention. The question in family law proceedings is usually about the competing claims of each parent in relation to where the child will live and with whom they will spend time. These are not the same questions that arise in child protection proceedings.
>
> Secondly, the information provided by the notifier may not disclose sufficient reason to believe the child is at risk of the abuse alleged. While the notifier may have a belief to that effect, the evidence to support that belief may be insufficient.
>
> Thirdly, the reported concern may relate to events some time in the past or the child may currently be in a situation where he or she is no longer exposed to the risk disclosed in the report. The Care Act, at least in relation to its reporting requirements, includes the standard of 'current concerns.' Thus historic matters, while relevant to family law proceedings, are not sufficient to attract the intervention of the child protection system. ...
>
> In addition, the *Family Law Act* requires the reporting of many incidents which are not reportable under the Care Act. Under the *Family Law Act*, the threshold for

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

81 R Chisholm, *Protecting Children—The Family Law Interface* (2009), 23.

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

> making a notification is that the child to whom the proceedings relate has been abused or is at risk of being abused. As indicated above, it does not require there to be any current concerns about the safety and welfare of the child, as is provided in the Care Act.
>
> Of particular note is the fact that, in the event that the parents have separated and the child can be protected adequately through orders made in family court proceedings, which deny or restrict contact between the offending parent and the child, there will be no need for DoCS to intervene. In other words, if there is a viable carer and the child is in his or her care, then the child will not be in need of intervention under the Care Act.[83]

Information from the child protection system to the family law system

14.79 How do family courts obtain evidence about child protection issues apart from notification by the parties or screening? In child protection cases, the child protection agency initiates proceedings by taking protective action in a court. The responsibility for obtaining evidence falls to the child protection agency. In family law proceedings, in the absence of intervention from a child protection agency—considered below—the court may not have relevant evidence relating to the alleged maltreatment of a child. The *Family Law Act* includes mechanisms for seeking such information from child protection authorities in the relevant jurisdiction—by subpoena and a power to seek information and documents from child protection agencies.

Subpoenas

14.80 Subpoenas may be issued under pt 15.3 of the *Family Law Rules*. 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*.[84] The specific issue was whether under the former *Family Law Rules 1984* (Cth) O 28 r 1 the court may compel production of documents which are the subject of a 'public interest' privilege under s 97(3) of the *Community Welfare Act* (NT).[85]

14.81 A majority of the court held that the subpoena issued by the Family Court in relation to the best interests of the child could not defeat state and territory confidentiality provisions because the best interests principle under the *Family Law Act* only applies when the evidence is complete and a decision is to be made.[86] The power to compel production under a subpoena arises as a question 'anterior to any question of the admissibility of evidence'.[87]

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83 Ibid.

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

85 The 'public interest privilege' of the executive government is discussed in *Sankey v Whitlam* (1978) 142 CLR 1.

86 *Northern Territory of Australia v GPAO* (1999) 196 CLR 553. This means that the best interests of the child are the paramount consideration only where the judicial officer has received all relevant information and is preparing to make a decision. It is not engaged either at the stage a subpoena is being answered or when evidence is being tendered.

87 Ibid, [77]–[85].

Orders to produce documents or information

14.82 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. 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.[88]

14.83 An order under s 69ZW overrides any inconsistent state and territory law,[89] 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.[90]

14.84 Once information is provided in response to the order, the court must admit into evidence any such information on which it intends to rely.[91] 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'.[92]

14.85 Each state and territory child protection law contains provisions for protecting the confidentiality of information collected by child protection agencies or for precluding such information from being admissible in another proceeding.[93]

Commissions' views

14.86 The Commissions have heard that state and territory child protection agencies provide very little information voluntarily to family courts. They also frequently challenge subpoenas issued by federal family courts. The Commissions understand from preliminary consultations that a number of child protection agencies regard the decision in *Northern Territory of Australia v GPAO* as supporting a view that they

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88 *Family Law Act 1975* (Cth) s 69ZW(2).
89 Ibid s 69ZW(4).
90 Ibid s 69ZW(3).
91 Ibid s 69ZW(5).
92 Ibid s 69ZW(6). The agency must be notified and given an opportunity to respond in such circumstances: s 69ZW(7).
93 *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.

cannot be compelled to answer subpoenas from a federal family court. This view, which also apparently affects the attitude of some jurisdictions to the exercise of the court's power under s 69ZW of the *Family Law Act*—even to the extent of suggesting that the power is unconstitutional[94]—could constitute a serious systemic problem because of the number of state and territory laws which may impact upon the sharing of child protection information between jurisdictions.

Question 14–8 In what ways can cooperation between child protection agencies and family courts be improved with respect to compliance with subpoenas and s 69ZW of the *Family Law Act 1975* (Cth)?

Child protection interventions in family law proceedings

14.87 A child protection agency may be involved in family law proceedings in three principal ways: a relevant agency may intervene as a party; parental responsibility may be conferred on the child protection agency; and child protection orders may be registered under the *Family Law Act.* In addition, a child protection agency may be involved through the Magellan project, which is considered below.

Securing intervention

14.88 The *Family Law Act* contains provisions concerning intervention in proceedings. Section 92 sets out the general rule that, apart from proceedings for divorce or validity of marriage, 'any person may apply for leave to intervene'.[95] Sections 91B and 92A specifically address intervention where child maltreatment concerns arise.

14.89 By virtue of s 92A, a prescribed welfare authority is entitled to intervene in proceedings where it is alleged that a child has been abused or is at risk of being abused. Section 91B enables a family court to request intervention by a child protection officer in a matter involving a child's welfare. An officer who agrees to intervene is deemed to be a party to the proceedings. An officer may also decline to intervene.[96]

14.90 The combined effect of these provisions is that a child protection agency is entitled to intervene—where child abuse, or a risk of it, is alleged; may request to intervene; or be requested to intervene. In all cases, once a child protection agency intervenes, it is, 'unless the court otherwise orders, to be taken to be a party to the proceedings with all the rights, duties and liabilities of a party'.[97] This includes liability for costs orders—a disincentive for child protection agencies.

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94 See A Dickey, *Family Law* (5th ed, 2007), 304–305. The Queensland Government has also previously raised issues concerning its operation, although it did not go so far as to argue it was beyond the power of the Commonwealth. See Senate Standing Committee on Legal and Constitutional Affairs—Parliament of Australia, *Inquiry into the Provisions of the Family Law Amendment (Shared Parental Responsibility) Bill 2005* (2006), [3.183]–[3.185].

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

96 Ibid s 91B(2).

97 Ibid s 92A(3).

14.91 The matter of securing intervention in such cases has attracted considerable comment.[98] Requests for intervention are regularly declined. For example, when told Families South Australia 'respectfully' declined the court's request to intervene in *Denny & Purdy*, Burr J commented that:

> That is not a new experience for the court. I can't remember the last time the department ever did intervene. However I can only request and you always say no.[99]

14.92 Burr J compared the request under s 91B with other powers, such as that under s 69ZW:

> there are a number of ways we can approach it. The first is we try the softly, softly approach of a request under 91B. We know what the answer is always going to be, regrettably. ...
>
> I acknowledge that the standard 91B request made at the beginning of all these Magellan proceedings[100] is perhaps inappropriate and we ought to abandon doing that; but it was I thought also on the understanding that if I then subsequently made a 91B request, the department would understand I meant it and that it was serious and it needed to be considered more than just the reflex response of, 'We don't want to get involved'. Now, the other thing I can do of course, I've got the section 69ZW power to order various reports if I want to. I can subpoena you to come along and give evidence irrespective of whether or not you're intervening. You would then be a witness, of course, not a party.
>
> I'd much prefer the cooperative approach that we've been able to establish over the last four or five years through the Magellan project. That certainly could evidence itself in a number of forms. It could be a conference with the independent children's lawyer and indeed with the parties. You could, I think, have perhaps a family case conference in the matter to try and see your way clear, because there are some complex issues here. [101]

14.93 A child protection agency may decline to intervene in family law proceedings for a range of reasons. The Wood Inquiry identified four reasons why child protection agencies may decide not to intervene in family law proceedings:[102]

- the evidence may not justify intervention;
- the evidence relates to past or future, rather than current concerns;
- the threshold for notifications of abuse under care and protection legislation are higher than the *Family Law Act*; and
- a party in proceedings for a parenting order under the *Family Law Act* may be deemed by a child protection agency to have taken sufficient protective action in relation to a child.[103]

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98 A Dickey, *Family Law* (5th ed, 2007), 274. Dickey argues that a court has no power to take initiative and order a person to intervene in proceedings under the *Family Law Act*.

99 *Denny & Purdy* [2009] FamCA 547, [34].

100 The Magellan project is considered below.

101 *Denny & Purdy* [2009] FamCA 547, [35].

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

14.94 Child protection agencies may also be dissuaded from taking protective action in a federal family court because, as parties, they become liable to costs orders.[104]

Commissions' views

14.95 The best outcome for a child at significant risk of harm is for: the judge to be made aware of any concerns at an early stage; the relevant state or territory child protection agency to be informed of the concern and take timely investigative action; and the relevant state or territory child protection agency to seek care orders if need be.

14.96 The worst outcome for the child is where protective action is not taken when required. This may arise where, for example, a judicial officer under the *Family Law Act* determines on the evidence that there are safety concerns in relation to the child, that neither parent is a viable carer, and where a child protection agency, having been previously notified of the safety concern, decides not to intervene in the parenting proceedings. In that instance, the judge may determine that it is not in the child's best interests to make a parenting order in favour of either parent, but the problem of who should have parental responsibility for that child remains. That was the position Benjamin J reached in *Ray v Males*, considered below.

14.97 In practical terms, the courts can only draw the safety needs of the child to the attention of the child protection agency. As has been discussed above, it can do this under s 67Z of the *Family Law Act* where a Form 4 has been filed. The concerns expressed by Burr J in *Denny & Purdy* suggest that the court's powers to subpoena documents under the *Family Law Rules* and require the production of documents and information by the child protection agency under s 69ZW, and to request that a child protection agency intervene in the proceedings under s 91B, are not working well.

14.98 Arguably the powers federal family courts have to encourage or initiate 'cooperation' from child protection agencies should be exercised with some temperance. Stakeholders have suggested that a circuit-breaker option should be explored. The Commissions consider that formalising the process by which the court can invite the relevant agency or Minister to consent to a parenting order being made in the agency's favour, may be one way to encourage engagement by child protection agencies.

14.99 Another option may be to empower family courts to join parties to parenting proceedings where the parents are found not to be viable carers for a child,[105] such as other people or agencies.

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103 Accordingly, the state, through its child protection agency, has no authority or mandate to intervene because a parent is considered to be properly able to care for the child. Parental responsibility therefore remains with the parents.

104 It is arguable that, where a judicial officer, in the exercise of his or her power under the *Family Law Act*, makes findings on the evidence the child was 'in need of protection' under the relevant child protection legislation, and the child protection agency refused to become a party, the question of costs may be moot.

105 See, eg, *Supreme Court Rules 2000* (Tas) r 184(1).

14.100 The Commissions' preliminary view is that the Australian Government should encourage the development of protocols and MOUs between federal family courts and child protection agencies that deal with the following issues:

- the election by a child protection agency to commence proceedings in a federal family court or a state or territory court;
- a process for dealing consistently with making and responding to orders for s 69ZW reports from child protection agencies;
- subpoenas addressed to child protection agencies; and
- a process which would permit a court to invite a child protection agency to consent to an order being made which allocates parental responsibility in its favour, in circumstances where the court determines that no order should be made in favour of either parent, or grandparent, in the absence of being required to become a party.

Conferring parental responsibility on a child protection agency

14.101 What happens if the child protection agency declines to intervene? The judicial officer may consider that neither parent should have parental responsibility for the child or children. Can a family court confer parental responsibility on the relevant child welfare authority, in the absence of intervention in the proceedings? These questions arose in *Ray v Males*,[106] in which it was alleged that neither parent was being protective of the child and that both parents' households presented a risk to the child. Benjamin J issued a request for intervention under s 91B, but this was declined.

14.102 Benjamin J held that parental responsibility should vest in the child welfare agency, notwithstanding that it had declined to intervene and be joined as a party.

> However, in the present case, the welfare jurisdiction of the Court is not being relied upon to contravene any such scheme, rather it is being used to enforce the existing statutory obligation placed upon the Secretary to provide care and protection for children who are at risk as set out in the *Children, Young Persons and Their Families Act 1997*. ... If none of the present parties are found to be able to be responsible for the children or one of them, it could not be the case that this Court would simply wash its hands of a child in the hope that the Secretary would change his view and commence proceedings under the State Welfare laws. It must be that when all else fails courts exercising jurisdiction under the Act can vest parental responsibility in a delegate of a State Government to make that officer responsible for the child.
>
> ...
>
> I do not accept that it is for the Secretary alone to determine which children need protection. There must exist powers for either courts exercising jurisdiction under the Act or State Supreme Courts to require Government to be responsible for children in the absence of responsible parents.[107]

106 *Ray v Males* [2009] FamCA 219.
107 Ibid, [79], [86].

14.103 Benjamin J determined that the Family Court had jurisdiction to make an order vesting parental responsibility for the child in the child protection agency:

> This welfare jurisdiction is in addition to any other jurisdiction that the Court has under Pt VII in relation to children. It confers upon the Court the equivalent of the *parens patriae* powers of the Supreme Courts.
>
> It also gives the Family Court, exercising its welfare jurisdiction, wide powers, enabling the Court to virtually make any order necessary to protect the welfare of a child. The High Court in [*Marion's* case] considered the scope of this power and held:
>
> > While there are limits on the Family Court's welfare jurisdiction, the scope of the jurisdiction is nevertheless very wide. So long as an order of the Family Court is constitutional there can be no limitation on the Court's powers emanating from the need to preserve the scope of the State legislative powers.[108]

14.104 This decision is currently being appealed.

14.105 In the absence of clear cooperative arrangements between state and territory child protection agencies and family courts, akin to those developed as part of the Magellan project[109]—considered below—the power of a family court to compel cooperation and information from state and territory agencies is limited. The limitations are illustrated by the research of Fehlberg and Kelly which found that of the 62 cases tracked in the Family Court where the Victorian Department of Human Services encouraged a carer to initiate family law proceedings, the Department appeared in only six cases, three times appearing *amicus curiae*. In the remaining 56 cases, the Department played no formal role in the Family Court proceedings.[110] This would not necessarily matter if comprehensive information were made available to courts exercising jurisdiction under the *Family Law Act*. However, it appears to be the case that little or no information is provided.

14.106 Where a child protection agency is a party to family law proceedings, an issue arises as to how a family court should evaluate whether the agency should have parental responsibility. In *Tran v Ferguson*—where a federal family court made parenting orders in favour of a child protection agency, having determined that neither parent was a viable carer for the child—Rose J considered that he was required to apply s 60CC of the *Family Law Act* in determining the child's best interests:

> The Intervenor's policy is not to identify and assess potential long-term carers for a child until such time as a final parenting Order is made. There are practical considerations that have driven that policy which I completely understand. They include applying resources to identify such a carer, creating the possibility of that carer having the child live with him or her, a potential carer then no longer being available to be considered for the care of another child, against the possibility that ultimately an order as sought by the Intervenor may not be made.

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108 Ibid, [70]–[71].

109 The Columbus Project is the equivalent in Western Australia.

110 F Kelly and B Fehlberg, 'Australia's Fragmented Family Law System: Jurisdictional Overlap in the Area of Child Protection' (2002) 16 *International Journal of Law, Policy and the Family* 38, 47–48.

> It seems to me that such a policy, whilst understandable, is really tailored by bearing in mind the proceedings that are otherwise instituted and determined in accordance with state legislation which does not have the considerations which the Act requires to be undertaken pursuant to Pt.VII. As I pointed out to counsel for the Intervenor at the commencement of the trial, I am required, in effect, to make findings of fact in relation to a range of matters which underpin both the primary and additional considerations, the subject of s 60CC, for the purpose of ultimately making a parenting order which is in the best interests of the child being the paramount consideration. Those considerations in s 60CC lie at the heart of arriving at that ultimate conclusion in accordance with s 60CA. There are obvious difficulties in following that approach which I am required to follow, when none of the relevant findings of fact can be made in respect of unknown potential long-term carers who cannot as yet even be identified.[111]

Commissions' views

14.107 The difficulties faced by federal family courts in obtaining sufficient information from state and territory agencies to inform their decision making is a matter of concern. For example, a response from an agency indicating that the matter was investigated and found not to be substantiated does at least provide some evaluation of the allegation, even if there is little detail. A response which states that no further action was required is filled with ambiguity, for it may indicate nothing more than a conclusion that the matter could be resolved by orders made under the *Family Law Act* in favour of a viable carer. To appropriately take into account child protection concerns in making decisions about the allocation of parental responsibility for children, family courts require all relevant information. The family courts do not have an investigative arm and must rely on the information provided by the parties and any information obtained from child protection agencies.

14.108 The Commissions seek submissions about the role that child protection agencies should play in family law proceedings and, in particular, whether family courts should have additional powers to require their intervention. The Commissions are also interested to hear whether any amendments are necessary to the *Family Law Act* in consequence—for example, whether the Act should provide that a family court may, upon finding that none of the parties to the proceedings is a viable carer, on its own motion join a child protection agency or some other person (such as a grandparent) as a party to proceedings.

Question 14–9 What role should child protection agencies play in family law proceedings?

111 *Tran v Ferguson* [2009] FamCA 1026, [246]–[247].

Question 14–10 Are amendments to the *Family Law Act 1975* (Cth) and state and territory child protection legislation required to encourage prompt and effective intervention by child protection agencies in family law proceedings? For example, should the *Family Law Act* be amended to provide that the court may, upon finding that none of the parties to the proceedings is a viable carer, on its own motion join a child protection agency or some other person (for example, a grandparent) as a party to proceedings? Should federal family courts have additional powers to ensure that intervention by the child protection system occurs when necessary in the interests of the safety of children?

Enforcement of child protection orders in family law courts

14.109 One mechanism for bridging the 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'—orders dealing with matters concerning residence and contact.[112] Section 70D provides a similar mechanism for the registration of a child order made in another state. A registered order 'has the same force and effect as if it were an order made by that court'—that is, as if it were a family court order.[113] 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).[114]

14.110 To register a relevant child protection order, a sealed copy of the order is filed in a family court registry.[115] The effect of the registration is to invoke the enforcement mechanisms of the *Family Law Act.*[116] Chisholm considered the operation of the registration provision and suggested that 'there would be no difficulty in [a child protection agency] making application for any of these various forms of enforcement of a Children's Court order registered in a family law court'.[117]

14.111 With regard to s 67ZK of the *Family Law Act*, Chisholm suggests that, even where a child protection order is registered, family courts may make orders in relation to children in the care of child protection authorities only if the state child welfare officer has given written consent to the institution or continuation of the proceedings.

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112 *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.

113 Ibid s 70E.

114 R Chisholm, *Protecting Children—The Family Law Interface* (2009), 31.

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

116 The enforcement of orders under the *Family Law Act* is considered in Ch 8.

117 R Chisholm, *Protecting Children—The Family Law Interface* (2009), 34.

This raises a practical difficulty in the interaction of the provisions with respect to NSW:

> Such written consent could, of course, be given as part of the documentation of the application [for the registration of the order]. The only difficulty here derives from the absence of delegated power to give consent.[118]

Commissions' views

14.112 The Commissions are interested in hearing whether the registration of relevant children's court orders is a useful strategy that enhances the safety of children, and the circumstances in which child protection agencies would consider its use.

14.113 As the giving of consent by a child welfare officer requires specific written authority,[119] if there is no delegated power then the consent required by s 67ZK may not effectively be given with the registration. The Commissions are interested in hearing how the interaction of these provisions operates in practice.

Question 14–11 What are the advantages of registration of state and territory child protection orders under ss 70C and 70D of the *Family Law Act 1975* (Cth)? What are the interactions in practice of the registration provisions and s 67ZK of the *Family Law Act*?

What the family courts can do with information about child maltreatment

14.114 Where a family court receives information about child maltreatment it can only prevent contact between the person responsible for maltreating the child and the child.

14.115 The assessment of child maltreatment in parenting proceedings in family courts does not necessarily raise any questions of interaction with child protection laws. The approach taken in such cases does, however, illustrate the different focus of the systems in relation to assessing the best interests of children which can, in turn, lead to the possibility of children falling into gaps between the two systems. The approach of the family courts is considered first, followed by a consideration of the problem of safety concerns not being dealt with by either system.

14.116 The protection of children from abuse, neglect or family violence is a primary consideration in determining what is in the child's best interests in the context of making parenting orders.[120] The test for assessing the protection needs of a child was considered by the High Court in 1988 in *M v M*, a case on child sexual abuse.[121] It remains 'the most authoritative statement of the law'.[122]

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118 Ibid, 35.
119 See definition of 'child welfare officer' in *Family Law Act 1975* (Cth) s 4.
120 Ibid s 60CC(1). See Ch 8.
121 *M v M* (1988) 166 CLR 69.
122 R Chisholm, *Reflections on Child Protection in Today's Family Law* (2009) College of Law, 1.

14.117 In this case the mother had custody of her daughter and the father had access.[123] The mother sought to have the access suspended or discharged on the grounds that the father had sexually abused his daughter and that her welfare would be put at further risk if the father's access to the child continued. The father denied that there was sexual abuse. Although the medical examination was inconclusive, a clinical psychologist and a police officer gave opinions suggesting there had been abuse. The trial judge was neither satisfied that the father had, or had not, abused his child. As the judge considered that there was a possibility of abuse, it was in the interests of the child that the risk should be eliminated by denying the father access—even if supervised.[124] The majority of the Full Court dismissed the father's appeal; and the High Court unanimously agreed.

14.118 The father argued that the court had to determine first, on the balance of probabilities, whether the father had abused the child; and, secondly, whether there was a risk of sexual abuse occurring, if parenting orders were made in favour of the father.[125] The High Court rejected this argument:

> The basic flaw in the [father's] argument is to identify the allegation of sexual abuse as the paramount issue for determination by the court. ... [The] ultimate and paramount issue to be decided in proceedings for custody of, or access to, a child is whether the making of the order sought is in the interests of the welfare of the child. The fact that the proceedings involve an allegation that the child has been sexually abused by the parent who seeks custody or access does not alter the paramount and ultimate issue which the court has to determine, though the court's findings on the disputed allegation of sexual abuse will naturally have an important, perhaps a decisive, impact on the resolution of that issue.[126]

14.119 The court distinguished the nature of the task in the federal family court from that in criminal proceedings:

> [I]t is a mistake to think that the Family Court is under the same duty to resolve in a definitive way the disputed allegation of sexual abuse as a court exercising criminal jurisdiction would be if it were trying the party for a criminal offence. Proceedings for custody or access are not disputes *inter partes* in the ordinary sense of that expression. ... The court is concerned to make such an order for custody or access which will in the opinion of the court best promote and protect the interests of the child. In deciding what order it should make the court will give very great weight to the importance of maintaining parental ties, not so much because parents have a right to custody or access, but because it is prima face in a child's interests to maintain the filial relationship with both parents.
>
> Viewed in this setting, the resolution of an allegation of sexual abuse against a parent is subservient and ancillary to the court's determination of what is in the best interests of the child.[127]

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123 As previously noted the language of 'custody' and 'access' has been replaced by residence and contact.
124 *M v M* (1988) 166 CLR 69, 73–74.
125 Ibid, 75.
126 Ibid, 76.
127 Ibid.

14.120 A central issue was whether it was necessary to find that a person had sexually abused the child. The court stated:

> No doubt there will be some cases in which the court is able to come to a positive finding that the allegation is well founded ... there will be cases also in which the court has no hesitation in rejecting the allegation as groundless. Again, in the nature of things there will be very many cases, such as the present case, in which the court cannot confidently make a finding that sexual abuse has taken place. And there are strong practical family reasons why the court should refrain from making a positive finding that sexual abuse has actually taken place unless it is impelled by the particular circumstances of the case to do so.[128]

14.121 The High Court proceeded to lay down the test for assessing the risk to the child in evaluating the child's best interests, in terms of 'unacceptable risk':

> In resolving the wider issue the court must determine whether on the evidence there is risk of sexual abuse occurring if custody or access be granted and assess the magnitude of that risk. After all, in deciding what is in the best interests of a child, the Family Court is frequently called upon to assess and evaluate the likelihood or possibility of events or occurrences which, if they come about, will have a detrimental impact on the child's welfare. The existence and magnitude of the risk of sexual abuse, as with other risks of harm to the welfare of a child, is a fundamental matter to be taken into account in deciding issues of custody and access.[129]

14.122 Having referred to earlier attempts to formulate an appropriate test, the court concluded that:

> In devising these tests the courts have endeavoured, in their efforts to protect the child's paramount interests, to achieve a balance between the risk of detriment to the child from sexual abuse and the possibility of benefit to the child from parental access. To achieve a proper balance, the test is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse.[130]

14.123 The decision has been the subject of subsequent judicial consideration and academic comment.[131] For example, in 1999 Professor Patrick Parkinson argued that while the High Court in *M v M* discouraged trial judges from making findings of fact in relation to the abuse itself, the judge's decision must nonetheless be based upon findings of fact in relation to matters that, cumulatively, justify a conclusion of unacceptable risk.[132]

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128 Ibid, 77.

129 Ibid.

130 Ibid, 78.

131 R Chisholm, *Reflections on Child Protection in Today's Family Law* (2009) College of Law gives an excellent summary of the cases as well as a list of academic commentary: 1, n 3. Academic consideration includes, eg, P Parkinson, 'Family Law and Parent-Child Contact: Assessing the Risk of Sexual Abuse' (1999) 23 *Melbourne University Law Review* 345; J Fogarty, 'Unacceptable Risk–A Return to Basics' (2006) 20 *Australian Journal of Family Law* 249.

132 P Parkinson, 'Family Law and Parent-Child Contact: Assessing the Risk of Sexual Abuse' (1999) 23 *Melbourne University Law Review* 345, 358.

14.124 Chisholm analysed the decision and its subsequent impact in family court decisions, particularly in the light of changes to pt VII of the *Family Law Act* in the meantime,[133] and concluded:

> Assessing whether to make orders for children to spend time with a person in cases involving allegations of abuse by that person remains, of course, an agonising matter. It is arguable that the authorities and the legislation itself give more emphasis than previously to the value of involvement by both parents, and would thus tend towards orders favouring children spending time with the other parent, supervised if necessary. However there is no reason to think that the need to protect children is any less than it ever was ... Ultimately the court must try to work out what is in the best interests of the particular child, and the need to have regard to the child's safety gets as much emphasis in the Act as the importance of continuing parental involvement. In cases where the child believes that he or she has been abused, I hope that careful consideration will be given to the child's understanding of the situation, and emotional well-being, in circumstances where the child is required to spend time, supervised or not, with the person the child believes is her abuser.[134]

14.125 The discussion above illustrates the manner in which allegations of child abuse may arise within the context of family law proceedings and that there may never be an investigation of such allegations leading to any child protection or criminal consequences. The focus of the investigation, and the relevance of the various pieces of information is different in criminal justice, child protection, family violence protection and family law contexts. While the criminal justice response is focused on incidents—past occurrences—the family law and family violence protection response is based on the relationship and the assessment of risk for the future and on an increasing understanding of the nature and dynamics of risk in family violence and sexual assault.

14.126 In an evaluation of the case management model for serious child abuse cases known as the 'Magellan project', considered below, Dr Daryl Higgins of the Australian Institute of Family Studies pointed out that:

> The only agency with responsibility for working out whether past abuse has happened is the criminal courts, based on evidence from police/forensic interviewers. It is not the Family Court's, nor the statutory child protection department's statutory role. The former is responsible for overall determining children's best interests, and the latter has a narrow remit of intervening to ensure the protection of children from harm.
>
> The fact that evidence for abuse may not be strong enough for the Director of Public Prosecutions to lay charges, or for the child protection department to substantiate (or even if evidence of past abuse is strong, the presence of a protective parent may prevent the department from substantiating risk of harm) does not mean abuse did not occur. Given the High Court's finding in *M and M*, even the focus of the Family Court's decisions is not about determining whether past abuse actually happened, but about whether there is a risk to the child in the future, which may therefore make a particular parenting arrangement not to be in the best interests of the child.

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133 Including, eg, the changes introduced by the *Family Law Reform Act 1995* (Cth) and the *Family Law Amendment (Shared Parenting Responsibility) Act 2006* (Cth).

134 R Chisholm, *Reflections on Child Protection in Today's Family Law* (2009) College of Law, 28–29.

> In this context, the Family Court should not be seen as a forum for investigating abuse allegations or determining the historical accuracy of one or both parents' allegations. It is not within their mandate to do so, even within the Magellan case-management model. However, the limitations of the broader child welfare and justice system are that unless good information from those who have conducted forensic interviews is presented to the Family Court (ie, via the 'Magellan Report')—about not only the past allegations, but their views on the safety of the child (a) in the current arrangements; and (b) if there was any alteration to the arrangement—decisions will be made about the child's living arrangement that do not fully account for all of the risks and what is in their best interests.[135]

14.127 The Family Law Council considered the family courts' inability to investigate allegations of abuse in 2002. The Council recommended that the federal government should establish a 'Child Protection Service', the objectives of which would be:

> 1. To investigate child protection concerns and provide information arising from such investigation to courts exercising jurisdiction under the *Family Law Act.*
> 2. To ensure, in the course of its work, that children and families are not subjected to unnecessary investigation, assessment or stress.
> 3. To avoid unnecessary duplication of resources and effort in the investigation and determination of matters involving both family law and child welfare law issues.
> 4. To promote the development of a co-operative approach between State and Federal agencies in responding to concerns about child abuse and neglect.[136]

14.128 The recommendation would have provided a dedicated risk assessment and investigative resource for federal family courts, as an alternative to, and in the absence of, information from state and territory child protection agencies. This recommendation was not adopted.

14.129 Other strategies for dealing with allegations of serious abuse have been developed, in particular through case management, such as the Magellan project, considered below. In the absence of such strategies, and given the different focus of family law and family violence protection proceedings, child protection proceedings and criminal proceedings, there is a danger that concerns for a child's safety may fall into gaps between the systems.

Falling into gaps between the systems

14.130 Research by Higgins and Dr Rae Kaspiew has shown that responses to child abuse and maltreatment in the family law system involve a complex interaction between various agencies.[137]

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135 D Higgins, *Co-operation and Coordination—An Evaluation of the Family Court of Australia's Magellan Case Management Model* (2007), 181.

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

137 D Higgins and R Kaspiew, '"Mind the Gap…": Protecting Children in Family Law Cases' (2008) 22 *Australian Journal of Family Law* 235.

14.131 Despite the differences between family law and child protection systems, they share positive obligations to consider the child's welfare. However, the emphasis given to the child's welfare at a given point in time—whether as a protection issue or an issue of parental responsibility—is largely a function of which court is engaged and when.

14.132 When the child protection system is initially engaged, there may be no orders made by courts in either jurisdiction.[138] If parenting orders under the *Family Law Act* are made first, those orders have legal effect subject to the overriding effect of any order under child protection legislation. If allegations of child abuse are made in the family law proceeding, the relevant child protection agency must be notified of this by the court so it can then decide whether to intervene in the family law proceeding and seek appropriate orders with respect to parental responsibility in that court. The child protection agency could alternatively commence child protection proceedings in the children's court if it determines that the child's welfare requires it. A further option is to seek a family violence protection order for a child and/or a parent, if a protection order has not already been made.

14.133 If the children's court's care and protection jurisdiction is engaged after parenting orders have been made under the *Family Law Act*, the child protection agency may seek orders that have the effect of overriding or suspending any pre-existing parenting orders made in a federal family court.[139] If orders of this kind are subsequently made by a children's court, the federal family court needs to be notified so it can give effect to s 69ZK and adjourn or terminate the parenting proceedings. While state and territory child protection systems take precedence over the family law system when a child is in the care of a child protection agency, proceedings may still be commenced in both jurisdictions. However, one of the jurisdictions may be more appropriate than the other.

14.134 In coming to a view about whether the evidence justifies intervention, child protection agencies conduct a risk assessment based on a mix of professional judgment and 'actuarial decision making frameworks'.[140] That assessment is shaped by the principle that the best protection for children is within their family, unless no parent is able or willing to protect the child. Victoria, Queensland, South Australia, Tasmania, and the ACT have specific provisions requiring the state to support the family wherever possible to protect the child.[141] This may encourage child protection agencies to decide against intervention.[142] That view may also be entrenched in relation to

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138 It is more likely that an interim or final family violence protection order would have been made, given the statistically significant correlation between family violence and child maltreatment proceedings.

139 The ability to vary parenting orders in the context of protection orders under state and territory family violence legislation is considered in Ch 8.

140 D Higgins and R Kaspiew, '"Mind the Gap…": Protecting Children in Family Law Cases' (2008) 22 *Australian Journal of Family Law* 235, 241.

141 *Children, Youth and Families Act 2005* (Vic) s 10; *Child Protection Act 1999* (Qld) s 5; *Children's Protection Act 1993* (SA) s 4; *Children, Young Persons and their Families Act 1997* (Tas) s 8; *Children and Young People Act 2008* (ACT) ss 349, 350.

142 D Higgins and R Kaspiew, '"Mind the Gap…": Protecting Children in Family Law Cases' (2008) 22 *Australian Journal of Family Law* 235, 244–245.

family law cases since, even though violence and abuse are alleged in an increasing proportion of family law cases, in many instances supporting evidence is not provided or claims sufficiently substantiated.

14.135 Child protection agencies may also expect that where parenting proceedings are on foot in a family court, and evidence which suggests child abuse is available to the court—for example, a 'Form 4' has been filed—the court will give appropriate weight to the evidence and make parenting orders which give effect to the child's protection and best interests. This expectation may create a gap between the two systems into which a child's case might fall. An illustration of this possibility was provided in the Family Violence Online Forum:

> State agencies are not routinely investigating child abuse allegations when they are raised as matters in the Family Court because they assume the Family Court will do the necessary investigations and be child protective. The Family Court assume that if the State agency has not acted on any notification regarding child abuse where the matter was in the Family Court, this implies to the Court that there was 'no cause' to investigate it, i.e. it was a 'false allegation'.[143]

14.136 The potential to fall into the gap is evident in this further example from the Online Forum:

> Neither the State child court nor the Family Court took much notice of each others' orders, even when making new orders. Each expected the other had been seized of the case, and each did not follow the technically spelt-out-by-legislation path. ... Altogether, some courts and several state government departments have the opportunity to play a role, yet, which combination of those entities will cause the least confusion, the most justifiable action and be the most fact focusing, of the possible combinations?[144]

14.137 These comments underscore what can happen where there is an absence of effective communication between courts. Courts must rely on the advice of legal representatives—if a party is represented—or the parties themselves to disclose proceedings in other jurisdictions.

14.138 There appears to be little statistical information available about the number of cases transferred between family law and child protection systems.[145] However, research in this area and consultations undertaken in this Inquiry indicate that sometimes child protection agencies act on the assumption that the family law system can protect children without their assistance where a viable carer is identified who anticipates or has commenced proceedings in a federal family court. This may be a reason why child protection agencies move matters from state and territory courts to a

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

144 Ibid.

145 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. The researchers commented that methodologies are based on the physical review and comparison of court files and documents held by child protection agencies which has proven to be a significant obstacle to research in this area.

federal family court.[146] For example, in their study of such cases in Victoria, Kelly and Fehlberg found that in two thirds of the cases studied, the child protection agency withdrew its application to the children's court because a 'viable carer' had been identified for the child, and the carer had or was going to apply for parenting orders in a federal family court.[147]

14.139 In five jurisdictions, the statutory threshold for child protection intervention provides that child protection agencies should only intervene when the child's parents are unable or unwilling to protect the child.[148] This criterion may mean that some children are not being protected from maltreatment by either system. Kelly and Fehlberg noted that they were unable to track 27 Children's Court cases in Victoria in the Family Court. In 17 of these cases, this inability was due to the fact that the viable carer had failed or refused to commence Family Court proceedings.[149]

14.140 Kelly and Fehlberg raise several other reasons for the transfer of cases from state and territory child protection courts to the Family Court. First, there was a belief among child protection officers that Family Court orders were more permanent and easier to obtain. For example, in South Australia orders relating to the custody and guardianship of children do not generally exceed a period of 12 months.[150] Secondly, there was a belief that cases may be resolved more quickly in the Family Court. Thirdly, the child protection agency could take a far more secondary role when matters were transferred to the Family Court.

14.141 State and territory child protection laws may contain other provisions which lead state and territory child protection agencies to conclude that proceedings involving allegations of child maltreatment should be dealt with in the Family Court. For example, in Queensland it is only possible to make an order placing a child in the custody or guardianship of someone other than a parent.[151]

14.142 The Family Law Council has noted that the fact that litigation is initiated under the *Family Law Act* does not mean that a child will be protected. The case may be withdrawn or finalised by consent.[152] In other cases, a matter may never reach the family law system. Current research indicates that while Indigenous children are over-

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146 Ibid, 47; T Brown, M Frederico, L Hewitt and R Sheehan, *Problems and Solutions in the Management of Child Abuse Allegations in Custody and Access Disputes Before the Family Court of Australia* (1998), 437–438.

147 F Kelly and B Fehlberg, 'Australia's Fragmented Family Law System: Jurisdictional Overlap in the Area of Child Protection' (2002) 16 *International Journal of Law, Policy and the Family* 38, 47.

148 *Children, Youth and Families Act 2005* (Vic) s 10(3)(g); *Child Protection Act 1999* (Qld) s 5(2)(e); *Children's Protection Act 1993* (SA) ss 4, 6(2)(b) and (c); *Children, Young Persons and their Families Act 1997* (Tas) ss 4(1)(c)(iii), 8; *Children and Young People Act 2008* (ACT) s 350(1)(d).

149 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, 45.

150 *Children's Protection Act 1993* (SA) s 38.

151 *Child Protection Act 1999* (Qld) ss 61–62.

152 Family Law Council, *Family Law and Child Protection—Final Report* (2002), [3.39]. The decision-making chain which may flow from parenting orders finalised by consent is discussed in Ch 8.

represented in the child protection system,[153] relatively few Indigenous parents appear to use the family law system.[154]

Commissions' views

14.143 The responsibility to investigate allegations of child maltreatment—where its level of seriousness accords with the relevant statutory intervention threshold—lies principally with child protection agencies or the criminal justice system. It is easy to lose sight of this starting point because of differences between the way federal family courts and child protection agencies receive and assess allegations in the 'protection' area. Federal family courts need to play a more active role in engaging and assisting child protection agencies to understand how child protection concerns arise in family law proceedings.

14.144 This section reveals some serious deficiencies in the system of protection directly relevant to the Terms of Reference. The Commissions have formed the preliminary view that in order to protect children in both jurisdictions, judicial officers exercising family law jurisdiction may be empowered to provide material filed and findings made to the relevant child protection agency. This may assist the agency to understand the child protection concerns and encourage them to take appropriate action.[155]

14.145 The Commissions are interested in hearing how, in practice, information exchange can best be facilitated between family courts and child protection agencies.

> **Question 14–12** How, in practice, can information exchange best be facilitated between family courts and child protection agencies to ensure the safety of children? Are changes to the *Family Law Act 1975* (Cth) necessary to achieve this?

Administrative arrangements

Background

14.146 A number of the problems identified in the area of child protection are caused by a lack of communication and coordination between the child protection and family law systems. The sections above focused on the legislative provisions and frameworks governing interaction between the two systems. This section considers the administrative arrangements in place to facilitate communication and coordination between the systems.

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153 For example, Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children are Sacred: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007); Australian Institute of Health and Welfare, *Child Protection Australia 2008–09* (2010).

154 C Cunneen and M Schwartz, *The Family and Civil Law Needs of Aboriginal People in New South Wales: Final Report* (2008).

155 Such as affidavits of the parties, expert reports and family reports.

14.147 The ALRC considered information flow in its 1981 report, *Child Welfare*.[156] The situation in which criminal proceedings against a parent were heard in one state court while care proceedings were heard in another state court was found to produce potentially unsatisfactory results, if there was no effective liaison between the two courts.[157] The ALRC recommended that:

> a procedure should be devised to secure liaison with regard to related proceedings ... Such liaison should not depend, as it presently does, upon intelligence or 'the grapevine', but should be achieved by way of formal, routine exchange of information by the registries of the courts.[158]

14.148 State and territory courts dealing with family violence legislation should be involved in any exchange of information. The next section considers protocols and MOUs that have been developed to improve communication between the two systems and dedicated case management programs.

Protocols and memorandums of understanding

14.149 Some states and territory child protection agencies have protocols and MOUs with the Family Court and the FMC.[159] 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'.[160] Such documents 'represent deliberate statements of policy and agreed procedures, but do not in any way change the law'.[161]

14.150 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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156 Australian Law Reform Commission, *Child Welfare*, ALRC 18 (1981).

157 Ibid, 307.

158 Ibid, 307–308.

159 Protocol between the Family Court of Australia and the NSW Department of Community Services (1 June 2005); Memorandum of Understanding between the Federal Magistrates Court of Australia and the NSW Department of Community Services (1 October 2007); Protocol between the Federal Magistrates Court of Australia and the NSW Department of Community Services (3 August 2007); Protocol between the Family Court of Australia and the Federal Magistrates Court of Australia, the Department of Child Safety Queensland (1 October 2007); Memorandum of Understanding between the Family Court of Western Australia, the Department for Child Protection, Legal Aid Western Australia (Revised June 2008).

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

161 R Chisholm, *Protecting Children—The Family Law Interface* (2009), 41.

Information sharing protocols and memorandums of understanding

NSW	Protocol between Legal Aid NSW and DoCS—dealings with independent children's lawyers in family law matters; MOU between the Family Court and DoCS; MOU between DoCS and the FMC; Protocol between DoCS and the FMC.
Victoria	Unsigned draft[162]— although the Department of Human Services are 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	Draft protocol.
Tasmania	No formalised protocol.
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.

14.151 The majority of the 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'.[163] The impact of this distinction is examined below.

14.152 As Higgins has observed, the mere fact that an MOU is in place does not necessarily lead to a more cooperative approach to the exchange of information

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

163 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).

between child protection agencies and the federal family courts, and other courts including specialist family violence protection courts.[164]

14.153 In its report in 2002, the Family Law Council noted that the principles and procedures in the existing protocols were at times difficult to translate into practice. While the protocols are 'an important part of providing better coordination between the courts exercising jurisdiction under the *Family Law Act* and the state and territory child protection agencies,' they are not a 'panacea for addressing all the problems associated with the interaction between the State and Federal systems concerned with the resolution of child protection concerns'.[165] 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.[166]

14.154 Procedures set out in the MOUs and protocols may not always be followed by the parties. For example, in 1998 it was noted that the Victorian child protection agency did not adhere to the reporting timelines set out in the Victorian protocol, and that the time taken by the agency to produce reports exceeded the time agreed upon in the reports by a number of weeks.[167] One issue is that the form and content of the protocols are different in each state and territory. It has been noted that this is largely a reflection of the differences in the state and territory child protection laws.[168]

Commissions' views

14.155 Stakeholders have told the Commissions that MOUs and protocols between the federal family courts and child protection agencies work well in the jurisdictions in which they are in place.[169] They shape the parties' expectations as to what each will do, and in what circumstances. Such agreements are absent—or subject to final agreement—in some jurisdictions, including those where the cases of *Denny & Purdy* (in South Australia) and *Ray v Males* (in Tasmania) have arisen—discussed above. This suggests a correlation between the absence of formal arrangements between the federal family courts and state and territory child protection systems and incidents of children's cases falling into the gap between the two systems. As such, nationally uniform or consistent approaches to information sharing between child protection agencies and federal family courts appear appropriate and desirable.

14.156 The Commissions' preliminary view is that all jurisdictions should have MOUs and protocols—as appropriate—to govern key elements of these relationships. They establish the basics for dealing with cases where family law proceedings require

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164 D Higgins, *Co-operation and Coordination—An Evaluation of the Family Court of Australia's Magellan Case Management Model* (2007), 137–141.

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

166 T Brown, R Sheehan, M Frederico and L Hewitt, *Resolving Family Violence to Children: An Evaluation of Project Magellan, A Pilot Project for Managing Family Court Residence and Contact Disputes when Allegations of Child Abuse Have Been Made* (2001), 49.

167 Ibid.

168 See D Higgins, *Co-operation and Coordination—An Evaluation of the Family Court of Australia's Magellan Case Management Model* (2007), 156.

169 For example, Legal Aid Commissions, *Consultation*, Sydney, 10 September 2009.

action or intervention by a state or territory child protection system. It is particularly important that where provisions in the *Family Law Act* provide a power to request information or assistance from a child protection agency, that the basis for the court's use of these powers be set out clearly and be readily available to judicial officers, parties, legal advisers and other courts.

14.157 The Commissions are interested to hear whether the variation in the protocols across the jurisdictions causes any difficulties in relation to information flow and also as to how knowledge of the MOUs and protocols can be improved.

Proposal 14–3 All states and territories should develop a Memorandum of Understanding or Protocol to govern the relationship between federal family courts and child protection agencies.

Question 14–13 Does the variation in the content of the protocols cause any difficulties and, if so, what changes should be made to facilitate the flow of information between the family courts and child protection agencies? What measures should be taken to ensure that the protocols are effective in practice?

Question 14–14 How could the Memorandums of Understanding and Protocols for exchange of information between federal family courts, child protection agencies and legal aid commissions be better known within courts, and beyond them?

Cooperative case management

The Magellan project

14.158 The Magellan project is a case management approach to address the needs of children and families where serious allegations of sexual abuse or physical abuse are raised during parenting disputes in the Family Court.[170]

14.159 The Magellan project involves special management of cases where serious allegations of sexual or physical abuse of children are made. Once a case is identified as suitable for the Magellan pathway, it is dealt with by a small, designated team of judges, registrars and family consultants. The Magellan project relies on a collaborative and highly coordinated set of processes and procedures, with significant resources directed to each case in the early stages.[171] A crucial aspect is strong inter-agency coordination, in particular with state and territory child protection agencies, which ensures that problems are dealt with efficiently and that information sharing is of high quality. An independent children's lawyer is appointed to every Magellan case.

170 It was initiated by Nicholson CJ of the Family Court and Dessau J: D Higgins, *Co-operation and Coordination—An Evaluation of the Family Court of Australia's Magellan Case Management Model* (2007), 14.

171 Ibid, 21.

Formal protocols for information sharing between child protection agencies and federal family courts apply.

14.160 A pilot program of 100 cases was conducted in Victoria from June 1998 to December 2000, involving a consortium of agencies,[172] after which the project was rolled out by the Family Court in all states and territories, except Western Australia.[173]

14.161 The Magellan approach commences when a Form 4 is filed with an application for parenting orders. The application is referred to the Family Court Magellan Registrar to be considered for inclusion in the Magellan list.[174] If the Court is made aware of allegations of sexual or physical abuse that it deems 'serious', it can request the intervention of the relevant child protection agency as a party under s 91B of the *Family Law Act*. The state or territory agency then assesses the allegations of abuse and reports its findings to the Family Court. This report (the Magellan report) is the key mechanism for sharing information and includes information about the history of abuse in the family, any previous notifications, and subsequent action by the child protection agency. It is a significant factor in encouraging parties to settle matters, as such reports either support or contradict a party's assertion of abuse.[175] In non-Magellan cases, the child protection agency does not make a report, and merely proffers information it has in respect of the child.[176]

14.162 A team of Magellan judges, registrars and family consultants at each family law registry manages the cases. Generally, the aim is to complete Magellan cases within six months from the case being listed. Early steps in a Magellan case include:

- making appropriate interim orders to protect the child until the matter comes on for trial;
- ordering a Magellan report from the respective state or territory child protection agency including whether it intends to intervene in the Family Court proceedings, whether it has previously investigated these or other allegations, the conclusion and the reasons for the conclusion of the investigation, and any recommendations or other relevant information;
- ordering a subpoena of the child protection agency file;
- ordering the appointment of an independent children's lawyer; and
- ordering a detailed family report, where appropriate, analysing the family dynamics and the needs of the children.

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172 T Brown, R Sheehan, M Frederico and L Hewitt, *Resolving Family Violence to Children: An Evaluation of Project Magellan, A Pilot Project for Managing Family Court Residence and Contact Disputes when Allegations of Child Abuse Have Been Made* (2001).

173 The Federal Magistrates Court is not included in the Magellan project.

174 Family Court of Australia, *Fact Sheet—Magellan Program* <www.familycourt.gov.au> at 17 October 2009.

175 D Higgins, *Co-operation and Coordination—An Evaluation of the Family Court of Australia's Magellan Case Management Model* (2007), 83.

176 Ibid, 146.

Reviews of the Magellan project

14.163 The Magellan project was reviewed in 2001 and 2007. Both reviews noted the information-sharing and cooperative arrangements between government agencies and the courts significantly reduced frictions between the child protection and family law systems.

14.164 The 2001 review found:

- difficulties in the child protection services and family court interface were much improved—the time taken by the child protection service to submit a report fell from an average of 42 days to 32 days, meaning that the reports were undertaken well within the time framework set up for their completion;
- the substantiation rate by child protection staff rose from 23% to 48%;
- disputes were resolved far more quickly, with the average time being taken falling from 17.5 months to 8.7 months;
- the average number of court events fell from an average of five to three events;
- far fewer cases proceeded to a judicial determination—only 13% proceeded this far compared with 30% previously;
- court orders broke down less frequently—previously some 37% of final orders broke down while 5% broke down in the new program;
- the amount Victoria Legal Aid spent on all parties per case averaged over all cases in the pilot program was $13,770 per case—well under the cap allowed for legal aid expenditure on family law cases and compared to the $19,867 in the non-Magellan comparison group of cases;
- the proportion of highly distressed children fell from 28% to 4%; and
- the parental and legal practitioner levels of satisfaction were high.[177]

14.165 The 2007 review also concluded that the Magellan project encourages a greater involvement of child protection agencies in the family law system.[178] In particular,

- Magellan cases were investigated by child protection agencies in 80% of cases compared to 26.3% of non-Magellan cases; and
- the child protection agency planned to give evidence at trial in 22.5% of cases compared to 1.3% of non-Magellan cases.[179]

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177 T Brown, R Sheehan, M Frederico and L and Hewitt, *Resolving Violence to Children: An Evaluation of Project Magellan* (2001), 132.

178 D Higgins, *Co-operation and Coordination—An Evaluation of the Family Court of Australia's Magellan Case Management Model* (2007), 12.

179 Ibid, 70 (table 5.10) and 214 (table 8.3).

14.166 Both reviews indicate that the interactions of the family law and child protection systems have improved as a result of the project and its method of intensive and coordinated case management of child abuse cases.

14.167 Higgins found that the child protection agency's compliance with subpoenas in Magellan cases was generally high, and that this was a result of the funded role of independent children's lawyers in:

- gathering information about the proceedings and facilitated discussions between parents where appropriate;
- procuring funding for Family Reports in cases where the Family Court's internal family consultants were not used;
- approaching relevant experts to give evidence in proceedings, ascertaining their availability to give evidence and providing them with documentation relating to the matter; and
- liaising between the parties to ensure that experts selected were not opposed.[180]

14.168 In relation to documents under subpoena, independent children's lawyers are now the only representatives able to view or listen to, and obtain copies of, recorded interviews between children and police.[181] Previously all parties were able to do this, but incidents where disgruntled parents had chastised children about making adverse disclosures to police, resulted in access to those interviews being limited to independent children's lawyers.[182]

14.169 Higgins highlighted the difficulties of complying with subpoenas in serious child maltreatment cases in the Brisbane registry of the Family Court. In that registry, instead of the child protection agency having responsibility for compiling a Magellan report, the independent children's lawyer was required to subpoena the entire child protection file on a particular child and make submissions according to the subpoenaed documents.[183] It was noted in the review that this procedure was problematic as Magellan reports produced by agencies were apt to focus attention on the salient issues of a case and were 'value added' as they were reports by reflective and experienced agency officials.[184] Magellan reports produced by child protection agencies do not merely present all information relating to the child, detail the agency's considered view.[185] Independent children's lawyers in Queensland are required to perform similar adjudicatory and investigatory functions which they may be ill-equipped and ill-resourced to perform. This provides further evidence of the real value of ensuring a concerted and focused response from child protection agencies in family law proceedings as discussed above.

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180 Ibid, 78, 107.
181 Ibid, 112.
182 Ibid.
183 Ibid, 101.
184 Ibid, 106.
185 Ibid, 101.

Federal Magistrates Court

14.170 The FMC has no current involvement with the Magellan project as the Magellan project is a Family Court initiative.

14.171 With the implementation of a common registry for the Family Court of Australia and the FMC, the transfer of matters between courts appears to have become less of an issue for complex child abuse cases which are part of the Magellan project. Neither of the annual reports of the two courts for 2008–09 raises this as an issue.

14.172 The FMC has adopted provisions for the transfer of more complex matters (which include matters identified for the Magellan list) that are filed in the FMC to the Family Court. The court has adopted a benchmark of two days as the primary indicator for hearing a family law matter itself or transferring the proceedings to the Family Court.

14.173 The FMC has argued that, with the introduction of the common registry, the Magellan project should be extended to include that court.[186]

Commissions' views

14.174 The Commissions' preliminary view is that the Magellan project should be extended to all qualifying cases, whether in the Family Court, FMC or other federal court structure for family cases. Unlike children's courts, federal family courts do not have the ability to investigate allegations of abuse for the purposes of establishing whether someone is a viable carer or not. That is the responsibility of state and territory child protection agencies. However, child protection agencies cannot investigate every allegation that arises in a family law proceeding. The scale of the problem is illustrated by the observation that most child abuse allegations in the family law system are made without any evidence to support them.[187] Collaborative relationships between all of the agencies involved in family law and child protection must be strong in order to ensure that child abuse is identified and responded to appropriately. The Magellan project appears to be an effective model for collaboration between family courts and child protection agencies.

14.175 Other options for ensuring an effective response in child protection cases in the family law system have been proposed. Submissions to the 2002 Family Law Council inquiry indicated that systemic failure could have the most serious and damaging consequences for children's lives.[188] The problem that neither system operates alone to receive, collate, interpret and act upon all relevant evidence is of profound importance to the welfare of children in highly conflicted family law and child protection proceedings. The Family Law Council recommended the establishment of a national child protection service to investigate every allegation of child maltreatment that emerges from family law proceedings, because child protection agencies are insufficiently resourced to do that work.

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186 Federal Magistrates Court, *Consultation*, Sydney, 3 February 2010.
187 Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009), 85.
188 Family Law Council, *Family Law and Child Protection—Final Report* (2002), 47–48.

14.176 A further option is for an early decision to be made about which court can best handle a particular case. Family court parenting orders may confer parental responsibility on persons other than the parents. In child protection, the child protection agency has a controlling influence in according parental responsibility or guardianship in relation to a child. In some cases a decision could be made early as to whether the matter should proceed under the *Family Law Act* or under child protection law. This view was previously expressed by the Family Law Council as the 'one court principle',[189] and was endorsed by the Wood Inquiry.[190]

14.177 The Commissions are interested in responses to these proposals and to hear views as to what changes to law and practice are required to prevent children from 'falling through the cracks' between the child protection and family law systems.

Proposal 14–4 The Australian Government should encourage all jurisdictions to develop consistent protocols between federal family courts and state and territory child protection agencies which include procedures:

(a) for electing the jurisdiction in which to commence proceedings;

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

(c) for responding to subpoenas issued by federal family courts; and

(d) which permit a federal family court to invite a child protection agency to consent to an order being made which allocates parental responsibility in the child protection agency's favour, in circumstances where it determines that no order should be made in favour of either parent.

Question 14–15 In what ways can the principles of the Magellan project be applied in the Federal Magistrates Court?

Question 14–16 What changes to law and practice are required to prevent children falling through the gaps between the child protection and family law systems?

Question 14–17 Can the problems of the interactions in practice between family law and child protection systems be resolved by collaborative arrangements such as the Magellan project? Are legal changes necessary to prevent systemic problems and harm to children, and, if so, what are they?

189 Ibid.

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

Part D

Sexual Assault

15. Sexual Assault and Family Violence

Contents

Introduction

15.1 This part of the Consultation Paper concerns the second Term of Reference of the Inquiry. This requires the Commissions to focus on the impact of inconsistent interpretation or application of laws in cases of sexual assault occurring in a family violence context, including rules of evidence, on victims of such violence.

15.2 This chapter outlines key background understandings of sexual assault in a family violence context, its nature and prevalence, and the response of the criminal justice system and other areas of law.

15.3 Chapter 16 describes the range of existing sexual offences and identifies inconsistencies in relation to elements of these offences, notably in relation to the issue of consent. It also discusses the role that guiding principles and objects clauses can

play in attempting to mitigate the impact of laws on victims of sexual assault in a family violence context.

15.4 Chapters 17 and 18 highlight ways in which particular laws and procedures operate for victims of sexual assault. Where it is possible to identify certain approaches as more promising and progressive than others, the Commissions propose that Commonwealth, state and territory governments should implement consistent measures based on the best model. Uniformity is not, of itself, a goal, but rather consistency with respect to identified best policy.

15.5 For simplicity, the Commissions' proposals are most often worded to propose that 'Commonwealth, state and territory' legislation should provide for certain matters, notwithstanding that:

- Commonwealth criminal law does not provide for ordinary sexual offences[1] and, in practice, only a small number of criminal and quasi-criminal matters are heard in federal courts; [2] and

- one or more jurisdictions may already have enacted legislation that fits the criteria proposed by the Commissions.

Chapter outline

15.6 This chapter canvasses what is known about the prevalence of sexual assault in the family violence context and situates the experience of sexual assault as part of family violence more generally. It highlights aspects of family violence that are important in understanding and responding to this category of sexual violence—for example, the many types of sexual violence experienced by women and children, its repetition within the family violence context, its cumulative impact and coexistence with other forms of family violence. Sexual assault by current and former intimate partners, for instance, requires responses that understand and take account of these interrelated contexts and acknowledge the distinct experience of sexual violence by an intimate partner.

15.7 The chapter then introduces the response of the criminal justice system—an examination that is expanded in Chapters 16 to 18. It outlines some of the unique

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1 As opposed to sexual offences such as those relating to child sex tourism: *Crimes Act 1914* (Cth) pt IIIA; rape or sexual violence in the context of war or as a crime against humanity: *Criminal Code* (Cth) ss 268.14, 268.19, 268.59, 268.64. See also *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth).

2 Rather, the Australian Parliament chooses to rely heavily on the state and territory courts to adjudicate proceedings with respect to federal offences in order to avoid the financial and administrative costs associated with establishing a separate system of federal criminal courts. The use of state courts was made possible by ss 71 and 77(iii) of the *Australian Constitution*. *Judiciary Act 1903* (Cth) s 39(2) invests state courts with federal jurisdiction in both civil and criminal matters, subject to certain limitations and exceptions. Under *Judiciary Act 1903* (Cth) ss 68(1), 79 state and territory procedural and evidence laws are applied to federal prosecutions in state and territory courts.

features of sexual assault and the legal response, as well as the myths about women, children and sexual assault that continue to hold some sway in the community and in the legal system. The chapter introduces the substantial reform of law and procedure that has been undertaken in this area over the last three decades to provide more appropriate criminal justice responses to sexual assault.

15.8 The chapter briefly discusses other areas of the law which also respond to sexual assault (including protection orders, family law, statutory compensation and tort law). This discussion recognises that the criminal justice system is not the only legal response, nor is it simply the law that is (or should be) called on to respond to and reduce sexual violence.

15.9 Finally, the chapter discusses the 'implementation gap'—the gap between written law and its practice—that remains despite extensive changes to law and procedure related to sexual assault.

Terminology

15.10 In this chapter the Commissions use two terms to signify different aspects of sexual violence in a family violence context. First, the term 'sexual violence' is used to describe the full range of sexually coercive or unwanted acts that many women and children experience, not all of which are against the law. Secondly, the terms 'sexual assault' or 'sexual offence' are used to refer to those acts that are proscribed in the various Australian criminal laws (for example, sexual intercourse without consent, or rape, indecent assault, offences against children and people with a cognitive impairment).[3] This approach recognises both 'experience-based' and 'offence-based' definitions of sexual violence. The distinction was explored in recent work by the Australian Bureau of Statistics (ABS)[4] and used in the National Council to Reduce Violence Against Women and Children (the National Council) report, *Time for Action: The National Council's Plan for Australia to Reduce Violence Against Women and their Children* (*Time for Action*).[5]

15.11 The ABS provides the following experience-based definition of sexual violence:

> Sexual assault is unwanted behaviour of a sexual nature directed towards a person:
>
> - which makes that person feel uncomfortable, distressed, frightened or threatened, or which results in harm or injury to that person;

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3 Ch 16 summarises the range of sexual offences in Australia.

4 Australian Bureau of Statistics, *Sexual Assault in Australia: A Statistical Overview* (2004), 8. For a more detailed discussion of this conceptualisation, see Australian Bureau of Statistics, *Sexual Assault Information Development Framework: Information Paper*, Cat No 4518.0 (2003), 7–10.

5 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). See also The National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), 11–12.

- to which that person has not freely agreed or given consent, or to which that person is not capable of giving consent;
- in which another person uses physical, emotional, psychological or verbal force or (other) coercive behaviour against that person.

Sexual assault may be located on a continuum of behaviours from sexual harassment to life-threatening rape. These behaviours may include lewdness, stalking, indecent assault, date rape, drug-assisted sexual assault, child sexual abuse, incest, exposure of a person to pornography, use of a person in pornography, and threats or attempts to sexually assault.[6]

15.12 Offence-based definitions are directly linked to the elements of the offences prescribed by the criminal law including, for example: penetration, absence of consent and the circumstances that negate consent (as defined in law).[7]

15.13 An understanding of both definitions is important in recognising the continuum of unwanted sexual behaviours that may exist in the family violence context. It is also important in ensuring appropriate responses, including service delivery and support for people who have experienced sexual violence that is not necessarily addressed by the criminal law.[8]

The prevalence of sexual violence

A limited picture

15.14 Information about the nature and prevalence of sexual assault is limited. This is due to a range of factors including lack of reporting generally, and under-reporting due to the methodologies and definitions employed in the various surveys or data sources.[9]

15.15 Moreover, many sexual assaults remain unreported to anyone, let alone to the police. For example, the 1996 ABS *Women's Safety Survey* found that one in five women who had been sexually assaulted did not tell anyone about it. In 2002, the National Crime and Safety Survey found that 80% of women did not report the most recent incident to the police.[10] Similarly, the Australian Component of the International Violence Against Women Survey (IVAWS) found that only 15% of women who experienced physical or sexual violence from an intimate partner reported that incident

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6 Australian Bureau of Statistics, *Sexual Assault in Australia: A Statistical Overview* (2004), 8.

7 Ibid, 9. There is variation across the jurisdictions in what acts are defined as sexual offences and the way in which consent is defined: See Ch 16.

8 Ibid, 8.

9 For a discussion of the limitations of various data sources, eg, police statistics, crime surveys and victim surveys, see B Cook, F David and A Grant, *Sexual Violence in Australia: Australian Institute of Criminology Research and Public Policy Series*, 36 (2001), 2–4.

10 Australian Bureau of Statistics, *Sexual Assault in Australia: A Statistical Overview* (2004), 57.

to the police.[11] In 2007, the Australian Institute of Criminology (AIC) estimated that less than 30% of sexual assaults and related offences are reported to the police.[12]

15.16 Some forms of sexual violence may be less likely to be reported than others. Notably, incidents (whether sexual or physical) perpetrated by current or former intimate partners are less likely to be reported than those incidents perpetrated by strangers.[13] This has particular significance for an understanding of sexual violence in a family context.

15.17 Women and children may not report or disclose the sexual violence that they have experienced for a range of reasons,[14] including because: they have not identified the act as sexual violence, let alone as a criminal offence; they do not consider the incident serious enough to warrant reporting;[15] they are ashamed, fearful of the perpetrator, do not think that they will be believed, fear how they will be treated by the criminal justice system, and may consider that they can handle it themselves.[16]

15.18 The failure to recognise or identify an act as sexual violence, or more specifically as a sexual assault, may be a 'survival strategy' for some women, particularly those who have been sexually assaulted by an intimate partner. As Debra Parkinson reported in her 2008 research report:

> If they had recognised it as rape, they could not have managed their situation. Some excused the behaviour of their partners—even the most brutal rapes—as a consequence of being married to him, 'it was his right'. As a result, the way women complete surveys would be inaccurate.[17]
>
> … women told us that it was not until they were no longer in the relationship and sometimes not until many years later that they had the perspective to recognise they were being raped within their relationship. While they were in the relationship, they struggled to make sense of what was happening to them, and were caught in our

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11 J Mouzos and T Makkai, *Women's Experiences of Male Violence: Findings of the Australian Component of the International Violence Against Women Survey* (2004) Australian Institute of Criminology, 102.

12 Australian Institute of Criminology, 'Guilty Outcomes in Reported Sexual Assault and Related Offence Incidents' (Press Release, 18 December 2007).

13 J Mouzos and T Makkai, *Women's Experiences of Male Violence: Findings of the Australian Component of the International Violence Against Women Survey* (2004) Australian Institute of Criminology, 92, 102.

14 Ibid, 14, 16–17.

15 The perceived seriousness of an event has been identified as a critical determinant in whether a person reports an incident to the police (seriousness includes such factors as whether the victim had been detained in some way, injured, or threatened, and the relationship with the perpetrator): Ibid, 92–95.

16 See Ibid, 97–99, 105–106. See also L Kelly, 'Promising Practices Addressing Sexual Violence' (Paper presented at Violence Against Women: Good Practices in Combating and Eliminating Violence Against Women Expert Group Meeting, Vienna, 17–20 May 2005), Box 1, 5.

17 D Parkinson, *Raped by a Partner: A Research Report* (2008), 18. Parkinson suggests that this may explain the disparity in some surveys between the number of women who disclose sexual assault by a current partner when compared to the number who disclose sexual assault by a former partner. For example, data in Australia Bureau of Statistics, *Personal Safety* Survey, 4906.0 (2005) show that of women who had experienced violence since the age of 15, 2.1% reported sexual violence by a current partner, compared to 21.7% by a previous partner: D Parkinson, *Raped by a Partner: A Research Report* (2008), 18, 133.

> society's demand to make the marriage work. Whilst in the relationship, they minimised the rapes, they blamed themselves, or they feared even worse consequences if they didn't comply.[18]

15.19 Different surveys or data sources report different findings about the extent of sexual violence in Australia, including because different definitions of sexual violence or sexual assault are relied upon.[19] Unsurprisingly, narrower offence-based definitions tend to result in lower levels of sexual violence being recorded.[20] Under-reporting, and under-estimates of prevalence, may also be caused by the mode of survey delivery. For example, surveys conducted via the telephone may mean that certain groups of women, particularly those who are more vulnerable to violence,[21] may not be captured in the survey.[22] Some survey instruments may be better designed to enhance disclosure, for example, through the use of multiple opportunities for disclosure, or open-ended questions that allow participants to talk about experiences that might not neatly fit within the categories set by survey questions.[23] Other methodological variations include whether interpreters are available to assist in the administration of the survey, whether the criteria for inclusion are age-specific and so on. Results also vary depending on participants' perceptions of whether certain conduct constitutes sexual violence or a crime.[24]

15.20 There is general agreement that, given these methodological problems (and direct evidence of under-reporting of sexual assault), the available survey data are likely to underestimate the incidence and prevalence of sexual violence.

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18 D Parkinson, *Raped by a Partner: A Research Report* (2008), 18.

19 J Mouzos and T Makkai, *Women's Experiences of Male Violence: Findings of the Australian Component of the International Violence Against Women Survey* (2004) Australian Institute of Criminology, 24; Australian Bureau of Statistics, *Sexual Assault in Australia: A Statistical Overview* (2004), 8.

20 See Australian Bureau of Statistics, *Sexual Assault in Australia: A Statistical Overview* (2004),16.

21 For example, those with unstable housing, Indigenous women particularly those living in rural and remote areas, women with limited or no English, women in custody, young women, or women in group homes or in institutional care.

22 The National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), 15.

23 See discussion in M Schwartz, 'Methodological Issues in the Use of Survey Data for Measuring and Characterizing' (2000) 6 *Violence Against Women* 815, 820–821; W DeKeseredy, 'Current Controversies on Defining Nonlethal Violence Against Women in Intimate Heterosexual Relationships' (2000) 6 *Violence Against Women* 728, 741.

24 See discussion about methodology and design in H Johnson, 'Assessing the Prevalence of Violence Against Women in Canada ' (Paper presented at A Statistical Overview, Challenges and Gaps in Data Collection and Methodology and Approaches for Overcoming Them: Expert Group Meeting, UN Division for the Advancement of Women, Violence Against Women, Geneva, 11–14 April 2005); P Tjaden, 'Defining and Measuring Violence Against Women: Background, Issues and Recommendations' (Paper presented at A Statistical Overview, Challenges and Gaps in Data Collection and Methodology and Approaches for Overcoming Them: Expert Group Meeting UN Division for the Advancement of Women, Violence Against Women, Geneva, 11–14 April 2005); S Walby, 'Improving the Statistics on Violence Against Women ' (Paper presented at A Statistical Overview, Challenges and Gaps in Data Collection and Methodology and Approaches for Overcoming Them: Expert Group Meeting, UN Division for the Advancement of Women, Violence Against Women, Geneva, 11–14 April 2005).

15.21 Understanding that sexual assault is under-reported is crucial background when considering the response of the criminal justice system. The vast majority of incidents of sexual assault do not come to the attention of the legal system. The problem is exacerbated in the family violence context. Therefore, an important part of the law reform focus should be on measures that might promote reporting and challenge community attitudes to sexual assault that continue to reinforce its invisibility.[25]

A snapshot of sexual violence

15.22 This section presents a snapshot of the statistics available about the experience of sexual assault and sexual violence in Australia. Where possible, statistics on sexual assault within the family violence context are highlighted.

15.23 Sexual violence is strongly gendered with many more women experiencing sexual violence than men.[26] When women and children are sexually assaulted, the perpetrator is likely to be someone well known to them, a current or former partner or family member.[27] While all women and children may be at risk of sexual violence, some are more vulnerable than others, including young women, Indigenous women, women from culturally and linguistically diverse backgrounds (CALD), and women with disabilities.

Children

15.24 There are limited available data about the extent of sexual violence against children. Available data come from crime statistics or child protection notifications. In 2003, it was estimated that 187 per 100,000 children aged 0–14 years were victims of sexual abuse.[28] Rates of sexual assault were higher for children aged 10–14 and 'three-quarters of reported victims were girls'.[29]

> There are no national data on how rates of reported physical and sexual assault vary across population groups. There is limited evidence suggesting that child sexual assault is more prevalent in rural and remote areas than in urban areas and is associated with social disadvantage. Information available from New South Wales and the AIHW National Child Protection Data Collection indicates that Aboriginal and Torres Strait Islander children are over-represented among victims of physical and sexual assault.[30]

Young women

15.25 Young women are overrepresented as victims of sexual assault. The Australian component of the IVAWS found that younger women (aged 18–24) were more likely than other women to have reported experiencing sexual violence in the 12 months prior

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25 See similar discussion in Victorian Law Reform Commission, *Sexual Offences: Discussion Paper* (2001), [1.11].
26 See Australian Bureau of Statistics, *Personal Safety Survey*, 4906.0 (2005), Tables 3, 5.
27 See Ibid, Table 19 in relation to women.
28 Australian Institute of Health and Welfare, *A Picture of Australia's Children 2009* (2009), 113.
29 Ibid.
30 Ibid.

to the survey.[31] In a study on non-reporting and the hidden reporting of sexual assault, it was noted that women in the '15–19 age group report the highest rates of sexual assault, at 495 per 100,000 compared to the total rate for all females of 139 per 100,000'.[32] An over-representation of young women as victims of sexual violence was found in the ABS *Personal Safety Survey*—30.7% of women who reported sexual violence in the 12 months prior to the survey were aged 18–24, and a further 29.8% were aged 25–34.[33]

Indigenous women

15.26 Various surveys and police statistics generally confirm higher rates of sexual violence perpetrated against Indigenous women compared to the non-Indigenous population:

- The Australian component of the IVAWS found that Indigenous women reported experiencing higher levels of all kinds of violence, with three times as many Indigenous women compared to non-Indigenous women reporting sexual violence in the 12 months prior to the survey.[34]

- 2008 recorded crime statistics found that the Indigenous victimisation rate for sexual assaults in NSW was nearly 3.5 times the rate for the non-Indigenous population.[35] In South Australia and the Northern Territory the victimisation rate was over three times that for the non-Indigenous population.[36]

- A NSW study on Aboriginal women in prison found that over three quarters had experienced child sexual assault, just under half had been sexually assaulted as adults, and almost 80% had experienced family violence.[37]

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31 J Mouzos and T Makkai, *Women's Experiences of Male Violence: Findings of the Australian Component of the International Violence Against Women Survey* (2004) Australian Institute of Criminology, 29.

32 D Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Review—Report prepared for the Commonwealth Office of the Status of Women* (2003) Australian Institute of Criminology, 7.

33 Australian Bureau of Statistics, *Personal Safety Survey*, 4906.0 (2005), Table 6.

34 J Mouzos and T Makkai, *Women's Experiences of Male Violence: Findings of the Australian Component of the International Violence Against Women Survey* (2004) Australian Institute of Criminology, 29. Note that Mouzos and Makkai emphasise that these result should be 'viewed with caution due to the high relative standard error': 30.

35 Australian Bureau of Statistics, *Recorded Crime—Victims*, Catalogue No 4510.0 (2008), 22. The ABS only reported on Indigenous victimisation for NSW, South Australia and the Northern Territory. It did not report on Indigenous victimisation for other jurisdictions given limitations in the quality of the data: 22. This ABS publication reports on selected offences recorded by the police for the 2008 calendar year: 53.

36 Ibid, 48, 51. See also N Taylor and J Putt, *Adult Sexual Violence in Indigenous and Culturally and Linguistically Diverse Communities in Australia* (2007), 2.

37 See N Taylor and J Putt, *Adult Sexual Violence in Indigenous and Culturally and Linguistically Diverse Communities in Australia* (2007), 2.

Women from culturally and linguistically diverse communities

15.27 There is limited information available on the prevalence of sexual violence against women from CALD backgrounds. Not all surveys have adopted measures to assist in eliciting information from CALD women, and even when they have, there may be other limitations with the data.[38]

15.28 The Australian component of the IVAWS found that non-English speaking background and English speaking women reported similar levels of sexual violence in the preceding 12 months, but that English speaking women reported higher levels of all kinds of violence over their lifetimes. The IVAWS notes that while this might indicate that violence against non-English speaking women is 'less prevalent', it is influenced by cultural perceptions and understandings about what is violence.[39]

15.29 In addition, some women and children in CALD communities may face barriers that limit their choices in making disclosures or reporting to the police.[40] It is important to recognise, however, that the CALD community is not a homogenous group, and includes women from a wide range of different backgrounds and experiences. There is variation in the extent to which women have knowledge about the law, ability to access the Australian legal system, willingness to engage with the police and other institutional actors, and knowledge about what unwanted sexual acts are against the law (for example, whether rape in marriage is illegal).[41]

Women with disabilities

15.30 Many studies have documented the increased vulnerability to physical and sexual violence of people with disabilities. As for other groups of women there is a dearth of statistics that document the extent of sexual violence. This may be linked to the failure of services, including the police, to record whether the victim has a disability.[42] However, one study has found that 90% of women with intellectual disabilities have been sexually abused; and 68% of women with an intellectual disability will be subjected to sexual abuse before they reach 18 years of age.[43] This prevalence is consistent with overseas studies.[44]

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38 See discussion in A Neame and M Heenan, *What Lies Behind the Hidden Figure of Sexual Assault: Issues of Prevalence and Disclosure*, Australian Centre for the Study of Sexual Assault Briefing (September 2003).

39 J Mouzos and T Makkai, *Women's Experiences of Male Violence: Findings of the Australian Component of the International Violence Against Women Survey* (2004) Australian Institute of Criminology, 32.

40 See discussion in A Neame and M Heenan, *What Lies Behind the Hidden Figure of Sexual Assault: Issues of Prevalence and Disclosure*, Australian Centre for the Study of Sexual Assault Briefing (September 2003).

41 See discussion in N Taylor and J Putt, *Adult Sexual Violence in Indigenous and Culturally and Linguistically Diverse Communities in Australia* (2007).

42 S Salthouse and C Frohmader, 'Double the Odds: Domestic Violence and Women with Disabilities' (Paper presented at Home Truths Conference, Melbourne, 15–17 September 2004).

43 Ibid.

44 Ibid.

Sexual assault in the family violence context

15.31 The important features of sexual assault in a family violence context include: multiple forms of sexual violence; a likelihood of repetition; and the fact that sexual violence is likely to be accompanied by other forms of violence.

Multiple forms of sexual violence

15.32 While this Inquiry is primarily concerned with sexual acts that are against the law, a range of unwanted or coercive sexual acts are experienced by many women and children in the context of their relationships.[45] Recognising the broader range is contextually important to understanding women's and children's experiences of sexual violence—and family violence more generally.

15.33 The findings of the Australian component of the IVAWS emphasise the importance of acknowledging this context. The 'most frequent type of sexual violence reported' by women who participated in that survey was 'unwanted sexual touching'. However, 'few women reported experiencing attempted forced sexual intercourse or actual forced sexual intercourse' over the same period.[46]

15.34 The ABS *Personal Safety Survey* also documented the range of unwanted sexual experiences of men and women. 32.5% of women reported that since they were aged 15, they had experienced inappropriate comments about their body or sex life, compared to only 11.7% of men. In addition, just over a quarter of women reported that they had experienced unwanted sexual touching, compared to 9.9% of men.[47]

15.35 Research has found that some women who experience family violence may also be subject to indecent assaults or unwanted touching. They may be exposed to pornography, have sexually explicit photographs taken without their permission, subjected to degrading comments about their sexuality or sexual performance, or called sexually demeaning names. They may be constantly questioned about sexual activities with other people and placed under surveillance, or forced to engage in sexual activity without the protection of a condom.[48]

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45 L Kelly, 'Promising Practices Addressing Sexual Violence' (Paper presented at Violence Against Women: Good Practices in Combating and Eliminating Violence Against Women Expert Group Meeting, Vienna, 17–20 May 2005).

46 J Mouzos and T Makkai, *Women's Experiences of Male Violence: Findings of the Australian Component of the International Violence Against Women Survey* (2004) Australian Institute of Criminology, 25.

47 Australian Bureau of Statistics, *Personal Safety Survey*, 4906.0 (2005).

48 See types of behaviour detailed in K Basile and L Saltzman, *Sexual Violence Surveillance: Uniform Definitions and Recommended Data Elements* (2009), 9–10. See also D Parkinson, *Raped by a Partner: A Research Report* (2008), 27–37; E Stark, *Coercive Control: How Men Entrap Women in Personal Life* (2007), 243.

Repetition of sexual violence

15.36 It is also important to recognise the extent to which sexual violence perpetrated in a family violence context is repeated and that this has 'cumulative impacts'.[49] Unlike stranger sexual assault, which is far more likely to be a single incident, sexual violence within a relationship is likely to be repeated given the ongoing nature of the relationship and the opportunity this provides for continued perpetration.[50] For victims who are unable to escape such violence, the prospects of self-criticism and acquiescence are enhanced, as is the 'normalisation' of such conduct.

15.37 The US National Violence Against Women Survey found that:

> Approximately half (51.2 percent) of the women raped by an intimate and two-thirds (65.5 percent) of the women physically abused by an intimate said that they were victimized multiple times by the same partner … Overall, female rape victims averaged 4.5 rapes by the same partner, and female assault victims averaged 6.9 assaults. Among women who were victimized multiple times by the same partner, 62.6 percent of the rape victims and 69.5 percent of the assault victims said that their victimization lasted a year or more. On average, women who were raped multiple times said their victimization occurred over 3.8 years, and women who were physically assaulted multiple times said their victimization occurred over 4.5 years.[51]

15.38 In a recent New Zealand study on pathways to recovery from sexual assault, over two thirds[52] of the participants who had been sexually assaulted by a current or former intimate partner or family or whānau (extended family) member,[53] reported that they had been sexually assaulted by that person before. The experience of repeat sexual assaults was highest for those reporting sexual assault by a former intimate partner (80%), followed by assaults by a current intimate partner (69%) and a family or whānau member (60%).[54]

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49 L Kelly, 'Promising Practices Addressing Sexual Violence' (Paper presented at Violence Against Women: Good Practices in Combating and Eliminating Violence Against Women Expert Group Meeting, Vienna, 17–20 May 2005).

50 L McOrmond-Plummer, *Considering the Differences: Intimate Partner Sexual Violence in Sexual Assault and Domestic Violence Discourse* (2009), 2; E Stark, *Coercive Control: How Men Entrap Women in Personal Life* (2007), 388; D Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Review—Report prepared for the Commonwealth Office of the Status of Women* (2003) Australian Institute of Criminology, 8. The vast majority of case studies presented in Parkinson's study of partner rape document multiple rapes experienced by the women who participated in that study: D Parkinson, *Raped by a Partner: A Research Report* (2008), 27–35.

51 P Tjaden and N Thoennes, *Extent, Nature and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey Research Report* (2000), 39.

52 22 out of 33.

53 V Kingi and J Jordan, *Responding to Sexual Violence: Pathways to Recovery* (2009), 48. 59% of the people in this study indicated that they had been sexually assaulted in a family violence context (ie, by a current/former intimate partner or by a family/whānau member). Only 8% were described as stranger assaults.

54 Ibid, 52.

Coexistence with other forms of violence and abuse

15.39 Various research reports and studies have documented the extent to which women and children experience multiple forms of violence in a family violence context.[55] The World Health Organisation in its multi-country study on domestic violence and women's health found 'substantial overlap' between the experience of physical violence and sexual violence by an intimate partner.

> In all sites, more than half of the women who reported partner violence reported either physical violence only or physical violence accompanied by sexual violence. In most sites between 30% and 56% of women who had ever experienced any violence, reported both physical and sexual violence.[56]

Indigenous communities

15.40 *Time for Action* emphasises that 'there is no "one-size fits all" approach' to the problem of family violence against women and children and acknowledges that different responses are needed for a range of vulnerable groups, including Indigenous peoples.[57]

15.41 The fact sexual violence affects Indigenous communities disproportionately is noted above. In essence, 'sexual violence in Indigenous communities occurs at rates that far exceed those for non-Indigenous Australians'[58] and is 'reported to be at crisis levels'.[59] A more complete picture recognises the 'wider issue of violence that occurs in Aboriginal communities', the 'diversity of peoples within and across Indigenous communities' and the variation 'between communities in their current situation in terms of violence'.[60] The lack of reported and analysed data in relation to the experience of family violence by Indigenous women and children, including in relation to the effectiveness of measures to reduce such violence, is a serious limitation to building an understanding of how to prevent and address it.[61]

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55 L Schafran, S Lopez-Boy and M Davis, *Making Marital Rape a Crime: A Long Road Travelled, A Long Way to Go* (2009); E Stark, *Coercive Control: How Men Entrap Women in Personal Life* (2007), 388.

56 C García-Moreno and others, *WHO Multi-Country Study on Women's Health and Domestic Violence Against Women: Initial Results on Prevalence, Health Outcomes and Women's Responses* (2005), 32. See also L Kelly, *Surviving Sexual Violence* (1988), 53, 127–32.

57 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), 14.

58 D Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Review—Report prepared for the Commonwealth Office of the Status of Women* (2003) Australian Institute of Criminology, 56.

59 M Keel, *Family Violence and Sexual Assault in Indigenous Communities: "Walking the Talk"* (2004)1.

60 Ibid, 5. See, also, Queensland Police Service, *Statistical Comparisons 2002–2003* (2003); H Blagg, D Ray, R Murphy and E Macarthy, *Crisis Intervention in Aboriginal Family Violence: Strategies and Models for Western Australia* (2000).

61 See, eg, 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), 54 (Strategies 1.5.2, 1.5.3); Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children are Sacred: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007), Part II: Supporting

15.42 The access to justice issues for Indigenous women and their children are two-fold: first, a number of obstacles impede Indigenous women from seeking assistance; secondly, services do not adequately recognise and respond to Indigenous experiences of family violence.

15.43 Obstacles which continue to prevent Indigenous women from reporting sexual assault include: 'intimidation by authority figures and white people in general; closeness of communities leading to fear of reprisals or shame; the relationship of the survivor to the perpetrator; unfamiliarity with legal process; … a fear that the perpetrator will be sent to prison',[62] and 'difficulty in communicating and a belief that both authorities and mainstream sexual assault services will not respond appropriately'.[63]

15.44 In addition, tensions may exist between mainstream approaches and those of Indigenous women and communities to understanding and responding to violence. Mainstream approaches are said to have

> relied more heavily on feminist analyses of violence, seek responses to the 'crime' of family violence that advance the rights of women to be socially, legally and economically supported should they decide to leave their violence partners.[64]

15.45 Indigenous community members may feel that this approach 'can exacerbate an already volatile situation':[65]

> Indigenous community members have consistently criticised [the approach to violence that largely criminalises violence and relies on the institutionalisation of the offender to protect the victim] as being irrelevant, discriminatory and a repeat of the kinds of violence inherent in policies and practises of colonisation. Indigenous experiences with these approaches have found them to be disempowering and processes by which methods of power and contract can be reinforced.[66]

15.46 Any proposed solutions to Indigenous family violence must take into account the realities of Indigenous communities. For example, Dr Kyllie Cripps and Hannah McGlade consider that the causes of Indigenous family violence are 'a multitude of inter-related factors' which can usefully be understood by categorising them into two groups:

> Group 1 factors include colonisation: policies and practices; dispossession and cultural dislocation; and dislocation of families through removal. Group 2 factors

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Research; Australian Institute of Health and Welfare, *Family Violence Among Aboriginal and Torres Strait Islander Peoples* (2006) 118–123.

62 M Keel, *Family Violence and Sexual Assault in Indigenous Communities: "Walking the Talk"* (2004) 7.

63 L Thorpe, R Solomon and M Dimopoulos, *From Shame to Pride: Access to Sexual Assault Services for Indigenous People* (2004), 7.

64 M Keel, *Family Violence and Sexual Assault in Indigenous Communities: "Walking the Talk"* (2004), 3.

65 K Cripps and H McGlade, 'Indigenous Family Violence and Sexual Abuse: Considering Pathways Forward' (2008) 14 *Journal of Family Studies* 240, 243.

66 Ibid.

> include: marginalisation as a minority; direct and indirect racism; unemployment; welfare dependency; past history of abuse; poverty; destructive coping behaviours; addictions; health and mental health issues; and low self-esteem and a sense of powerlessness.[67]

15.47 In addition, the 2004 Report, *From Shame to Pride: Access to Sexual Assault Services for Indigenous Peoples,* identified the following areas as critical to understanding sexual assault in Indigenous communities:

- The issue is widespread and 'endemic'
- Very few victims report the issue to police or seek assistance
- Child sexual abuse is still very much hidden
- There is a 'normalisation' of sexual violence that is now becoming intergenerational
- The issues have to be addressed in a holistic way if any real outcomes are to be achieved.[68]

15.48 The literature and reports which consider the interface between Indigenous family violence, child abuse and the criminal law,[69] focus on enhanced service delivery and exploring approaches that 'attend to needs of all members of the community' including restorative justice.[70]

History of activism and legal change

15.49 This section briefly canvasses the last three decades of legislative and procedural change to improve responses to sexual offences, increase reporting and to reduce the negative experience of complainants in sexual assault proceedings. The changes made to the law and procedures have variously been intended to

> take greater account of the realities of rape and sexual abuse, to make the trial process less daunting for complainants and to encourage a higher proportion of victims of sexual assault to report these crimes to the police.[71]

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67 Ibid, 242.

68 L Thorpe, R Solomon and M Dimopoulos, *From Shame to Pride: Access to Sexual Assault Services for Indigenous People* (2004), 21.

69 See, eg, K Cripps and H McGlade, 'Indigenous Family Violence and Sexual Abuse: Considering Pathways Forward' (2008) 14 *Journal of Family Studies* 240; Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children are Sacred: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007); Aboriginal Child Sexual Assault Taskforce (NSW), *Breaking the Silence: Creating the Future. Addressing Child Sexual Assault in Aboriginal communities in NSW* (2006); M Keel, *Family Violence and Sexual Assault in Indigenous Communities: "Walking the Talk"* (2004); S Gordon, K Hallahan and D Henry, *Putting the Picture Together, Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (2002).

70 M Keel, *Family Violence and Sexual Assault in Indigenous Communities: "Walking the Talk"* (2004). Restorative justice is discussed in Ch 11.

71 Victorian Law Reform Commission, *Sexual Offences: Discussion Paper* (2001), [2.2].

15.50 Since the 1970s there has been considerable change to the law relating to sexual offences across Australia, as has been the case in many other countries. These developments were brought about by a number of factors including: growing community awareness about the extent of sexual violence and the manner in which complainants were historically treated by the legal system; the growth and activism of the women's movement in this area;[72] and growing awareness about the particular problems faced by child sexual assault complainants in the legal system.[73]

Historical approaches to sexual violence

15.51 Feminist research and advocacy from the 1970s argued that the law addressed sexual assault in discriminatory ways, including the way in which it viewed and assessed women and children as complainants. This work drew attention to a range of myths and misconceptions that underpinned the approach of not only the laws on sexual assault, but the approaches of key legal players (police, prosecutors, defence lawyers and judicial officers). This work highlighted the way in which the law in this area has largely been defined and implemented by men and presents particular historical ideas about women, children, men, sexual violence, and sexual relationships more generally.

Myths and misconceptions

15.52 A range of myths and misconceptions about women, children and sexual assault have underpinned the legal and evidential rules in sexual assault proceedings. They have been the subject of extensive commentary in the literature and the site of considerable law reform in order to counter their resilience. Key myths and misconceptions (frequently inter-related) include:

That women and children are inherently unreliable and lie about sexual assault

15.53 The idea that women and children are inherently unreliable and lie about sexual assault focuses on the 'untrustworthiness' of women and children generally, particularly when they complain about sexual assault.[74] It is clearly demonstrated in the emphasis on corroboration of women's and children's evidence in sexual assault trials. While corroboration is no longer required, remnants of this myth can be discerned in various common law directions to the jury that remain in currency despite successive restrictions in legislation around Australia. Judicial warnings are discussed in detail in Chapter 18.

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72 Ibid, 3.

73 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), 1; Victorian Law Reform Commission, *Sexual Offences: Discussion Paper* (2001), 3.

74 See C Taylor, *Court Licensed Abuse: Patriarchal Lore and the Legal Response to Intrafamilial Sexual Abuse of Children* (2004), 30; K Mack, '"You Should Scrutinise Her Evidence With Great Care": Corroboration of Women's Testimony about Sexual Assault' in P Easteal (ed) *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998) 59, 59–61.

That the accusation of rape is easily made, but difficult to challenge

15.54 This view is clearly reflected in the oft-quoted assertion by the 17th century English jurist Sir Matthew Hale that 'rape is an accusation easily to be made, hard to be proved, and harder yet to be defended by the party accused, tho' never so innocent'.[75] The belief is connected with the emphasis on corroboration and ideas about what a 'real' rape looks like.[76] It is a powerful notion not only in positioning women and children as potential liars, but feeds into other conceptions of particular women as vindictive or vengeful—for example, a woman who makes allegations against a former spouse might be characterised in this way; and wanting to hide their sexual behaviour—the suggestion that some young women, in order to hide their sexual activities from their parents, 'cry rape'.[77] It is one basis for the ever present concern about 'false' allegations.

That sexual assault is most likely to be committed by a stranger

15.55 Most sexual assaults are actually perpetrated by someone known to the victim and often known very closely. This fact conflicts with popular ideas of who is a rapist, and who is a 'real victim'. This myth connects with a range of other myths—for example, the assumption that victims of rape report without delay, while this may be a more complex process of recognition and decision for those who are raped by an intimate partner or family member.

That women cannot be sexually assaulted by their spouse

15.56 This was the situation under common law—although significantly not the reality for many women—until the 1980s, when all Australian jurisdictions amended their law. Prior to this time it was generally not possible for a man to be charged with, and prosecuted for, raping his wife or, in some cases, de facto partner.[78] The marital rape immunity was based on historical notions that women became men's property on marriage, and that through marriage women consent, on a continuing basis, to sex with their spouse. It is the articulation of this notion by Sir Matthew Hale that is most often quoted:

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75 As quoted in L Schafran, S Lopez-Boy and M Davis, *Making Marital Rape a Crime: A Long Road Travelled, A Long Way to Go* (2009), 15.

76 'Real rape' is rape perpetrated by a stranger in a dark alley against a 'good' woman, as opposed to 'not real' rape where the women is assaulted by someone she knows in circumstances where there are questions about her behaviour, eg, in terms of sexual experience and drug and alcohol use: see S Estrich, 'Rape' (1986) 95 *Yale Law Journal* 1087, 1088. The VLRC drew a distinction between the 'classic' rape scenario and its reality: Victorian Law Reform Commission, *Sexual Offences: Discussion Paper* (2001), [3.15].

77 See discussion in S Doyle and C Barbato, 'Justice Delayed Is Justice Denied: The Experiences of Women in Court as Victims of Sexual Assault' in J Breckenridge and L Laing (eds), *Challenging Silence: Innovative Responses to Sexual and Domestic Violence* (1999) 50, 50.

78 There were exceptions to this general approach: P Easteal, 'Rape in Marriage: Has the Licence Lapsed?' in P Easteal (ed) *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998) 107, 111.

> [T]he husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.[79]

15.57 While this no longer holds true in the law across Australia, and in numerous overseas jurisdictions,[80] it continues to hold some sway in community understandings about what is sexual assault.[81] This influences the extent to which these cases continue to be less likely to be reported, prosecuted and result in conviction.

That some sexual assaults are more serious and damaging than others

15.58 Earlier studies revealed disparities in sentencing sexual assault offenders depending on their relationship to the victim—with spousal rapes traditionally being seen as less serious than stranger sexual assault—and the characteristics of the victim, with sexual assaults of sex workers, for example, either being seen as 'not possible' or less serious, given that the provision of sex is part of her occupation.[82]

That non-consent is verbally articulated, evidenced by struggle and results in physical injuries

15.59 Many people still believe that a 'true' sexual assault involves the use of physical violence and that there will be physical injuries that provide independent verification of the complainant's story. Research, however, indicates that very few cases of sexual assault and/or rape have such physical evidence.[83] The 1996 ABS *Women's Safety Survey* found that only 26% of women who had been sexually assaulted since the age of 15 had sustained physical injuries.[84] It is worth reflecting here on the other 'injuries' and impacts sustained by women who have been sexually assaulted, including ongoing psychological impacts, fear, guilt, shame and depression.[85] Counter to what many may assume, women who are raped by their partner may be more likely to sustain serious injuries than those raped by a stranger.[86] Considerable legislative change in the definition of consent and in directions to the jury, specifically seek to counter ideas about silence and the absence of physical struggle.

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79 As quoted in P Easteal and C Feerick, 'Sexual Assault by Male Partners: Is the Licence Still Valid?' (2005) 8 *Flinders Journal of Law Reform* 185, 186, n 6.

80 For a brief discussion of the different treatment of marital rape and the removal of this defence in various US jurisdictions see L Schafran, S Lopez-Boy and M Davis, *Making Marital Rape a Crime: A Long Road Travelled, A Long Way to Go* (2009), 12–13.

81 N Taylor and J Putt, *Adult Sexual Violence in Indigenous and Culturally and Linguistically Diverse Communities in Australia* (2007), 2–3 found that some CALD women do not know that rape by their spouse is against the law in Australia.

82 See discussion in R Graycar and J Morgan, *The Hidden Gender of Law* (2nd ed, 2002), 345–348.

83 M Heenan and H McKelvie, *The Crimes Rape Act 1991: An Evaluation Report* (1997), 44 as cited in Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), 309.

84 Australian Bureau of Statistics, *Women's Safety Australia* (1996), Table 3.14.

85 See discussion in Victorian Law Reform Commission, *Sexual Offences: Discussion Paper* (2001), [3.17].

86 P Tjaden and N Thoennes, *Extent, Nature and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey Research Report* (2000), iv.

That a 'true' or 'genuine' victim of sexual assault does not delay in reporting

15.60 Many people still think that a person who has been sexually assaulted would report without delay, and that the failure to do so is suggestive of fabrication. Again this connects to the dominant idea that women and children lie about sexual assault. Given what we know about the fact that so few acts of sexual assault are reported in the first place, the resilience of this myth as an indicator of truth stands counter to the evidence. Despite legislation that requires a judge to explain to the jury that there may be 'good reasons' why a victim of sexual assault may delay in reporting to the police,[87] women and children can still expect to be cross-examined at length on this point.

15.61 There are other myths and misconceptions, including that men have uncontrollable sexual urges,[88] and related to this, that women have a responsibility to monitor and curtail their own behaviour (dress, intoxication, flirtation) in order to avoid sexual assault.

15.62 The various myths and misconceptions about sexual violence, women and children, have been challenged and addressed over time. There remain ongoing connections, however, between these historical notions demonstrated in prevailing community attitudes and in the application of the law in some instances, which is a key focus of this Inquiry. These connections are raised where appropriate in Chapters 16 to 18.

The nature of sexual offences

15.63 Research on legal responses to sexual assault highlights the unique features of these offences and their treatment by the legal system. These features include: the nature of the crime for the victim, the nature of the crime in terms of the elements that need to be proved and what this means for the content of the evidence that has to be elicited from the victim, the focus on credibility, the focus on consent in adult sexual assault matters, the length and nature of cross-examination, and the likelihood that there is some close relationship between the complainant and the victim (as current or former intimate partners or family members).

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87 See, eg, *Crimes Act 1958 (Vic)* s 61(1)(b). See Ch 18 on jury warnings.

88 While much of the mythology in this area is in the form of negative perceptions of women it is worth reflecting on this rather narrow negative perception of men and their sexuality. As Heath notes, some of the traditional ideas about rape and marriage leave 'little room for male sexualities that are respectful rather than possessory, and little space for female sexualities that are autonomous rather than submissive, there-to-be-possessed': M Heath, 'Disputed Truths: Australian Reform of the Sexual Conduct Elements of Common Law Rape' in P Easteal (ed) *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998) 13, 16.

15.64 Two key empirical studies published in the mid-1990s highlighted the traumatic experience of the sexual assault trial, particularly for adult women victims.[89] In 2003, the Victorian Law Reform Commission (VLRC) commented:

> During the late 1980s and early 1990s substantial reforms were made to procedure and evidence in sexual offence cases. The outcomes of our research and consultations suggest that these reforms have had limited success in improving the experience of complainants in sexual offence cases.[90]

15.65 In fact, the experience of the sexual assault trial has often been characterised by victims as being a re-traumatising experience, and in some instances like being sexually assaulted again.[91] One focus of the Commissions' work is to examine to what extent changes made since those landmark reports have served to address and limit that traumatic experience.

The 'nature of the crime' for the victim

15.66 There are particular dimensions of sexual offences that distinguish victims' experiences from those of other victims of crime. These dimensions are linked to the relationship between the victim and the offender, the nature of the harm and its longstanding impact:

> The crime experienced by sexual violence victims is more than an assault. The sexual nature of the act adds an additional and highly complex dimension ... not only is the victim assaulted, but the private and protected physical and psychological boundaries of the person are intrusively invaded ...
>
> The very nature of crime evokes certain emotions in all victims ... The crime of sexual violence is no exception ... the sexual violence victim is often confronted with a range of additional feelings resulting from the social stigma and physical invasiveness of the incident. These feelings can include shame, guilt, embarrassment, confusion, feeling dirty and used. Feelings of self-blame and self-recrimination are particularly common among sexual violence victims.[92]

Consent and credibility

15.67 The vast majority of adult sexual offence cases rest on the issue of consent. More often than not there is no physical evidence of the assault or witnesses to the assault. Therefore, the focus of the trial is on the competing evidence of the complainant and the defendant about whether the sexual activity was consensual. The Rape Law Reform Evaluation Project (RLREP) conducted in Victoria found that in

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89 J Bargen, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault, Gender Bias and the Law Project* (1996); M Heenan and H McKelvie, *The Crimes Rape Act 1991: An Evaluation Report* (1997). This was the second report of the Rape Law Reform Evaluation Project (RLREP) overseen by the Victorian Attorney General's Department. See discussion of the work of the RLREP in Victorian Law Reform Commission, *Sexual Offences: Discussion Paper* (2001), [2.19]–[2.12].

90 Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [4.4].

91 Ibid.

92 Legislative Council Standing Committee on Social Issues—Parliament of NSW, *Sexual Violence: The Hidden Crime—Inquiry into the Incidence of Sexual Offences in New South Wales*, Part 1 (1993), [1.1.1]–[1.1.2].

30% of rape trials conducted in 1992–93, the defendant's main argument was that the complainant had consented to the sexual intercourse. In a further 23% the 'main line of defence was either that the accused believed the complainant had consented, or a defence which involved a combination of consent and the accused's belief that the complainant consented'.[93]

15.68 The focus on consent, and the way in which consent is constructed in law, have been the subject of considerable criticism. It is seen as the key way in which the focus of the trial is placed on the complainant, her actions and behaviour—rather than on the behaviour of the accused. The focus on consent, therefore, is inextricably linked to the focus on credibility, where women and children—particularly when they raise allegations about sexual violence—have generally been seen as less credible.

15.69 In both adult and child sexual assault cases the key aim of defence questioning is to challenge and undermine the credibility of the complainant. For adult complainants this is intertwined with the issue of whether the activity was consensual. For children (as well as adults) it is about whether their evidence can be believed.

Elements of the offence

15.70 In sexual offence proceedings, a complainant may be required to discuss elements of the offence, such as penetration or other genital or anal contact—in explicit detail and on multiple occasions. As noted by the New South Wales Law Reform Commission (NSWLRC), giving this type of intimate and graphic evidence can be very 'humiliating and distressing' for all victims of sexual assault, and may be particularly difficult for 'women who are from different cultural backgrounds in which such matters are not conventionally discussed in front of men'.[94]

Cross-examination

15.71 In addition to having to discuss in detail the elements of the offence in evidence-in-chief and in cross-examination, there is the experience of cross-examination itself. As one of the key strategies of the defence is to challenge the credibility of the complainant, cross-examination may take on particularly personal dimensions that may not be seen in other criminal proceedings. Research has found that, on average, cross-examination is longer in duration in a sexual assault trial when compared to other assault trials.[95]

Balancing rights?

15.72 Possible changes to the law and procedure relating to sexual assault invariably raise questions and concerns about the need to balance the rights of the accused and the

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93 As discussed in Victorian Law Reform Commission, *Sexual Offences: Discussion Paper* (2001), [5.19].

94 New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report No 101 (2003), [2.5].

95 D Brereton, 'How Different are Rape Trials? A Comparison of the Cross Examination of Complainants in Rape and Assault Trials' (1997) 37 *British Journal of Criminology* 242, 257–258.

rights of the complainant.[96] It is important to recognise that these are not necessarily rights in contest (although they are commonly positioned this way), but rather they both occupy important, related positions in the administration of the criminal justice system.

15.73 The VLRC in its sexual offences report articulated these positions as follows:

> The criminal justice system must be, and be seen to be, fair to the accused. People accused of sexual offences are entitled to the presumption of innocence. Conviction for a sexual offence has very serious consequences for an accused, which may include a lengthy prison sentence and life-long stigma. It is vital to ensure that any conviction is based on reliable evidence.
>
> However, the criminal justice system must also take account of the needs of complainants who have a direct interest in the outcome of the prosecution, and of the community interest in encouraging people to report alleged offences and in convicting perpetrators ... [C]urrent deficiencies in the system contribute to substantial under-reporting of sexual offences and discourage people who allege they have been assaulted from giving evidence at committal or trial. Criminal procedures that discourage reporting or which stigmatise and traumatise witnesses in sexual assault cases may result in some offenders escaping apprehension, which may put more members of the community at risk.[97]

15.74 In the present Inquiry, the Commissions are similarly mindful of the rights of the accused, and the rights of the complainant, in discussing possible changes to the law and procedure relating to sexual offences. The Commissions recognise the very serious consequences of being charged with a sexual offence for an accused, and the need to be able to effectively test the evidence that is presented in the case against the accused.

15.75 The 'rights of the accused', in essence, entail that they are not to be convicted except following the conduct of a fair trial according to the law.[98] The International Convention on Civil and Political Rights (ICCPR) provides some further detail about elements of a fair trial.[99]

15.76 The concept of a fair trial has not historically incorporated the rights of the complainant—instead the focus is on the Crown acting on behalf of the community.[100] However, the experience and role of victims in the criminal justice system has changed

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96 See, eg, Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), 87–90; New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report No 101 (2003), [1.7]–[1.9].

97 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [1.9]–[1.10].

98 See *Dietrich v The Queen* (1992) 177 CLR 292, 299–300.

99 Including: the presumption of innocence, guilt determined according to law, adequate time to prepare defence and brief lawyer of own choosing, being brought to trial in a timely manner, being tried in his or her presence, having access to an interpreter if required and being able to effectively test the evidence presented against him or her: *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976), art 14.

100 Victorian Law Reform Commission, *Sexual Offences: Discussion Paper* (2001), [4.6].

in recent times with greater recognition of the rights of victims, as evidenced by various charters of victims' rights, and in the reception of victim impact statements in some jurisdictions.[101] Rights to protection by the law and its processes are also articulated in various international conventions and declarations to which Australia is a party.[102]

15.77 The 'rights of the accused' are frequently raised as a powerful rhetorical tool to limit possible changes in law and procedure which aim to ameliorate some of the more negative experiences for complainants of sexual offence proceedings. Measures that might assist complainants are sometimes opposed by lawyers on the basis of perceived incursions into the rights of the accused without an appreciation of exactly what the measure is, what it is designed to do, and how it operates.[103]

15.78 The focus of reform that aims to reduce the traumatic experience of complainants in sexual offence proceedings should not be misconceived as merely aimed at increasing the rate of conviction (although this is important), but rather at improving the operation of the legal system and its response to serious criminal offences. Reform efforts to date have focused on challenging the myths that have underpinned the law's responses to sexual assault and arguably continue to resonate with some current practices and attitudes. Such myths bear no relationship to reality and hence do not concern the accused and the right to a fair trial, but rather foster implicit prejudices to raise 'doubts' about the complainant's credibility generally, and specifically credibility as a 'true' victim of sexual assault.

15.79 A good example of this process of interrogating what is a 'right of the accused' in a criminal proceeding is provided by recent legislative prohibitions on the accused conducting personal cross-examination of the complainant in sexual offence proceedings.[104] In introducing these measures there was a need to maintain the 'fundamental rule of natural justice that people on trial for criminal offences have the right to test the evidence against them' while addressing the 'highly distressing' situation of a complainant being cross-examined by their alleged attacker.[105] Law reform bodies that have considered this issue in detail have drawn a clear distinction between the right to test the evidence, and any perceived right to conduct cross-examination in any manner or format.

15.80 A related theme can be characterised as the 'spectre of false complaints'—that is, that false complaints of sexual assault are commonly made. The extent of false

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101 For example, *Victims' Rights Act 1996* (NSW); *Victims' Charter Act 2006* (Vic).

102 For example, under the *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, [1983] ATS 9, (entered into force generally on 3 September 1981); *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990). See Ch 2.

103 Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [4.31].

104 See Ch 18.

105 New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report No 101 (2003), [1.7].

complaints of sexual assault is difficult to establish. However, the available evidence suggests that it is small. A Victorian study, which analysed 850 rapes reported to the police over the period 2000–03, found that only 2.1% of reports were designated as false by the police. In these cases, the alleged victim was either charged or told that she would be charged unless she dropped the complaint. While this only represents a fraction of the sample, there was a much larger proportion of cases where police were confident, or reasonably confident, that the allegations were false, but there was no attempt to institute charges against the alleged victim.[106]

15.81 Despite these data, concern about lying and fabrication has been a central feature of the sexual assault trial. Research has indicated that many complainants are asked about lying in cross examination. In the *Heroines of Fortitude* study, for example, 84% of complainants were asked questions about lying, one complainant was asked 98 questions about lying in cross examination.[107] In addition, women are questioned about their motives for reporting, seeking revenge, and whether they made a report simply to access victims compensation—one-third of complainants in the *Heroines* study were asked about this.[108]

Law reform

15.82 The present Inquiry follows an extensive body of work by law reform commissions[109] and other government bodies[110] on reform of the law and procedure

106 Victorian Government Statewide Steering Committee to Reduce Sexual Assault, *Study of Reported Rapes in Victoria 2000–2003: Summary Research Report* (2006) as summarised in: Z Morrison, 'What is the Outcome of Reporting Rape to the Police?' (2008) (17) *Australian Centre for the Study of Sexual Assault Newsletter* 4.

107 S Doyle and C Barbato, 'Justice Delayed Is Justice Denied: The Experiences of Women in Court as Victims of Sexual Assault' in J Breckenridge and L Laing (eds), *Challenging Silence: Innovative Responses to Sexual and Domestic Violence* (1999) 50, 50.

108 Ibid, 50–51.

109 See, eg: New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report No 101 (2003); New South Wales Law Reform Commission, *Review of Section 409B of the Crimes Act 1900 (NSW)*, Report 87 (1998); Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004); Queensland Law Reform Commission, *Reform of the Law of Rape*, Report 21 (1976); Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report No 8 (2006); ACT Law Reform Commission, *Sexual Assault*, Report No 18 (2001); Northern Territory Law Reform Committee, *Report on the Laws Relating to the Investigation and Prosecution of Sexual Assault in the Northern Territory* (1999).

110 For example, at the national level, see Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999). In NSW: Criminal Justice Sexual Offences Taskforce (NSW), *Responding to Sexual Assault: The Way Forward* (2005); Legislative Council Standing Committee on Law and Justice—Parliament of New South Wales, *Report on Child Sexual Assault Prosecutions*, Report No 22 (2002); J Bargen, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault, Gender Bias and the Law Project* (1996). In Victoria: Crime Prevention Committee—Parliament of Victoria, *Combating Child Sexual Assault: An Integrated Model* (1995); the work of the RLREP, eg, M Heenan and H McKelvie, *The Crimes Rape Act 1991: An Evaluation Report* (1997). In Queensland: Crime and Misconduct Commission (Qld), *Seeking Justice: An Inquiry into How Sexual Offences are Handled by the Queensland Criminal Justice System* (2003). In Tasmania: Task Force on Sexual Assault and Rape in Tasmania, *Report of the Task Force on Sexual Assault and Rape in Tasmania* (1998). In South Australia: see L Chapman, *Review of South Australia Rape and Sexual Assault Law: Discussion Paper* (2006). In

relating to sexual offences. Since the 1970s, there have been successive rounds of legislative and procedural change across Australian jurisdictions.

Focus of reform

15.83 In relation to the substance of sexual offences, reform has focused, at different times and in different jurisdictions, on the following issues:

- ***Terminology***. Some Australian jurisdictions have moved away from the language of rape to the language of sexual assault.[111] This was generally seen as a way to move away from the emphasis on sexual elements, to focus instead on sexual assault as an assault—that is, as an act of violence. Other jurisdictions have retained the language of rape.[112]

- ***Consent***. Since the 1990s there has been a move to define consent in legislation. All Australian jurisdictions, with the exception of the ACT, now have a legislative definition of consent.[113] These definitions are based on a communicative model of consent.

- ***Definition of sexual assault***. Definitions of what constitutes a sexual assault have been broadened, so that, for example, penetrative sexual offences includes penetration by a penis, object, part of a body or mouth.[114]

- ***Gender neutral laws***. All jurisdictions amended the laws relating to sexual assault or rape so that they are gender neutral. Before this, rape had been specifically defined as an offence perpetrated by a man against a woman.[115]

WA: Western Australian Community Development and Justice Standing Committee, *Inquiry into the Prosecution of Assaults and Sexual Offences* (2008).

111 In NSW, WA, ACT and NT, the offence of sexual penetration or sexual intercourse without consent is articulated as one of a number of sexual assault offences: see *Crimes Act 1900* (NSW) s 61I; *Criminal Code* (WA) s 325; *Crimes Act 1900* (ACT) s 54; *Criminal Code* (NT) s 192.

112 *Crimes Act 1958* (Vic) s 38; *Criminal Code* (Qld) s 349; *Criminal Law Consolidation Act 1935* (SA) s 48; *Criminal Code* (Tas) s 185. All jurisdictions, whether they call the penetrative offence 'rape' or 'sexual intercourse without consent', have broadened the offence beyond the common law offence of rape which was penile penetration of a women without her consent (or against her will). There are still debates about what is the best approach and most appropriate language to employ: see discussion in M Heath, 'Disputed Truths: Australian Reform of the Sexual Conduct Elements of Common Law Rape' in P Easteal (ed) *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998) 13, 23–24. Professor Reg Graycar has observed that, while some jurisdictions have done away with the language of rape, the 'phenomenon that women fear is still [called] rape': R Graycar, 'Frozen Chooks Revisited: The Challenge of Changing Law/s' in R Hunter and M Keyes (eds), *Changing Law: Rights, Regulation and Reconciliation* (2005) 49, 55. See also discussion in J Bargen and E Fishwick, *Sexual Assault Law Reform: A National Perspective* (1995), [6.2.2.1].

113 *Crimes Act 1900* (NSW) s 61HA; *Crimes Act 1958* (Vic) s 36; *Criminal Code* (Qld) s 348; *Criminal Law Consolidation Act 1935* (SA) s 46–47; *Criminal Code* (Tas) s 2A; *Crimes Act 1900* (ACT) s 67; *Criminal Code* (NT) s 192. This issue is discussed in detail in Ch 16.

114 See, eg, *Crimes Act 1900* (NSW) s 61H(1).

115 A number of commentators thought that the move to gender neutrality might lead to improvements in the way that the law dealt with sexual offences as now men would have a 'stake in making the law of rape

- ***Graded sexual offences***. Some jurisdictions introduced graded sexual offences–that is, a range of sexual offences with different penalties attached. This differentiation usually takes account of the presence of physical violence or other aggravating circumstances.[116] It was an approach again intended to focus on sexual assault as an act of violence.

- ***Removal of the marital immunity***. All jurisdictions legislated to remove the marital immunity.[117]

- ***Age of criminal responsibility***. With the exception of Tasmania, all jurisdictions removed notions that a person was not capable, simply on the basis of their age, of having or intending to have sexual intercourse.[118]

15.84 In relation to criminal procedure and evidence law, reform has focused on:

- ***Evidence of sexual reputation and experience***. Legislation was enacted to restrict the cross-examination of complainants and the admission of evidence of complainants' sexual reputation and prior sexual experience.[119]

- ***Protecting counselling communications***. Legislation was enacted to protect confidential counselling communications from being disclosed or used in sexual offence proceedings.[120]

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work better': M Heath, 'Disputed Truths: Australian Reform of the Sexual Conduct Elements of Common Law Rape' in P Easteal (ed) *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998) 13, 15. However, other commentators pointed out that gender neutrality obscures 'who is doing what to whom', by failing to make explicit the fact that while men can, and are, sexually assaulted, women and girls are overwhelmingly the victims of these acts (that is to say, that it is a particularly gendered crime: see discussion in S Bronitt and B McSherry, *Principles of Criminal Law* (2nd ed, 2005), 559; R Graycar and J Morgan, *The Hidden Gender of Law* (2nd ed, 2002), 364–365. Graycar and Morgan note that one of the ways in which the gendered nature of sexual assault can be recognised is through an objects, or guiding principles, clause: 365. This has been done in Victoria, see discussion in Ch 16.

116 For a discussion of arguments in favour and those against graded approaches see Heath in P Easteal (ed) *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998), 22.

117 For express statutory provisions see *Crimes Act 1900* (NSW) s 61T; *Crimes Act 1958* (Vic) s 62(2); *Criminal Law Consolidation Act 1935* (SA) s 73(3); *Crimes Act 1900* (ACT) s 69. The remaining jurisdictions have removed the immunity by inference.

118 *Crimes Act 1900* (NSW) s 61S; *Crimes Act 1958* (Vic) s 62(1); *Criminal Code* (Qld) s 29; *Criminal Code* (WA) s 29; *Criminal Law Consolidation Act 1935* (SA) s 73(2); *Crimes Act 1900* (ACT) s 68; *Criminal Code* (NT) s 38. In Tasmania a male child under the age of seven is presumed to be incapable of having sexual intercourse: *Criminal Code* (Tas) s 18(3).

119 *Criminal Procedure Act 2009* (Vic) s 339(1); *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4; *Evidence Act 1906* (WA) s 36A; *Evidence Act 1929* (SA) s 34L(1); *Evidence Act 2001* (Tas) s 194M(1); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 49; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4.

120 For current provisions see: *Criminal Procedure Act 1986* (NSW) ch 6 pt 5 div 2; *Evidence (Miscellaneous Provisions) Act 1958* (Vic) pt 2 div 2A; *Evidence Act 1906* (WA) ss 19A–19M; *Evidence Act 1929* (SA) pt 7 div 9; *Evidence Act 2001* (Tas) s 127B; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) pt 4 div 4.5; *Evidence Act 1939* (NT) pt VIA. Note that Queensland has not engaged specific legislation protecting sexual assault counselling communications.

- ***Jury warnings***. Legislation was enacted restricting or providing greater guidance to judicial officers, on warnings to the jury regarding unreliable evidence and corroboration[121] and the implications of delay in complaint.[122]

- ***Giving evidence***. Legislation was enacted to restrict or provide limits on inappropriate and offensive questioning in cross-examination;[123] and to enable access to other modes of giving evidence, particularly for children and people with a cognitive impairment.[124] This has included the use of pre-recorded evidence, the use of closed circuit television or screens and enabling complainants to give evidence accompanied by a support person.[125]

15.85 At the same time, changes have occurred in relation to police and prosecutorial practices and procedure. For example, as discussed in Chapter 17, there have been moves towards more specialised and integrated police responses to sexual violence, aimed in part at ensuring that complainants receive appropriate support at the outset from the criminal justice system. Prosecutorial guidelines require the interests of victims to be taken into account in various ways.

Recent work

15.86 A number of important projects and law reform initiatives intended to address continuing concerns with how the criminal justice system responds to allegations of sexual assault have taken place since 2003. These have included the:

- NSW Criminal Justice Sexual Offences Taskforce;[126]

- VLRC sexual offences inquiry;[127]

- Queensland Crime and Misconduct Commission inquiry into the handling of sexual offences;[128]

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121 *Evidence Act 1995* (Cth) s 164(3); *Evidence Act 1995* (NSW) s 164(3); *Evidence Act 2008* (Vic) s 164(3); *Criminal Code* (Qld) s 632(2); *Evidence Act 1906* (WA) s 50; *Criminal Code* (Tas) s 136; *Evidence Act 2001* (Tas) s 164; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 69, 70.

122 Uniform Evidence Acts, s 165B; *Evidence Act 1929* (SA) s 34CB.

123 Uniform Evidence Acts, s 41; *Evidence Act 1977* (Qld) s 21(2); *Evidence Act 1906* (WA) s 26(3); *Evidence Act 2001 (Tas)* s 41(2); *Evidence Act 1939* (NT) s 16(2).

124 For example, in relation to the use of pre-recorded evidence: *Criminal Procedure Act 2009* (Vic) s 368; *Evidence Act 1977* (Qld) div 4, 4A; *Evidence Act 1906* (WA) ss 106HB; *Evidence Act 1929* (SA) s 13A; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) div 4.2B; *Evidence Act 1939* (NT) s 21E.

125 These issues of criminal procedure and evidence law are discussed in Chs 17–18.

126 Criminal Justice Sexual Offences Taskforce (NSW), *Responding to Sexual Assault: The Way Forward* (2005).

127 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004).

128 Crime and Misconduct Commission (Qld), *Seeking Justice: An Inquiry into How Sexual Offences are Handled by the Queensland Criminal Justice System* (2003).

- Western Australian government Inquiry into the Prosecution of Assaults and Sexual Offences;[129]
- South Australian Review of Rape and Sexual Assault Laws;[130]
- ACT Sexual Assault Response Program;[131] and
- Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Child Abuse.[132]

Current initiatives

15.87 There are several relevant inquiries and investigations currently being undertaken. These include:

- NSWLRC and Queensland Law Reform Commission inquiries examining jury directions;[133] and
- the Tasmania Law Reform Institute inquiry examining tendency and coincidence evidence.[134]

15.88 In addition, there is work being undertaken by the Standing Committee of Attorneys General (SCAG). SCAG is currently looking at provisions relating to vulnerable witnesses and protection for counselling communications. The ALRC has been specifically directed not to duplicate this work.[135]

Other legal responses

15.89 As noted at the beginning of this chapter, sexual assault does not only appear in the criminal justice system—it is raised in, and seeks a response from, a range of different legal areas, often arising from the same incident. These include:

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129 Western Australian Community Development and Justice Standing Committee, *Inquiry into the Prosecution of Assaults and Sexual Offences* (2008).

130 L Chapman (for Government of South Australia), *Review of South Australian Rape and Sexual Assault Law—Discussion Paper* (2006).

131 Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, *Responding to Sexual Assault: The Challenge of Change* (2005).

132 Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children are Sacred: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007).

133 New South Wales Law Reform Commission, *Jury Directions*, CP 4 (2008); Queensland Law Reform Commission, *A Review of Jury Directions*, WP67 (2009).

134 Tasmania Law Reform Institute, *Evidence Act 2001 Sections 97, 98 & 101 and Hoch's Case: Admissibility of Tendency and Coincidence Evidence in Sexual Assault Cases with Multiple Complainants*, Issues Paper 15 (2009).

135 The Terms of Reference are set out at the front of this Consultation Paper.

- ***Protection orders***. In most jurisdictions, sexual assault is nominated as one of the forms of violence that may ground an application for a civil protection order.[136] Such allegations may be contained in the actual complaint or raised in oral evidence before the court. There is little research available about the extent to which sexual violence is included within protection order proceedings. It has, however, been suggested that sexual violence is rarely referred to expressly in protection order complaints.[137] This has the potential to render this form of violence invisible in these proceedings and, in those cases where it has taken place—but not been referred to—provides an inadequate picture in which to assess the need for protection. Protection orders and the relationship between protection orders and criminal law proceedings are discussed in Chapter 6.

- ***Family law***. Sexual violence may be raised in family law proceedings, including in relation to decisions about parenting or property orders. Child sexual assault and the family law system is specifically discussed in Chapter 14. In relation to adult sexual assault in family law proceedings, again research suggests that it is raised in few matters.[138] It has been suggested that sexual violence may be less visible than other forms of family violence due to the reluctance of lawyers, and other professionals, to ask specifically about sexual violence.[139] There may be a lack of understanding about how sexual violence is a risk factor in the future seriousness and repetition of family violence and, therefore, how it should be taken into account in any family law determinations. As with civil protection orders, the experience of sexual violence as part of family violence is important in understanding the risk faced by a victim, and in considering the ways in which it might have an impact on determinations about whether and how contact with children should proceed. The Commissions are interested in hearing about mechanisms that might be useful in assisting the courts exercising jurisdiction under the *Family Law Act 1975* (Cth) to better assess the risk created by family violence, including sexual assault, and how that combined experience impacts on questions concerning parenting orders.

- ***Crimes compensation schemes***. Compensation for victims of sexual assault may be available through the various state and territory crimes compensation schemes. For example, in NSW, persons injured by an act of violence, including a sexual assault, are eligible for an award of compensation between $7,500 and $50,000.[140] In recent years there have been changes to criminal injuries

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136 The main exception is Western Australia which does not specifically refer to sexual offences under the *Criminal Code* (WA). Queensland includes 'indecent behaviour without consent'—which could potentially include a range of unwanted sexual behaviour.

137 In NSW, see J Wangmann, '"She Said …" "He said …" : Cross Applications in NSW Apprehended Domestic Violence Order Proceedings', *Thesis*, University of Sydney, 2009, 152–153.

138 L Moloney and others, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-reform Exploratory Study* (2007) Australian Institute of Family Studies, 69, Table 5.3.

139 Women's Legal Services NSW, *Consultation*, Sydney, 23 September 2009.

140 Under the *Victims Support and Rehabilitation Act 1996* (NSW).

compensation schemes, in some jurisdictions, in terms of how domestic violence and sexual assault are dealt with, and flexibility around the time limits within which applications must be lodged. An area of concern for sexual assault victims is the manner in which related acts are defined and dealt with under the various statutory schemes. This is a particular issue given that family violence, including sexual assault, is the 'quintessential repeat crime'.[141] Often these provisions mean that acts perpetrated around the same time, by the same perpetrator, and in similar circumstances, may be treated as related acts—limiting the claim to a single event.[142]

- ***Law of torts***. The acts comprising sexual assault or domestic violence also constitute a civil wrong, known as a tort. In particular, the torts of battery, assault and negligence are possible sources of redress for victims of family violence. Bringing an action in tort for assaults and batteries that took place as part of family violence is rare when compared to claims made under the various state and territory compensation schemes. This is because there are a number of barriers that plaintiffs encounter, including: the cost of bringing such an action; the limited prospect of recovery, even if successful; the effect of limitation periods; the difficulty in proving the case, particularly if the events took place some time ago; and the adversarial nature of these proceedings (particularly when compared to the process available under crimes compensation schemes).[143]

15.90 In each of these areas questions may be raised about the visibility of sexual assault and whether the response of the legal system is adequate. The Commissions are interested in comment on whether any of these areas should be examined in more detail in the final report.

Law is not the only response

15.91 The law (criminal and civil) is not the only mechanism available to respond to the problem of sexual assault. A range of legal and non-legal measures is required in order to substantially reduce sexual violence. This need is particularly clear given the very small number of cases that come to the attention of the criminal justice system. The VLRC recognised this reality, noting that:

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141 R Felson and A Cares, 'Gender and Seriousness of Assaults on Intimate Partners and Other Victims' (2005) 67 *Journal of Marriage and the Family* 1182, 1183.

142 See, eg, the procedural history in *Moore v Victims Compensation Fund Corporation* [2009] NSWSC 1300.

143 Notwithstanding such difficulties, women have successfully brought such actions for physical and sexual abuse perpetrated as part of family violence. See, eg, *Morris v Karunaratne* [2009] NSWDC 346; *Giller v Procopets* (2008) 40 Fam LR 378; *Varmedja v Varmedja* [2008] NSWCA 177.

> An adequate response to the harm of sexual assault must go beyond the criminal justice process and include other mechanisms for assisting people who have been sexually assaulted such as access to information, provision of counselling and support services ... and compensation.[144]

15.92 While the Commissions recognise that non-legal measures are vital in developing an appropriately integrated response to sexual assault, the main focus in this part of the Inquiry is on the interpretation and application of criminal law and procedure. In this context it is important to recognise the process of feedback between the legal system and the community. On the one hand, community attitudes inform the legal system's responses to sexual assault; on the other, the law—how it defines and responds to sexual assault—plays a key symbolic role in forming community perceptions of sexual violence. As such, the law is a critical mechanism through which understandings of appropriate sexual relationships—based on notions of autonomy and freedom of choice—can be fostered.

The implementation gap

15.93 Despite extensive changes to law and procedure, research continues to highlight a gap between written law and its practice—referred to as an 'implementation gap'. This gap highlights the resistance to change evident in the legal system through its legal players who may still hold views about sexual assault characterised by myths and misconceptions. Some commentators question the over-reliance on, or confidence in, legislative change alone to bring about substantive changes for women and children as complainants in sexual offences.[145]

15.94 The VLRC reflected on this problem in its report on sexual offences, noting that:

> The changes to procedure and evidence laws which are recommended in this Report are unlikely to be effective unless they are also accompanied by changes to the culture of the criminal justice system.[146]

15.95 The likely continued disjunction between the purpose and intention of legislation and its application in practice without extensive cultural change needs to be borne in mind.

15.96 The disjunction is not confined to Australia. Commentators in other countries have also noted the limits of focusing on changes to legislation alone to bring about substantive change to sexual assault trials, the experience of complainants in those trials, the rates of conviction and acquittal, and the need instead to focus on attitudinal

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144 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [1.53].

145 See, eg, R Graycar, 'Frozen Chooks Revisited: The Challenge of Changing Law/s' in R Hunter and M Keyes (eds), *Changing Law: Rights, Regulation and Reconciliation* (2005) 49; J Stubbs, 'Sexual Assault, Criminal Justice and Law and Order' (2003) 14 *Women Against Violence* 14, 14; J Bargen and E Fishwick, *Sexual Assault Law Reform: A National Perspective* (1995), 7–8.

146 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), xxiv.

and cultural change.[147] Cultural change requires general community education, education of police officers, lawyers and judicial officers, as well as changes to policies and procedures.

15.97 *Time for Action* noted that 'enhanced community awareness and education programs are needed to change violence-supportive attitudes'.[148] The report recommended a range of measures to strengthen community leadership, awareness and understanding of sexual assault and family violence; and to promote positive male behaviours.[149]

15.98 Community attitudes also determine the legal system's response to sexual assault complaints. The key players in the legal system—police, lawyers, judicial officers, jury members—are also members of the general community, frequently sharing the same attitudes and beliefs about sexual assault, who perpetrates it, and who can be a victim. While there has been great progress in community attitudes about violence against women—including sexual assault—there are still a number of resilient myths in currency. If key legal players also subscribe to some of these community attitudes and myths, the implementation of reform is hampered.[150]

15.99 *Time for Action* included recommendations intended to ensure that judicial officers, law enforcement personnel and other professionals within the legal system have appropriate knowledge and expertise. These included the development and implementation of:

> a national education and professional development framework that recognises the specific roles and functions of police; prosecutors; defence counsel; family and migration lawyers; legal advisers; court staff and the judiciary.[151]

Judicial and legal education

15.100 The National Council also recommended the production of a model Bench Book, in consultation with jurisdictions, and as part of a national professional development program for judicial officers on sexual assault and domestic and family

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147 In South Africa, see C van der Bijl and P Rumney, 'Attitudes, Rape and Law Reform in South Africa' (2009) 73 *Journal of Criminal Law* 414. In the UK, see J Temkin and B Kráhe, *Sexual Assault and the Justice Gap: A Question of Attitude* (2008); P Rumney, 'The Review of Sex Offences and Rape Law Reform: Another False Dawn' (2001) 64 *Modern Law Review* 890. In Canada, see M Randall, 'Sexual Assault in Spousal Relationships,"Continuous Consent" and the Law, Honest but Mistaken Judicial Beliefs'' (2008) 32 *University of Manitoba Law Journal* 144.

148 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), 49.

149 Ibid, 50–51.

150 In its final report the VLRC noted that some police 'are influenced by common myths surrounding sexual assault and the behaviour of victims': Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), xxii.

151 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), 121.

violence. This Bench Book would 'provide a social context analysis and case law to complement existing resources and enhance the application of the law'.[152] Specialist sexual assault bench books have been developed by the Judicial Commission of New South Wales[153] and the Judicial College of Victoria.[154]

15.101 The need for judicial education in relation to dealing with sexual assault cases is highlighted in different contexts in the following chapters. For example, judicial and practitioner education on the 'nature of sexual assault, including the context in which sexual offences typically occur, and the emotional, psychological and social impact of sexual assault'[155] may be needed in relation to decisions about jury warnings on the effect of delay on the credibility of complainants. Similarly, there may be a need for guidance on expert opinion about children's responses to sexual abuse and their reliability as witnesses; and the admission of evidence about a complainant's prior sexual history.[156]

15.102 More generally, the need for a 'common knowledge base' of family violence has been identified by the Family Law Council.[157] For this purpose, the Council has recommended that an expert panel be established that 'considers research, distils accepted opinions, and agrees on information that should be included in the common knowledge base'.[158] Such a centralisation of information attached to a specific judicial education or other body (such as the Australian Institute of Family Studies) could support consistency and improved legal responses. Judicial officers, prosecutors, defence lawyers, police and others involved in the criminal justice response to sexual assault in the family violence context might all be better informed.

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152 Ibid.

153 Judicial Commission of New South Wales, *Sexual Assault Handbook* (2009) <www.judcom.nsw.gov.au/publications/benchbks/sexual_assault/index.html> at 14 April 2010.

154 Judicial College of Victoria, *Sexual Assault Manual* (2008) <www.judicialcollege.vic.edu.au/publications/sexual-assault-manual> at 21 February 2010.

155 See Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102, NSWLRC Report 112, VLRC FR (2005), [18.173].

156 See Ch 18.

157 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), 38. The principal recommendations are noted in Ch 1.

158 Ibid, 38.

16. Sexual Offences

Contents

Introduction

16.1 This chapter summarises the range of existing sexual offences and identifies inconsistencies in relation to elements of these offences, notably in relation to the issue of consent. It also discusses the role that guiding principles and objects clauses can play in explaining the reality of sexual assault.

16.2 The summary of offences is not comprehensive, but focuses on those sexual offences that are most likely to be perpetrated by a current or former intimate partner or family member. For example, sexual offences proscribed in the Commonwealth criminal law such as those relating to child sex tourism,[1] or rape or sexual violence in the context of war or as a crime against humanity[2] are not included.[3]

16.3 The purpose of summarising these offences is to illustrate the range of sexually coercive behaviour that is proscribed in various criminal laws, and in some instances to point to promising approaches to counter such conduct. This outline also assists in

1 *Crimes Act 1914* (Cth) pt IIIA.
2 *Criminal Code* (Cth) ss 268.14, 268.19, 268.59, 268.64.
3 See also *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth).

understanding the context of other key developments in law reform and their position in relation to the way the legal system responds to sexual assault—for example, in its construction of consent, which is not an element of sexual offences against children.

Overview of sexual offences

16.4 Extensive reforms of the laws relating to sexual offences over the last 25 years have resulted in a new range of sexual offences in most jurisdictions.[4] As discussed in Chapter 15, key areas of law reform included a move away from the language of 'rape' to that of 'sexual assault' as a way of emphasising sexual offences as acts of violence. Related to this was the grading of sexual offences to take account of different circumstances and aggravating factors. These changes are reflected in the following summary of the relevant offences.

Legislative framework

16.5 Each Australian jurisdiction has its own set of substantive and procedural criminal laws. The main point of divergence between the jurisdictions is whether the criminal law is codified or remains guided by the common law. Within that distinction, there is a further differentiation as to whether the jurisdiction has adopted the uniform Evidence Acts.[5]

16.6 In the criminal code jurisdictions—Queensland, Western Australia, Tasmania and the Northern Territory—statutes comprehensively set out the criminal law such that 'all crimes now exist in statutory form as defined by the various Codes which have specifically supplanted common law crimes'.[6] In the common law jurisdictions—NSW, Victoria, South Australia and the ACT—any legislation is 'interpreted in the light of common law precepts unless Parliament has expressly, or by necessary implication, evinced a clear intention to displace the common law'.[7]

'Rape': the penetrative sexual offence

16.7 Statutory extensions and modifications to the common law crime of rape have been made in all jurisdictions to varying degrees.[8] At common law, rape was defined as carnal knowledge of a woman against her will. In all jurisdictions, the conception of the offence has been expanded. The penetrative sexual offence is no longer gender specific, and generally includes penetration of genitalia[9] by a penis, object, part of a body or mouth.[10] A number of jurisdictions also prohibit a person from compelling

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4 See ThomsonReuters, *The Laws of Australia* (2010), vol 10, *Criminal Offences*, 10.3, [10].

5 The uniform Evidence Acts are: *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2008* (Vic); *Evidence Act 2001* (Tas); *Evidence Act 2004* (NI). See Ch 18.

6 M Bagaric and K Arenson, *Criminal Laws in Australia: Cases and Materials* (2nd ed, 2007), 18.

7 Ibid, 18.

8 See ThomsonReuters, *The Laws of Australia* (2010), vol 10, *Criminal Offences*, 10.3, [140].

9 In some jurisdictions it is specified as penetration of the vagina or anus: eg, *Crimes Act 1900* (ACT) s 50.

10 For example, in NSW, it includes 'sexual connection occasioned by the penetration to any extent of the genitalia … of a female person or the anus of any person' by 'any part of the body of another person, or

another person to take part in sexual penetration.[11] In addition, common law understandings of consent, and the conditions or circumstances that are seen as negating consent, have been considerably modified.

16.8 The penetrative sexual offence is described as: 'rape' in Victoria,[12] Queensland,[13] South Australia[14] and Tasmania;[15] as 'sexual assault' in NSW;[16] as 'sexual intercourse without consent' in the ACT and the Northern Territory;[17] and as 'sexual penetration without consent' in Western Australia.[18] The offence includes the continuation of sexual intercourse after penetration in order to address cases where consent has subsequently been withdrawn.[19]

16.9 The penalty for sexual intercourse without consent ranges from 12 years[20] to life imprisonment,[21] depending on the jurisdiction and the presence of aggravating factors.[22]

16.10 In all jurisdictions the prosecution must prove that sexual penetration took place without the consent of the complainant. These are the physical elements of the offence. In the common law jurisdictions—NSW, Victoria, South Australia and the ACT—the prosecution must also prove that the accused knew that the victim was not consenting or was reckless about whether there was such consent.[23] This is known as the mental element of the offence, or *mens rea*. Similar provisions apply in the Northern

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any object manipulated by another person': *Crimes Act 1900* (NSW) s 61H(1). See also the definition of sexual penetration in the Model Criminal Code: Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), app 2, cl 5.2.1.

11 See, eg, *Crimes Act 1958* (Vic) s 38A. See also Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), app 2, cl 5.2.7.

12 *Crimes Act 1958* (Vic) s 38.

13 *Criminal Code* (Qld) s 48.

14 *Criminal Law Consolidation Act 1935* (SA) s 48.

15 *Criminal Code* (Tas) s 185.

16 *Crimes Act 1900* (NSW) s 61I.

17 *Crimes Act 1900* (ACT) s 54; *Criminal Code* (NT) s 192.

18 *Criminal Code* (WA) s 325.

19 *Crimes Act 1900* (NSW) s 61H(1)(d); *Criminal Code* (WA) s 319(1); *Criminal Law Consolidation Act 1935* (SA) s 5; *Criminal Code* (Tas) s 1; *Crimes Act 1900* (ACT) s 50(e); *Criminal Code* (NT) s 1. *Crimes Act 1958* (Vic) s 38(2)(b) refers to the failure to withdraw after becoming aware that a person is not consenting.

20 *Crimes Act 1900* (ACT) s 54(1).

21 *Criminal Code* (Qld) s 349(1); *Criminal Law Consolidation Act 1935* (SA) s 48(1); *Criminal Code* (NT) s 192(3).

22 Under the Model Criminal Code it is proposed that the penalty would be imprisonment for a maximum of 15 years which would increase to 20 years if aggravating factors were present: Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), app 2, cl 5.2.6.

23 *Crimes Act 1900* (NSW) s 61HA(3); *Crimes Act 1958* (Vic) s 38(2); *Criminal Law Consolidation Act 1935* (SA) s 48; *Crimes Act 1900* (ACT) s 54.

Territory.[24] By contrast, in the Code jurisdictions—Queensland, Western Australia and Tasmania—the prosecution need only prove intention.[25]

16.11 Until recently, in all the common law jurisdictions, a defendant who could prove an honest albeit unreasonable belief in consent would be acquitted of the offence. In the code jurisdictions, a defendant may raise the defence of an honest *and* reasonable belief in consent. Key changes in relation to the definition of consent and the mental element relating to consent are discussed later in this chapter.

Aggravated sexual assaults

16.12 Each jurisdiction provides in some way for aggravating factors for the penetrative offence (as well as for other sexual offences). These may be outlined in a definition section,[26] articulated as a separate aggravating offence,[27] as a subsection of the substantive offence,[28] or as an entirely separate offence.[29] The Model Criminal Code provides for increased penalties for all sexual offences when certain aggravating factors are present.[30]

16.13 Factors that are commonly nominated as aggravating include: causing injury; using a weapon; detaining the victim; the victim's age; if the victim had a disability or cognitive impairment; or where the accused was in a position of authority in relation to the victim.[31]

16.14 For example, the penetrative sexual offence is supplemented with the separate crimes of 'aggravated sexual assault' in NSW and 'aggravated sexual penetration without consent' in Western Australia.[32] These carry a higher maximum penalty than the basic offence. One of a range of aggravating factors must be proved including, for example, the infliction of harm, the use of a weapon or being in company with another.[33]

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24 *Criminal Code* (NT) s 192(3)(b).

25 ThomsonReuters, *The Laws of Australia* (2010), vol 10, *Criminal Offences*, 10.3, [320].

26 *Criminal Code* (WA) s 319.

27 See, eg, *Crimes Act 1900* (NSW) s 61J, aggravated sexual assault. See also *Crimes Act 1900* (NSW) s 61JA which combines sexual assault perpetrated in company with another aggravating factor; *Crimes Act 1958* (Vic) s 60A, sexual offence while armed with an offensive weapon; *Criminal Code* (WA) s 326, aggravated sexual penetration without consent.

28 See, eg, *Crimes Act 1958* (Vic) s 45, sexual penetration of a child under 16.

29 See, eg, *Criminal Code* (WA) s 330, which creates an offence of having sexual intercourse with persons, other than children, incapable of consent.

30 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), app 2, pt 5.2, div 7.

31 See, eg, *Crimes Act 1900* (NSW) s 61J; *Criminal Code* (WA) s 326. A number of jurisdictions also have separate offences for sexual assaults taking place in these circumstances, eg, where the victim has a cognitive impairment or where the accused is in a position of authority in relation to the victim—these are discussed later in this chapter.

32 *Crimes Act 1900* (NSW) s 61J; *Criminal Code* (WA) s 326.

33 In NSW, there is also a separate offence of aggravated sexual assault in company, which carries a maximum penalty of life imprisonment: *Crimes Act 1900* (NSW) s 61JA.

16.15 In the Northern Territory, the maximum punishment for the basic offence increases where there are aggravating factors—defined as where 'harm' or 'serious harm' is caused.[34] In the ACT, the law provides for different offences ranging from sexual assault in the first degree (the most serious) to sexual assault in the third degree, depending on the existence of aggravating factors.[35]

Indecent assault and acts of indecency

16.16 Indecent assault covers sexual acts that do not constitute rape. Indecent assault is an offence in all the states.[36] For example, in Victoria, a person commits indecent assault if 'he or she assaults another person in indecent circumstances';[37] and in NSW the offence applies where any person 'assaults another person and … commits an act of indecency on or in the presence of the other person'.[38] To establish this offence there must be an assault (actual or threatened) in addition to indecency. Some jurisdictions also have offences for aggravated indecent assault.[39]

16.17 The territories have adopted a different approach. The ACT has an offence for 'acts of indecency without consent',[40] which does not require an assault. Other jurisdictions also proscribe acts of indecency,[41] including in aggravated circumstances.[42] In the Northern Territory, instead of an offence of indecent assault, the legislation increases the maximum penalty for assault where the victim is assaulted in an indecent manner.[43]

16.18 Indecency is not defined in any of the legislative schemes. It is considered a word of 'ordinary meaning' for the jury to assess in the circumstances of the case and according to the standards of the day.[44]

Assaults with intent to commit sexual acts

16.19 In addition to crimes of sexual assault and indecent assault, some jurisdictions have offences involving assaults or acts with intent to commit sexual acts.[45] These

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34 *Criminal Code* (NT) s 192(7)–(8).
35 *Crimes Act 1900* (ACT) ss 51–53.
36 *Crimes Act 1900* (NSW) s 61L; *Crimes Act 1958* (Vic) s 39; *Criminal Code* (Qld) s 352; *Criminal Code* (WA) s 323; *Criminal Law Consolidation Act 1935* (SA) s 56; *Criminal Code* (Tas) s 127.
37 *Crimes Act 1958* (Vic) s 39.
38 *Crimes Act 1900* (NSW) s 61L.
39 Ibid s 61M; *Criminal Code* (WA) s 324; *Criminal Code* (Tas) s 127A.
40 *Crimes Act 1900* (ACT) s 60.
41 *Crimes Act 1900* (NSW) s 61N(2); *Criminal Code* (Qld) s 227; *Criminal Code* (Tas) s 137.
42 *Crimes Act 1900* (NSW) s 61O(1A): aggravating circumstances include where the act is performed in company; s 61O(3): where the accused is in a position of authority over the victim, or where the victim has a physical disability or cognitive impairment. As for sexual intercourse without consent, in relation to acts of indecency without consent the ACT provides for three further offences that relate to circumstances of aggravation, first, second and third degree: *Crimes Act 1900* (ACT) ss 57–59. See also *Criminal Code* (WA) s 324.
43 *Criminal Code* (NT) s 188(2).
44 ThomsonReuters, *The Laws of Australia* (2010), vol 10, *Criminal Offences*, 10.3, [550].
45 See, eg, *Crimes Act 1900* (NSW) ss 61K, 61P; *Crimes Act 1958* (Vic) s 40; *Criminal Code* (Qld) s 351.

offences apply where the accused uses violence or threatens to use violence in order to facilitate a sexual act.

16.20 The idea behind such offences was to 'place primary emphasis on the violence factor in sexual assault, rather than on the element of sexual contact and consent'.[46] For example, in NSW, it is an offence 'with intent to have sexual intercourse with another person' to inflict or threaten to inflict 'actual bodily harm on the other person or a third person who is present or nearby'.[47]

16.21 Some jurisdictions also provide for offences where drugs or other substances have been administered to the victim in order to render that person unable to resist the sexual activity.[48]

Question 16–1 Do significant gaps or inconsistencies arise among Australian jurisdictions in relation to sexual offences against adults in terms of the:

(a) definition of sexual intercourse or penetration;

(b) recognition of aggravating factors;

(c) penalties applicable if an offence is found proven;

(d) offences relating to attempts; or

(e) definitions of indecency offences?

Question 16–2 Do these gaps or inconsistencies have a disproportionate impact on victims of sexual assault occurring in a family violence context? If so, how?

Sexual offences against children and young people

16.22 Each jurisdiction provides a range of offences concerning sexual conduct with children. For example: sexual intercourse;[49] attempts to have sexual intercourse;[50] acts

46 ThomsonReuters, *The Laws of Australia* (2010), vol 10, *Criminal Offences*, 10.3, [780].

47 *Crimes Act 1900* (NSW) s 61K.

48 See, eg, *Crimes Act 1958* (Vic) s 53; *Criminal Code* (Qld) s 218(1)(c). See also *Crimes Act 1900* (NSW) s 38A which is a general offence relating to 'drink spiking'.

49 NSW: *Crimes Act 1900* (NSW) s 66A under 10 years of age; s 66C aged between 10 and 16. Victoria: *Crimes Act 1958* (Vic) s 45 under the age of 16. Queensland: offences of 'carnal knowledge of a child'—*Criminal Code* (Qld) s 215, relating to children under 16 years of age, and *Criminal Code* (Qld) s 208(1) sodomy relating to children under 18 years of age. WA: *Criminal Code* (WA) s 320(2) children under 13; s 321(2) children aged between 13 and 16. SA: *Criminal Law Consolidation Act 1935* (SA) s 49(1) under

of indecency;[51] procuring or grooming a child for 'unlawful sexual activity';[52] and abducting a child with the intention of engaging in unlawful sexual activity.[53] Absence of consent is generally not an element of these offences.[54]

16.23 Offences against children are commonly articulated in terms of the age of the victim. For example, offences against young children (under the age of 10, 12 or 13, depending on the jurisdiction),[55] and offences against older children (generally under the age of 16,[56] but in some cases 17,[57] and in Queensland, in relation to sodomy, 18 years).[58] This gradation generally reflects the seriousness of offences against very young children. Accordingly, the sentences attached to those offences are higher than for those against older children. For example, in NSW, different penalties are provided where the child is under ten years of age (25 years imprisonment); between 10 and 14 years of age (16 years imprisonment); and between 14 and 16 years of age (10 years

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the age of 14 years; s 49(3) under the age of 17 years. Tasmania: *Criminal Code* (Tas) s 124 under the age of 17. ACT: *Crimes Act 1900* (ACT) s 55(1) under the age of 10 years; s 55(2) under the age of 16 years. Northern Territory: *Criminal Code* (NT) s 127 under the age of 16 years.

50 *Crimes Act 1900* (NSW) ss 66B, 66D.

51 Ibid s 61N(1); *Crimes Act 1958* (Vic) s 47; *Criminal Code* (Qld) s 210—indecent treatment of a child under 16 (this includes procuring, exposure, exposure to pornography, taking indecent photographs of the child); *Criminal Law Consolidation Act 1935* (SA) s 58—acts of gross indecency; *Criminal Code* (WA) s 320(4)—indecently dealing with a child under the age of 13, s 321(4)—indecently dealing with a child aged 13 to 16; *Criminal Code* (Tas) s 125B; *Crimes Act 1900* (ACT) s 61; *Criminal Code* (NT) s 127—gross indecency, s 132—indecent dealing with a child.

52 *Crimes Act 1900* (NSW) s 66EB. See also *Crimes Act 1958* (Vic) s 58; *Criminal Code* (Qld) s 217—procuring child for carnal knowledge; *Criminal Code* (Qld) s 218A—using the internet to procure children; *Criminal Code* (WA) ss 320(3), 320(5), 321(3), 321(5); *Criminal Code* (Tas) ss 125C–125D; *Criminal Code* (NT) s 131. Western Australia also has an offence of using electronic communication to procure or expose a child to indecent material: *Criminal Code* (WA) s 204B.

53 *Crimes Act 1958* (Vic) s 56; *Criminal Code* (NT) s 201. See also Queensland which has an offence of 'taking a child for immoral purposes': *Criminal Code* (Qld) s 219.

54 Except, eg, in Tasmania where the victim is 15 years and over and the defendant is not more than five years older or where the victim is 12 years or over and the defendant is not more than three years older: *Criminal Code* (Tas) s 124(3). A similar approach was recommended under the MCCOC which recognised that consent may play a role in situations where the victim and the accused are close in age. Under the MCCOC this is specified as the accused being not more than two years older than the complainant (where the child is over the no defence age), or where the accused was not more than two years younger than the complainant (where the complainant is over the no defence age): see MCCOC, cl 5.2.17. A different approach is taken in South Australia, which also recognises similarity in age. See *Criminal Law Consolidation Act 1935* (SA) s 49(4), under which it is a defence to an offence of sexual penetration where the victim is over 16 and the accused is under 17 years of age. If sexual intercourse takes place without consent then the accused would be charged under the adult provisions.

55 Under the age of 10: *Crimes Act 1900* (NSW) s 66B; *Crimes Act 1958* (Vic) s 45(2)(a); *Crimes Act 1900* (ACT) s 55(1). Under 12 years of age: see *Criminal Code* (Qld) s 215(3). Under the age of 13: *Criminal Code* (WA) s 320.

56 NSW creates two age groups, victims between the age of 10 and 14: *Crimes Act 1900* (NSW) s 66C(1), and between 14 and 16 years: *Crimes Act 1900* (NSW) s 66C(3); *Crimes Act 1958* (Vic) s 45(2)(b); *Criminal Code* (Qld) s 215(1); *Crimes Act 1900* (ACT) s 55(2). It is under the age of 16 in the Northern Territory: eg, see *Criminal Code* (NT) s 127.

57 In South Australia, the various sexual offences against children tend to be divided between those perpetrated against children under the age of 14, and under the age of 17: see *Criminal Law Consolidation Act 1935* (SA) s 49(1), s 49(3). Tasmania also has sexual offences against children under the age of 17: see *Criminal Code* (Tas) s 124.

58 *Criminal Code* (Qld) s 208.

imprisonment).[59] As for offences against adults, aggravating factors are also applicable to offences against children.[60]

16.24 There is inconsistency in the age of consent—the age at which young people are considered able to consent to sexual activity—across the jurisdictions. The age of a sexual assault victim may be relevant as an element of sexual offending and to the availability of defences.

16.25 The *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth), concerning child sex tourism offences, sets the age of consent at 16 years of age. According to the Explanatory Memorandum, this 'strikes the appropriate balance between the need to protect vulnerable persons from sexual exploitation, and the need to allow for sexual autonomy'.[61] The Commissions agree with this approach.

Proposal 16–1 Commonwealth, state and territory sexual offences legislation should provide that the age of consent for all sexual offences is 16 years.

Question 16–3 How should 'similarity in age' of the complainant and the accused be dealt with? Should it be a defence, or should lack of consent be included as an element of the offence in these circumstances?

Question 16–4 At what age should a defendant be able to raise an honest and reasonable belief that a person was over a certain age?

Offences by a family member

16.26 State and territory jurisdictions provide for a range of incest offences,[62] where the victim and the accused are closely related. For example, Victorian law provides that a person must not take part in an act of sexual penetration with a person whom he or she knows to be: his or her child or other lineal descendant or his or her stepchild; the child or other lineal descendant or the stepchild of his or her de facto spouse; his or

59 *Crimes Act 1900* (NSW) ss 66A, 66C.

60 See, eg, *Crimes Act 1900* (NSW) ss 66A(3), 66C(5) aggravating factors for sexual intercourse offences; s 61O(1) aggravated acts of indecency.

61 Explanatory Memorandum, Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 (Cth).

62 See, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), Part 5.2, Div 6. There is considerable debate about the use of the term incest: Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [8.3]–[8.4]. Note that, in Western Australia, this offence is referred to as sexual offences by a 'relative and the like': *Criminal Code* (WA) s 329.

her father or mother or other lineal ancestor or his or her stepfather or stepmother; his or her sister, half-sister, brother or half-brother.[63]

16.27 In some jurisdictions these offences apply to all age groups—that is, children and adults.[64] In others, general offences in respect of children are applicable, and the incest offence relates to cases where the victim is over 16 years of age.[65]

Offences where the accused is in a position of trust or authority

16.28 A number of jurisdictions have introduced offences that apply to an accused who has a special relationship with the victim as a result of the accused's position or authority, or the care that he or she provides to the child—for example, as a teacher, religious guide, doctor, employer or sports coach.[66] The Model Criminal Code Officers Committee (MCCOC) recommended offences of this kind in relation to sexual penetration, indecent touching, and indecent acts directed at a young person by a person in a position of trust or authority and considered that young people up to two years over the age of consent may be vulnerable in this context.[67]

Persistent sexual abuse of a child

16.29 All jurisdictions have introduced offences in relation to the 'persistent sexual abuse of a child',[68] 'maintaining a sexual relationship with a young person',[69] or the 'persistent sexual exploitation of a child'.[70]

16.30 The impetus for the enactment of these offences was the recognition of the practical difficulties encountered in successfully prosecuting child sex offences. The requirement of particularity in child sexual offences—that is, precise details around single incidents—fails to capture the multiple, repetitive experiences of many children,

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63 *Crimes Act 1958* (Vic) s 44(1)–(4).

64 Ibid s 44; *Criminal Code* (Qld) s 222; *Criminal Law Consolidation Act 1935* (SA) s 72; *Criminal Code* (Tas) s 133; *Crimes Act 1900* (ACT) s 62; *Criminal Code* (NT) s 134. This last section also provides for harsher penalties where the victim is a child under the age of 10, or between 10 and 16 years of age. See also Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), cl 5.2.34.

65 *Crimes Act 1900* (NSW) s 78A.

66 The relationships included vary across the jurisdictions, see, eg, *Crimes Act 1958* (Vic) s 49(4); *Crimes Act* (NSW) s 73(3); *Criminal Law Consolidation Act 1935* (SA) s 49(5a); *Criminal Code* (NT) s 128(3).

67 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), app 2, pt 5.2, div 4, cl 5.2.21. See also, L Kelly, 'Promising Practices Addressing Sexual Violence' (Paper presented at Violence Against Women: Good Practices in Combating and Eliminating Violence Against Women Expert Group Meeting, Vienna, 17–20 May 2005), 4: 'promising practices in legal reform' include measures designed to address 'capacity to consent for people with major disabilities and breach of trust offences committed by professionals and those in positions of authority and care'.

68 *Crimes Act 1900* (NSW) s 66EA; *Crimes Act 1958* (Vic) s 47A; *Criminal Code* (WA) s 321A. See also Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), cl 5.2.14.

69 *Criminal Code* (Qld) s 229B; *Criminal Code* (Tas) s 125A; *Crimes Act 1900* (ACT) s 56; *Criminal Code* (NT) s 131A, maintaining a relationship of a sexual nature.

70 *Criminal Law Consolidation Act 1935* (SA) s 50.

particularly in the context of sexual abuse by family members.[71] As then NSW Attorney General Jeff Shaw explained in the second reading speech for the Crimes Legislation (Child Sexual Offences) Bill 1998:

> children are often unable to give precise details of offences, particularly where the alleged sexual assaults took place over many years, involved numerous occasions of abuse, and the accused was in a position of trust or authority. … [I]f the prosecution is unable to prove particulars of the time, date and place of an allegation of child sexual abuse, then the accused cannot be prosecuted. … The Government is of the firm view that the time has come to introduce legislation to better protect children. This bill accomplishes that purpose. By creating the offence of persistent sexual abuse of a child, we recognise the reality of continuing or prolonged child sexual abuse.[72]

16.31 Generally these offences capture a number of unlawful sexual acts[73]—not necessarily of the same kind—against a child within the one indictment. The provisions clearly stipulate that 'it is not necessary to specify or to prove the dates and exact circumstances of the alleged occasions on which the conduct constituting the offence occurred'.[74] Instead, reasonable particularity for the period during which the offences are alleged to have taken place is required and there must be a description of the 'nature of the separate offences alleged to have been committed by the accused during that period'.[75]

16.32 The maximum penalty for the offences is relatively similar across the jurisdictions—ranging from life in Queensland and South Australia,[76] to 20 years imprisonment in Western Australia.[77] The higher penalties imposed for persistent sexual abuse or maintaining a sexual relationship make it likely that 'the offence of persistent sexual abuse may be more readily prosecuted than incest or offences pertaining to sexual penetration by persons in authority'.[78]

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71 See, eg, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), 133–137. See also, *S v The Queen* (1989) 168 CLR 266.

72 New South Wales, *Parliamentary Debates*, Legislative Council, 20 October 1998, 8541 (J Shaw QC—Attorney General.

73 Generally three or more, although in Queensland and South Australia it is simply more than one unlawful act: *Criminal Code* (Qld) s 229B(2); *Criminal Law Consolidation Act 1935* (SA) s 50(1).

74 *Crimes Act 1900* (NSW) s 66EA(4). See also *Crimes Act 1958* (Vic) s 47A(3); *Criminal Code* (Qld) s 229B(4); *Criminal Law Consolidation Act 1935* (SA) s 50(4); *Criminal Code* (WA) s 321A(5)(b); *Criminal Code* (Tas) s 125A(4)(a); *Crimes Act 1900* (ACT) s 56(4); *Criminal Code* (NT) s 131A(3).

75 Crimes Act 1900 (NSW) s 66EA(5).

76 *Criminal Code* (Qld) s 229B(1); *Criminal Law Consolidation Act 1935* (SA), s 50(1).

77 *Criminal Code* (WA) s 321A(4).

78 ThomsonReuters, *The Laws of Australia* (2010), vol 10, *Criminal Offences*, 10.3, [370].

Question 16–5 Has the offence of 'persistent sexual abuse' or 'maintaining a relationship' achieved its aims in assisting the prosecution of sexual offences against children in the family context, where there are frequently multiple unlawful acts? If not, what further changes are required?

Sexual offences against people with cognitive impairment

16.33 Specific offences have been enacted to address the particular vulnerabilities to sexual assault of people with a cognitive impairment.[79] These specific offences may supplement other sexual offences where offending against a victim with a cognitive impairment is an aggravating factor. The offences often regulate people in a particular position, for example those who have a role in caring for the person,[80] or are providers of medical or therapeutic services[81] or special programs.[82] In some jurisdictions, where the accused is a person responsible for the care of the person with the cognitive impairment, or where sexual intercourse was conducted with the intention of taking advantage of that person, consent is not a defence to the charge.[83]

Consent

16.34 Liability for sexual offences against adults generally requires that the victim did not consent. In some cases the defendant will deny that sexual activity took place, but in the majority of cases the defendant admits sexual activity but asserts that it was consensual. Where the complainant and the defendant know each other, particularly in the context of a previous or current intimate relationship, the issue of consent is particularly complex. For these reasons, consent is the key issue in many adult sexual assault trials.

16.35 Defining consent in legislation and, importantly, identifying what circumstances vitiate consent—that is, in what circumstances should it be presumed that consent has not been given—has been a key site of law reform. Previous reforms have attempted to articulate a communicative model of consent that acknowledges a person's freedom and autonomy to make decisions about engaging in sexual activity. These legislative efforts have been important steps in attempting to 'displace ... powerful myths' about

79 *Crimes Act 1900* (NSW) s 66F; *Crimes Act 1958* (Vic) ss 51–52; *Criminal Code* (Qld) s 216; *Criminal Law Consolidation Act 1935* (SA) s 49(6); *Criminal Code* (WA) s 330; *Criminal Code* (Tas) s 126; *Criminal Code* (NT) s 130. See also Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), pt 5.2, div 5.

80 *Crimes Act 1900* (NSW) s 66(F)(2); *Criminal Code* (Tas) s 126.

81 *Crimes Act 1958* (Vic) s 51.

82 Ibid s 52; *Criminal Code* (NT) s 130.

83 See, eg, *Crimes Act 1900* (NSW) s 66F(5)–(6); *Crimes Act 1958* (Vic) ss 52–52; *Criminal Code* (Tas) s 126(2).

women and sexual assault,[84] and to 'provide a legislative statement of appropriate standards of sexual interaction'.[85]

16.36 The report of the National Council to Reduce Violence Against Women and their Children, *Time for Action*, noted variations across Australia in terms of:

- the definition of consent;
- the conditions or circumstances that are seen as negating consent;
- the way in which an accused's 'honest belief' in consent is dealt with; and
- the use of judicial directions as a way in which to inform and educate the jury about what amounts (or does not amount) to consent.[86]

16.37 These variations, their practical impact and whether further legislative change is required are examined below.

Statutory definition of consent

16.38 With the exception of the ACT,[87] every Australian jurisdiction has a statutory definition of consent based on one of the following three approaches:

- free agreement;[88]
- free and voluntary agreement;[89] or
- consent freely and voluntarily given.[90]

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84 For a discussion of these myths, see Ch 15.

85 Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [7.4].

86 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), 107–109.

87 Note that s 67 of the *Crimes Act 1900* (ACT) only lists a range of factors that negate consent. In 2001 the ACT Law Reform Commission recommended the enactment of a statutory definition, which was supported by the ACT Government: ACT Law Reform Commission, *Sexual Offences*, Report No 17 (2001), 71.

88 *Crimes Act 1958* (Vic) s 36; *Criminal Code* (Tas) s 2A(1).

89 *Crimes Act 1900* (NSW) s 61HA(2); *Criminal Law Consolidation Act 1935* (SA) s 46(2); *Criminal Code* (Cth) s 192(1). See also *Criminal Code* (Cth) ss 268.14, 268.19, 268.59, 268.64, 268.82, 268.87. As these are all sexual violence or rape offences in the context of war crimes or crimes against humanity, they are not discussed in this chapter.

90 *Criminal Code* (Qld) s 348(1); *Criminal Code* (WA) s 319(2). Section 348(1) of the *Criminal Code* (Qld) further provides that consent means 'consent freely and voluntarily given by a person with the cognitive capacity to give the consent'. See also *Michael v Western Australia* (2008) 183 A Crim R 348 for a discussion of the statutory definitions of consent and the role of deceit and fraud.

16.39 The legislation of all jurisdictions—except Queensland—also specifically addresses the continuation of sexual intercourse after consent has been withdrawn.[91]

16.40 In the United Kingdom, the definition of consent also explicitly requires agreement: 'a person consents if he agrees by choice, and has the freedom and capacity to make that choice'.[92] This model was initially recommended by the NSW Criminal Law Review Division and included in its consultation draft bill.[93]

16.41 Definitions of consent seek to provide legal clarity, make clear that resistance and injury are not required to prove lack of consent; and educate the general community 'about the boundaries of proscribed sexual behaviour'.[94] The Australian definitions also accord with the recommendation of the United Nations Division for the Advancement of Women that legislation should approach consent as 'unequivocal and voluntary agreement' and that the accused should be required to prove the steps taken to 'ascertain whether the complainant/survivor was consenting'.[95]

Commissions' views

16.42 The Commissions support the adoption of a statutory definition of consent across all Australian jurisdictions. In taking this view, the Commissions are informed by the discussion by the MCCOC of the relative merits of a statutory or common law definition of consent.[96]

16.43 The Commissions' view is that the preferred statutory definition of consent is 'free and voluntary agreement'. This definition is consistent with the Model Criminal Code, and has been adopted by the Commonwealth, NSW, South Australia and the Northern Territory. The Commissions agree with the view of the MCCOC that

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91 While continuation is not specifically addressed in Queensland legislation it is suggested that the 'weight of authority supports treating the continuation of sexual intercourse as satisfying the physical act required for a charge of rape': ThomsonReuters, *The Laws of Australia* (2010), vol 10, *Criminal Offences*, 10.3, [190].

92 *Sexual Offences Act 2003* (UK) s 74.

93 Criminal Law Review Division, NSW Attorney General's Department, *The Law of Consent and Sexual Assault,* Discussion Paper (2007), 12.

94 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), 33, 35. See also arguments in favour of inserting a definition of consent in NSW in NSW Criminal Justice Sexual Offences Taskforce, *Responding to Sexual Assault: The Way Forward* (2005), 34. It should be noted that a definition of consent was subsequently inserted in the NSW legislation.

95 United Nations Department of Economic and Social Affairs Division for the Advancement of Women, *Handbook for Legislation on Violence Against Women*, 1 July 2009, 27. See also discussion of this approach in *Time for Action*, 108, n 183 referring to earlier work by the Division of the Advancement of Women. The latter component of this definition regarding the steps taken by the accused is discussed below.

96 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), 41–47.

including the term 'agreement' reinforces positive and communicative understandings of consent and suggests mutuality.[97]

Proposal 16–2 Commonwealth, state and territory sexual offences legislation should provide statutory definitions of consent based on 'free and voluntary agreement'.

Circumstances that negate consent

16.44 Legislation in every Australian jurisdiction provides a non-exhaustive list of circumstances that negate or vitiate consent. If the prosecution proves a negating factor or vitiating circumstance in a particular case, consent will not be a fact in issue at trial.[98] In addition, some jurisdictions provide for particular offences for which there is no defence of consent.[99]

16.45 Many of the negating factors are common to all Australian jurisdictions. There is, however, considerable variation in scope and approach. Some of the negating factors prescribed by legislation merely codify the position at common law;[100] others go beyond the common law position—rectifying anomalies, deficiencies or gaps.[101]

Use of force and threat of the use of force

16.46 In all jurisdictions, there is no consent where force is used or threatened to be used against the complainant or another person.[102] The inclusion of the use of force or threatened use of force against another person is of particular relevance to the family violence context—for example, force or threats of force may be made to children in order to force the mother to agree to sexual intercourse.

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97 The MCCOC had suggested, in its discussion paper, that consent be defined as that which is freely and voluntarily given, this position was changed to free and voluntary agreement in the final report: Ibid, 43.

98 Ibid, 39.

99 See, eg, *Crimes Act 1900 (NSW)* s 66F(5)–(6).

100 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), 43

101 See, eg, the discussion in Criminal Justice Sexual Offences Taskforce (NSW), *Responding to Sexual Assault: The Way Forward* (2005), 36; Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), 43–49. For a general discussion of the common law's resistance to recognising that consent may be vitiated by fraud or mistake and hence the introduction of legislative provisions see Criminal Justice Sexual Offences Taskforce (NSW), *Responding to Sexual Assault: The Way Forward* (2005), 39–40.

102 *Crimes Act 1900* (NSW) s 61HA(4)(c); *Crimes Act 1958* (Vic) s 36(a); *Criminal Code* (Qld) s 348(2)(a); *Criminal Code* (WA) s 319(2)(a); *Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act 2008 (SA)* s 46(3)(a)(i); *Criminal Code* (Tas) 2A(2)(b); *Crimes Act 1900* (ACT) s 67(1)(a)–(c); *Criminal Code* (NT) s 192 (2)(a). In the ACT, this other person is required to be 'present or nearby'—no other jurisdiction has this qualification around the use or threat of the use of force to a person other than the complainant. See also Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), 38, app 2, cl 5.2.3.

16.47 Similarly, in some jurisdictions, consent may be negated in circumstances of 'fear of harm of any type',[103] 'fear of bodily harm',[104] 'threats of terror',[105] and 'reasonable fear of force'.[106] South Australia specifically provides that a 'threat of the application of force' may be express or implied.[107]

Intimidation, extortion, deceit or fraud

16.48 In a small number of jurisdictions, consent is negated, or may be negated, where agreement to engage in the sexual activity is obtained by intimidation,[108] extortion,[109] deceit[110] or fraud.[111]

Other threats

16.49 The ACT provides that consent is negated where it is caused 'by a threat to publicly humiliate or disgrace, or to physically or mentally harass, the person or another person'.[112] Similarly, in South Australia, consent is not freely and voluntarily given when it is obtained because of 'an express or implied threat to degrade, humiliate, disgrace or harass the person or some other person'.[113]

16.50 Broader provisions that identify threats 'that do not involve a threat of force'[114] or 'of harm of any type'[115] or harm 'of any kind'[116] apply in some jurisdictions and seek to prescribe non-physical threats and acts as circumstances which negate consent.

Asleep, unconscious or affected by drugs

16.51 In NSW, Victoria, South Australia, Tasmania and the Northern Territory, there is no consent when the complainant is asleep or unconscious.[117]

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103 *Crimes Act 1958* (Vic) s 36(b); *Criminal Code* (NT) s 192(2)(a). See also *Criminal Code* (Qld) s 348(2)(c) which includes 'fear of bodily' harm.

104 *Criminal Code* (Qld) s 348(2)(c).

105 *Crimes Act 1900* (NSW) s 61HA(4)(c).

106 *Criminal Code* (Tas) s 2A(2)(b).

107 *Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act 2008* (SA) s 46(3)(a)(i).

108 *Criminal Code* (Qld) s 348(2)(b); *Criminal Code* (WA) s 319(2)(a). See also *Crimes Act 1900* (NSW) s 61HA(6)(b) 'if the person has sexual intercourse because of intimidatory or coercive conduct, or other threat, that does not involve a threat of force'.

109 *Crimes Act 1900* (ACT) s 67(1)(c) including extortion against another person.

110 *Criminal Code* (WA) s 319(2)(a).

111 Ibid s 319(2)(a); *Criminal Code* (Tas) s 2A(f); *Crimes Act 1900 (ACT)* s 67(1)(g).

112 *Crimes Act 1900* (ACT) s 67(1)(d).

113 *Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act 2008* (SA) s 46(3)(a)(ii).

114 *Crimes Act 1900* (NSW) s 61HA(6)(b).

115 *Crimes Act 1958* (Vic) s 36(b) this covers a threat against another person; *Criminal Code* (NT) s 192(2)(a). See also *Criminal Code* (Qld) s 348(2)(c) which includes 'fear of bodily' harm.

116 See also *Criminal Code* (Tas) s 2A(2)(c).

117 In some jurisdictions being asleep or unconscious is specified on its own as a circumstance that negates consent: *Crimes Act 1900* (NSW) s 61HA(4)(b); *Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act 2008* (SA) s 46(3)(c). These two jurisdictions deal with the lack of consent in the context of the effect or alcohol and other drugs separately. Other jurisdictions specify being asleep or unconscious along with the effect of alcohol and other drugs: *Crimes Act 1958* (Vic) s 36(d); *Criminal Code* (Tas) s 2A(h); *Criminal Code* (NT) s 192(2)(c). See also Model Criminal Code Officers Committee

16.52 In Victoria, South Australia, Tasmania and the Northern Territory, consent is not given where the complainant is so affected by alcohol or other drugs 'to be incapable of freely agreeing' to the sexual activity.[118] In the ACT, the effect of alcohol or other drugs is not so qualified; consent is negated if it is caused by 'the effect of intoxicating liquor, a drug or anaesthetic'.[119] In NSW, the fact that a complainant was 'substantially intoxicated by alcohol or any drug' may negate consent.[120] The NSW provision adopts the view expressed in the report of the Criminal Justice Sexual Offences Taskforce that the degree of intoxication and whether it was such that a person was 'unable to consent' are matters for the jury.[121]

Mistaken identity

16.53 In all jurisdictions—except Western Australia[122]—there is no consent where the complainant is mistaken as to the identity of the person with whom she has engaged in sexual activity.[123] In addition, NSW provides that there is no consent where the complainant mistakenly believed that she was married to the person.[124]

Mistaken about the sexual nature of the act

16.54 In Victoria, South Australia, Tasmania and the Northern Territory there is no consent where the person agreed or submitted to sexual activity being mistaken about the sexual nature of the act.[125] Other more specific vitiating factors in this category include:

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of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), cl 5.2.3, 38.

118 *Crimes Act 1958* (Vic) s 36(d). See also *Criminal Law Consolidation Act 1935* (SA) s 46(3)(d); *Criminal Code* (Tas) s 2A(2)(h); *Criminal Code* (NT) s 192(2)(c). See also Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), 38, app 2, cl 5.2.3.

119 *Crimes Act 1900* (ACT) s 67(1)(e).

120 *Crimes Act 1900* (NSW) s 61HA(6)(a).

121 Criminal Justice Sexual Offences Taskforce (NSW), *Responding to Sexual Assault: The Way Forward* (2005), 37.

122 Western Australia does however specify that consent is negated where it has been obtained by 'deceit, or any fraudulent means': *Criminal Code* (WA) s 319(2)(a).

123 *Crimes Act 1900* (NSW) s 61HA(5)(b); *Crimes Act 1958* (Vic) s 36(f); *Criminal Code* (Qld) s 348(2)(f); *Criminal Law Consolidation Act* (SA) s 46(3)(g); *Criminal Code* (Tas) s 2A(2)(g); *Crimes Act 1900* (ACT) s 67(1)(f); *Criminal Code* (NT) s 192(e).

124 *Crimes Act 1900* (NSW) s 61HA(5)(b). See also *Criminal Code* (Qld) s 348(2)(f) which specifies that there is no consent where the person agrees to the sexual activity when they had the 'mistaken belief induced by the accused that they were sexual partners'.

125 *Crimes Act 1958* (Vic) s 36(f); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(h); *Criminal Code* (Tas) s 2A(g), where the complainant must have been 'reasonably mistaken about the nature or purpose of the act'; *Criminal Code* (NT) s 192(2)(e). See also Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), cl 5.2.3, 38.

- in NSW, Victoria and the Northern Territory—mistaken belief that sexual intercourse is for medical or hygienic purposes;[126] and

- in NSW and Queensland—agreeing or submitting to an act because of false or fraudulent representations about the nature or purposes of the act.[127]

Capacity to understand nature of the act

16.55 Most jurisdictions prescribe that there is no consent where the person who has agreed or submitted to the sexual act does not have the capacity to understand the sexual nature of the act.[128] The question of capacity is part of the Queensland definition of consent.[129]

Abuse of position of authority or trust

16.56 Consent is negated when the accused person is in a position of authority or trust over the complainant in Queensland, Tasmania and the ACT.[130] Consent 'may' be negated when the accused has abused a 'position of authority or trust' in NSW.[131] In addition, the *Crimes Act 1900* (NSW) specifies that consent is not a defence to a range of sexual offences occurring within relationships of authority or trust. For example, it is an offence for a person who is 'responsible for the care' of a person with a cognitive impairment to have sexual intercourse with that person, and consent is not a defence.[132]

Unlawful detention

16.57 In most jurisdictions a person unlawfully detained does not consent to sexual activity.[133]

Communicating consent

16.58 Tasmania is the only jurisdiction in which the absence of verbal or physical communication as to free agreement negates consent.[134] In other jurisdictions, such as

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126 *Crimes Act 1900* (NSW) s 61HA (5)(c). See also *Crimes Act 1958* (Vic) s 36(g); *Criminal Code* (NT) s 192(1)(f).

127 *Criminal Code* (Qld) s 348(2)(e). See also *Crimes Act 1900* (NSW) s 61HA(5)(c).

128 *Crimes Act 1900* (NSW) s 61HA(4)(a); *Crimes Act 1958* (Vic) s 36(e); *Criminal Law Consolidation Act 1935* (SA) s 46(f); *Criminal Code* (Tas) s 2A(2)(i); *Crimes Act 1900* (ACT) s 67(1)(i); *Criminal Code* (NT) s 192(2)(d). See also MCCOC, cl 5.2.3, 38. Note that the *Crimes Act 1900* (NSW) s 61HA(4)(a) specifically provides that a person does not consent to sexual intercourse where that person 'does not have the capacity to consent to the sexual intercourse, including because of age or cognitive capacity'.

129 *Criminal Code* (Qld) s 348(1).

130 Ibid s 348(2)(d); *Criminal Code* (Tas) s 2A(2)(e); *Crimes Act 1900* (ACT) s 67(1)(h).

131 *Crimes Act 1900* (NSW) s 61HA(6)(c).

132 Ibid s 66F(2), (5). The penalty applicable for this offence, a maximum of 10 years imprisonment, is less than that for sexual assault without consent (14 years).

133 Ibid 61HA(4)(d); *Crimes Act 1958* (Vic) s 36(c); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(b); *Criminal Code* (Tas) s 2a(2)(d); *Crimes Act 1900* (ACT) s 67(1)(j); *Criminal Code* (NT) s 192(2(b). See also Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), cl 5.2.3, 38.

134 *Criminal Code* (Tas) s 2A(2)(a).

Victoria, the implications of communication of consent are dealt with by directions to the jury.[135]

Commissions' views

16.59 The approach to factors which negate consent varies across Australia. The ACT identifies the most vitiating circumstances and Western Australia the least. The Victorian approach is similar to that recommended by the MCCOC.[136] NSW, which lists circumstances where there is no consent, where consent is vitiated and where consent may be vitiated (which is a question for the jury to decide),[137] is unique in providing legislative recognition to circumstances which may negate consent in the circumstances of a case.

16.60 One of the concerns of law reform has been identifying the circumstances that ought to be statutorily recognised as negating consent and the circumstances that ought to be statutorily recognised factors which the jury may consider negate consent in a particular case.[138]

16.61 The Commissions consider that it is desirable that such lists be non-exhaustive, as is the case in all Australian jurisdictions. This allows juries to find, on the evidence, that there was no consent even if a case does not fall within one of the listed circumstances.[139] In addition, to move towards a model where all the possible factors that may negate consent are deemed to do so would represent a 'significant shift in legal policy'.[140]

16.62 The Commissions are interested in comment about how the various vitiating provisions relate to complainants who have experienced sexual assault in a family violence context. Issues may arise, for example, in relation to whether longstanding and pervasive family violence creates a coercive, intimidating or threatening environment (whether or not there are threats of physical force); and as a corollary, whether such a family violence context may negate consent to sexual activity. Do actual threats or coercive behaviours need to be immediately present to vitiate consent?

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135 See *Crimes Act 1958* (Vic) s 37AA.

136 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), 49. However, since the MCCOC report, NSW has legislated in a different way from other jurisdictions, as discussed below.

137 *Crimes Act 1900* (NSW) s 61HA(4)–(6).

138 See, eg, discussion in Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), 49. The MCCOC referred approvingly to the arguments made by Jennifer Temkin based around sexual choice and the recognition that some circumstances there remains choice, albeit unpalatable ones: T Temkin, 'Towards a Modern Law of Rape' (1982) 45 *Modern Law Review* 399, 411.

139 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), 41.

140 Criminal Justice Sexual Offences Taskforce (NSW Attorney General's Department), *Responding to Sexual Assault: The Way Forward* (2005), 37.

16.63 A useful case study was presented by a Women's Legal Service solicitor in the Family Violence Online Forum. The case study raises some issues about proximity as it relates to vitiating circumstances and the prosecution of sexual assaults perpetrated in a family violence context:

> I accompanied a client through the process of making a statement to the police about long term domestic violence (ten years) which included rape. There was one particular incident we flagged for the police because it was so abhorrent—he had punched her in the mouth splitting her lip. She had to go to the hospital at 1:00am to get it stitched up. When she got home from the hospital exhausted and in pain, he forced her to have sex with him.
>
> We will have no trouble pressing the general assault charges—medical records, her friend who drove her to the hospital, her daughter who cleaned up the blood in the living room, … but the police have told us they are keeping the accusation of sexual assault in her statement but will not pursue a charge of sexual assault because (a) it is her word against his, and (b) there is no DNA evidence.
>
> I believe that intelligent interrogation could lead to admissions that sexual intercourse took place, leaving only the consent issue.
>
> It seems to me that there is space for a presumption in law of non-consent where sex follows an incident of extreme violence. This could at least catch some intimate partner rapes and prevent any defence that it was 'make up' sex. This incident was a prime example of how, although there was no physical resistance from our client, the power imbalance and fear totally negated any possibility of genuine consent.[141]

16.64 Only NSW identifies 'coercive conduct' as a behaviour that may negate consent.[142] This may be a useful factor in recognising the absence of consent in the context of sexual assault perpetrated in a family violence context.

Proposal 16–3 Commonwealth, state and territory sexual offences legislation should prescribe a non-exhaustive list of circumstances where there is no consent to sexual activity, or where consent is vitiated. These need not automatically negate consent, but the circumstances must in some way be recognised as potentially vitiating consent. At a minimum, the non-exhaustive list of vitiating factors should include:

(a) lack of capacity to consent, including because a person is asleep or unconscious, or so affected by alcohol or other drugs as to be unable to consent;

141 *Comment on ALRC Family Violence Online Forum: Women's Legal Service Providers*.
142 *Crimes Act 1900* (NSW) s 61HA(6)(b).

(b) the actual use of force, threatened use of force against the complainant or another person, which need not involve physical violence or physical harm;

(c) unlawful detention;

(d) mistaken identity and mistakes as to the nature of the act (including mistakes generated by the fraud or deceit of the accused); and

(e) any position of authority or power, intimidation or coercive conduct.

Question 16–6 To what extent are the circumstances vitiating consent set out in current legislation appropriate to sexual assaults committed in a family violence context? Are any amendments required to draw attention to the coercive environment created by family violence, or are the current provisions sufficient?

Reconstructing the offence to remove 'consent'

16.65 There are alternative approaches to the construction of the penetrative sexual offence which seek to refocus the offence away from issues of consent and instead focus on the circumstances under which penetration took place. These include the so-called 'Michigan model' and the 'Young and Rush' proposal.

16.66 The Michigan model is based on the *Criminal Sexual Conduct Act 1974*, enacted in Michigan, USA. This abolished the offence of rape and established a single offence of 'criminal sexual conduct' graded into four degrees.[143] The offence requires the 'prosecution to prove that sexual penetration occurred in 'coercive circumstances'[144] and removes the word 'consent' from the definition of the offence. The benefits and limitations of this model are canvassed in the literature.[145] Evaluations of these reforms have found that it has not been successful in removing the emphasis on consent, and

143 S Bronitt and B McSherry, *Principles of Criminal Law* (2nd ed, 2005), 561; Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), 25; Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [7.9]. For another example of this approach see the recommendation made by the South African Law Reform Commission, *Report on Sexual Offences*, Project 107 (2002), 28–37.

144 Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [7.9].

145 S Bronitt and B McSherry, *Principles of Criminal Law* (2nd ed, 2005), 561–562; Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), 25–27; Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [7.9]–[7.10]; S Bronitt, 'Rape and Lack of Consent' (1992) 16 *Criminal Law Journal* 289, 307–310. See also J Marsh, A Geist and N Caplan, *Rape and the Limits of Law Reform* (1982), 50–52; S Caringella-MacDonald, 'The Comparability in Sexual and Nonsexual Assault Case Treatment: Did Statute Change Meet the Objective?' (1985) 2 *Crime and Delinquency* 206.

that consent 'has continued to play a significant role in the prosecution and there was only a limited effect on reporting rates, prosecution practices and trial outcomes'.[146]

16.67 Another approach has been proposed by Professor Alison Young and Dr Peter Rush.[147] They proposed that the offence of rape be reconceptualised as 'Rape: Causing Injury with Sexual Penetration'. The model seeks to focus on the harm caused by the accused and the victim's injury. The Victorian Law Reform Commission (VLRC) discussed this proposal in detail in its Interim Report on sexual offences,[148] and concluded that the proposed offence is unlikely to reduce the stress of the trial process for complainants, the 'victimisation of complainants through the trial process', or 'marginalise consent as a determinative factor in rape trials'.[149]

16.68 A detailed consideration of such alternative formulations of the penetrative sexual offence is beyond the scope of the current Inquiry.

The mental element

16.69 In all jurisdictions, the prosecution must prove that sexual penetration took place without the consent of the complainant. These are the physical elements of the offence. In a number of jurisdictions a further element, the mental element, must also be proved in relation to consent. The mental element is the 'state of mind of the accused which must be established beyond reasonable doubt before the accused can be convicted'.[150]

16.70 It is this mental element which has raised the most contentious questions for law reform and reveals the most striking differences between the jurisdictions, particularly between the Code jurisdictions and the common law jurisdictions.[151]

16.71 In the common law jurisdictions, and the Northern Territory (a Code jurisdiction), the prosecution must prove that the defendant knew that the complainant was not consenting, or the defendant was reckless as to that consent.[152] In the

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146 Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [7.10] (references omitted).

147 The Young and Rush proposal was submitted to MCCOC: Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), 27–29. Young and Rush reformulated their proposal and also submitted it in response to the VLRC Discussion Paper: Victorian Law Reform Commission, *Sexual Offences: Discussion Paper* (2001), Submission 5.

148 Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [7.11]–[7.48].

149 Ibid, [7.46]–[7.48].

150 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [8.1].

151 See, eg, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), 67; Criminal Justice Sexual Offences Taskforce (NSW), *Responding to Sexual Assault: The Way Forward* (2005), 42–52; Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [8.6]–[8.36]; Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, *Responding to Sexual Assault: The Challenge of Change* (2005), 214–216.

152 *Crimes Act 1900* (NSW) s 61HA(3); *Crimes Act 1958* (Vic) s 38(2); *Criminal Law Consolidation Act 1935* (SA) s 48; *Crimes Act 1900* (ACT) s 54. See also Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), 408 n 1060: 'In the 'common law' States of Vic, SA, the ACT and NSW,

remaining jurisdictions,[153] 'the mental state for rape is satisfied by a mere intention to have intercourse'.[154] In these jurisdictions, while the prosecution must prove that the complainant did not consent, they do not have to prove that the defendant knew the complainant was not consenting or was reckless as to consent.

16.72 In all jurisdictions the defendant may raise a defence that he or she honestly believed that the complainant was consenting. Again, there is a clear difference of approach between most of the common law jurisdictions and the Code jurisdictions. In the common law jurisdictions, with the exception of NSW, this honest belief in consent need not be reasonable.[155] However, in the Code jurisdictions, and in NSW (a common law jurisdiction), this belief must be both honest *and* reasonable.[156]

16.73 There has been considerable legislative change in NSW, Victoria and South Australia—in terms of knowledge, recklessness, the defence of an honest or mistaken belief in consent, and the requirement in some instances to consider the steps taken by the defendant to ascertain whether consent exists.[157] These are important developments that seek to introduce more objective assessments of the state of mind of the accused and place a positive responsibility on people to actively ascertain whether consent exists.

Recklessness

16.74 The NSW, Victorian and South Australian conceptions of 'recklessness' differ substantially. Significantly, South Australia has modified the subjective element of recklessness by requiring the trier of fact to have regard to an objective consideration—that is, whether the accused failed to 'take reasonable steps to ascertain whether the other person does in fact consent, or has in fact withdrawn consent, to the act before deciding to proceed'.[158]

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the *mens rea* of rape is now statutorily defined, although it is broadly consistent with the common law as stated in *DPP v Morgan*'.

153 *Criminal Code* (Qld) s 349; *Criminal Code* (WA) s 325.

154 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [8.4].

155 *DPP v Morgan* [1976] AC 182.

156 *Criminal Code* (Qld) s 24; *Criminal Code* (WA) s 24. See also Tasmania which has included recklessness within its treatment of a mistaken belief: *Criminal Code* (Tas) s 14A(1)(b). See discussion in Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), 71; and Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [8.4].

157 In NSW, the question of the steps taken by the defendant relates to the issue of the defendant's knowledge, recklessness or reasonable belief: *Crimes Act 1900* (NSW) s 61HA(3). In South Australia, it relates to assessing reckless indifference: *Criminal Law Consolidation Act 1935* (SA) s 47. In Victoria, steps taken by the defendant are not part of the definition of consent, but are a factor in jury directions on whether the 'accused was aware' that the complainant was not consenting': *Crimes Act 1958* (Vic) s 37AA.

158 *Criminal Law Consolidation Act 1935* (SA) s 47.

16.75 In NSW, a person who is reckless as to whether the other person consents to the sexual intercourse is guilty of sexual assault without consent. Recklessness is not defined in the NSW legislation but may be established where the accused:

- 'realised the possibility that the complainant was not consenting' but went ahead regardless;[159] or
- 'failed to consider whether or not the complainant was consenting … notwithstanding the risk that the complainant was not consenting would have been obvious to someone with the accused's mental capacity if they had turned his or her mind to it'.[160]

16.76 Both of these kinds of recklessness—'advertent' or 'non-advertent' recklessness respectively—are 'wholly subjective'.[161]

16.77 By criminalising 'non-advertent' recklessness, the NSW is said to 'go further' than other jurisdictions.[162] The policy reasons why non-advertent recklessness should be included were expressed by Kirby P in *R v Kitchener*:

> To criminalise conscious advertence to the possibility of non-consent, but to excuse the reckless failure of the accused to give a moment's thought to that possibility, is self-evidently unacceptable. In the hierarchy of wrong-doing, such total indifference to the consent of a person to have sexual intercourse is plainly reckless, at least in our society today … Such a law would simply reaffirm the view that our criminal law, at crucial moments, fails to provide principled protection to the victims of unwanted sexual intercourse, most of whom are women.[163]

16.78 In Victoria, a person who did not give 'any thought' as to whether or not the complainant was consenting is guilty of the offence of rape.[164] This provision addresses the position in *R v Ev Costa*, where it was held that recklessness required conscious advertence to the question of whether the complainant was consenting.[165]

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159 Criminal Justice Sexual Offences Taskforce (NSW), *Responding to Sexual Assault: The Way Forward* (2005), 43. See *R v Hemsley* (1988) 36 A Crim R 334, 337–338; *R v Murray* (1987) 11 NSWLR 12, 15.

160 Criminal Justice Sexual Offences Taskforce (NSW), *Responding to Sexual Assault: The Way Forward* (2005), 43. See *R v Kitchener* (1993) 29 NSWLR 696, 697; *R v Tolmie* (1995) 37 NSWLR 660; *R v Milton* [2002] NSWCCA 124.

161 Criminal Justice Sexual Offences Taskforce (NSW), *Responding to Sexual Assault: The Way Forward* (2005), 43. See also *Banditt v The Queen* (2005) 219 CLR 43.

162 ThomsonReuters, *The Laws of Australia* (2010), vol 10, *Criminal Offences*, 10.3, [300].

163 *R v Kitchener* (1993) 29 NSWLR 696, 697 (Kirby P). See also *R v Tolmie* (1995) 37 NSWLR 660.

164 *Crimes Act 1958* (Vic) s 38(2). This legislation is not consistent with the recommendations of Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004). See also, D Smith, 'Reckless Rape in Victoria' (2008) 32 *Melbourne University Law Review* 1007, 1008.

165 *R v Ev Costa* [1996] VSC 27. Cf *R v Kitchener* (1993) 29 NSWLR 696 where complete failure to consider or avert to consent was held sufficient to constitute recklessness.

16.79 In South Australia, a person who is 'recklessly indifferent' to the fact that the complainant was not consenting or had withdrawn consent is guilty of the offence of rape.[166] 'Reckless indifference' is defined in the following way:

> a person is ***recklessly indifferent*** to the fact that another person does not consent to an act, or has withdrawn consent to an act, if he or she—
>
> (a) is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but decides to proceed regardless of that possibility; or
>
> (b) is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but fails to take reasonable steps to ascertain whether the other person does in fact consent, or has in fact withdrawn consent, to the act before deciding to proceed; or
>
> (c) does not give any thought as to whether or not the other person is consenting to the act, or has withdrawn consent to the act before deciding to proceed.[167]

16.80 In the ACT and the Northern Territory, a person who engages in sexual intercourse with another person and who is reckless as to whether that other person consents to the sexual intercourse is guilty of the offence of sexual intercourse without consent. This position is similar to the NSW approach.[168]

Defences

16.81 The common law defences of 'honest belief' and 'honest and reasonable belief' that the complainant was consenting, available in the criminal code jurisdictions and NSW respectively, are discussed below.

Defence of 'honest belief'

16.82 That an accused may be acquitted on the basis of an honest, but unreasonable, belief or mistake in consent was established by the House of Lords in *DPP v Morgan*.[169] In that case three men were told by the husband of the complainant that they could have sexual intercourse with her and that any resistance (physical or verbal) she made was pretence, with the husband suggesting that his wife found such behaviour exciting. The men proceeded to have intercourse with the woman and were subsequently charged with and found guilty of rape. The men appealed on the basis that they held an honest belief that the woman was consenting. The convictions were

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166 *Criminal Law Consolidation Act 1935* (SA) s 48(1). This legislation was enacted in 2008 pursuant to the *Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act 2008* (SA).

167 *Criminal Law Consolidation Act 1935* (SA) s 47. For a discussion of the significance of the accused being aware of the 'possibility' as opposed to the 'probability' that the other person might not be consenting to the act or has withdrawn consent to the act, see *R v Egan* (1985) 15 A Crim R 20.

168 *Crimes Act 1900* (ACT) 54(1); *Criminal Code* (NT) s 192(3). See also, *DPP Reference No 1 of 2002* [2002] NTCCA 11; *Crimes Act 1900* (NSW) s 61HA(3).

169 *DPP v Morgan* [1976] AC 182. In the Australian common law jurisdictions see *R v Brown* [1975] 10 SASR 139; *Banditt v The Queen* (2005) 219 CLR 43. However, it is important to note that the decision in *Banditt* was made before the most recent legislative change in NSW which has introduced an objective element. *Morgan* does not apply in the Code jurisdictions.

ultimately upheld on the basis that a jury 'would have been extremely unlikely … [to have] accepted this defence on the facts of the case'.[170]

16.83 The significance of *Morgan* is that a majority of the House of Lords held that where the accused held an honest, albeit unreasonable belief, that the complainant was consenting to the sexual intercourse, the offence of rape was not committed:

> to insist that a belief must be reasonable to excuse it is to insist that the accused is to be found guilty of intending to do that which in truth he did not intend to do, or that his state of mind although innocent of evil intent, can convict him if it be honest but not rational.[171]

16.84 The decision in *Morgan* was controversial and generated considerable debate. It led to the creation in 1975 of an Advisory Group on the Law of Rape,[172] which concluded that the test was correct but that there should be clarification of the significance of 'reasonableness' in the legislation.[173]

16.85 The defence of honest belief is currently available to accused persons in Victoria, South Australia, and the ACT in respect of the offence of rape or sexual intercourse without consent.[174] In Victoria, judges must direct juries to consider whether an accused's belief was reasonable in all the circumstances, including reference to 'whether the accused took any steps to ascertain whether the complainant was consenting'.[175]

Defence of 'honest and reasonable belief'

16.86 Generally, in the criminal code jurisdictions, the question of whether a defence of honest and reasonable belief is available to an accused is answered by a two-stage inquiry: (a) did the accused believe that the complainant was consenting, and (b) if so, was that belief reasonable?[176]

16.87 The Tasmanian *Criminal Code*, however, articulates a defence specific to mistake as to consent. This defence articulates that an accused's mistaken belief about the existence of consent is not honest or reasonable if the accused:

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170 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), 73.

171 *DPP v Morgan* [1976] AC 182, 210 (Hailsham LJ).

172 The Advisory Group became known as the Heilbron Committee.

173 This recommendation was implemented in 1976 and substantially superseded by later extensive reform of the law in the UK.

174 See, eg, *R v Brown* [1975] 10 SASR 139 (decided before Morgan but reaching the same decision); *Banditt v The Queen* (2005) 219 CLR 43. However, it is important to note that the decision in *Banditt* was made before the most recent legislative change in NSW which has introduced an objective element. *Morgan* does not apply in the Code jurisdictions.

175 *Crimes Act 1958* (Vic) s 37AA. This approach was also recommended by Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), 85.

176 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), 73.

(a) was in a state of self-induced intoxication and the mistake was not one which the accused would have made if not intoxicated; or

(b) was reckless as to whether or not the complainant consented; or

(c) did not take reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to the act.[177]

16.88 Until recently, the defence of honest belief that the complainant consented was available in NSW (a common law jurisdiction). Substantive changes in relation to consent were enacted in 2007.[178] Section 61HA(3) of the *Crimes Act 1900* (NSW) now provides that an accused knows that the other person does not consent if the accused has 'no reasonable grounds for believing that the other person consents to the sexual intercourse'.[179] The trier of fact is required to have regard to 'any steps taken by the [accused] to ascertain whether the other person consents to the sexual intercourse' other than any 'self-induced intoxication' of the accused.[180]

Subjective and objective mental elements

16.89 Focusing on subjective mental states emphasises the perspective of a particular defendant. Objective elements focus on 'the actual consequences of an accused's conduct or the actual circumstances under which the conduct occurred rather than on the accused's mental state during the performance of the conduct'.[181] In this context, 'honest and reasonable belief' incorporates a subjective element (honest belief)[182] and an objective element (reasonable belief).

16.90 The arguments for and against subjective fault or mental elements have been canvassed in reports by the MCCOC and the VLRC.[183] The main arguments in support of *subjective* mental elements include the following:

- Consistency with fundamental notions of criminal responsibility—for example, the notion that the criminal law, particularly in relation to serious offences, should not impose guilt where the person did not knowingly transgress the law.[184]

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177 *Criminal Code* (Tas) s 14A.
178 *Crimes Amendment (Consent—Sexual Assault Offences) Act 2007* (NSW).
179 *Crimes Act 1900* (NSW) s 61HA(3)(c).
180 Ibid s 61HA(3)(d)–(e).
181 M Findlay, S Odgers and S Yeo, *Australian Criminal Justice* (2005), 15.
182 See, *DPP v Morgan* [1976] AC 182, in relation to the classification of honest belief in consent as a subjective test.
183 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), 77–83; Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), ch 8.
184 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), 83.

- Avoidance of the practical difficulties of formulating objective standards—for example, the 'reasonable person' test raises issues in relation to whether the jury ought to consider what they would have done in the situation or whether the standard is that of a 'reasonable man'. In addition, questions arise in relation to the qualities and attitudes about men and women that are ascribed to a 'reasonable person'.[185]

- The view that the trier of fact in determining whether a subjective mental state existed may take into account the reasonableness of the mental state.[186]

- In respect of a defendant's mistaken belief, which is the focus of only a small number of rape trials, an objective element would 'jeopardise the principles of criminal responsibility without ensuring that a higher proportion of people who are actually guilty of rape are convicted'.[187]

16.91 The main arguments in support of *objective* mental elements include the following:[188]

- Subjective mental elements reinforce myths about men, women and children and sexuality—in particular as to whether sexual access is always available and expectations about how consent is conveyed.[189]

- That an objective test is in accordance with the communicative model of consent established in the definitional frameworks.[190]

- A defendant should not 'be able to avoid culpability' on the basis that 'he did not give any thought at all as to whether the complainant was consenting or not'.[191]

- That the law 'ought to impose a higher standard of care in sexual circumstances',[192] because 'it is possible for a man to ascertain whether a

185 Ibid 77. See also S Bronitt, 'Rape and Lack of Consent' (1992) 16 *Criminal Law Journal* 289, 305.

186 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), 71. See also, *Report of the Advisory Group on the Law of Rape* HMSO, London (1975), 7.

187 Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [7.91].

188 See discussion in Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), 79.

189 In respect of the defence of honest belief, it 'supports the attitude that a person is entitled to have sex, unless the other person actively indicates they do not wish to do so. This places the onus on a person approached for sex to indicate lack of consent, instead of requiring the initiator to ascertain whether the other person is consenting': Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [8.7].

190 Ibid; Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [7.94].

191 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [8.11]. See, eg, the Victorian decision of *R v Ev Costa* [1996] VSC 27, compared to the position in NSW stated in *R v Kitchener* (1993) 29 NSWLR 696, which found that failure to consider or advert to consent at all is reckless.

woman is consenting or not with minimal effort';[193] and to have sexual intercourse with a woman without her consent is 'to do her great harm'.[194]

- That subjective tests are difficult because they contain a 'double subjective element': that is, both the complainant's (was she consenting?) and defendant's (did he know she was not consenting?) states of mind.[195] This difficulty is compounded because the jury often must make its decision on the basis of the competing evidence of the complainant and the accused.[196]

Commissions' views

16.92 The law's treatment of honest and mistaken belief remains an issue of 'continuing controversy'.[197] The availability of the defence is potentially an important issue for complainants who have, or have had, an intimate relationship with the accused and, therefore, is of particular relevance to the family violence context of this Inquiry. The intimate partner context may enable accused persons to raise a belief in consent based on past consensual activities or ways of agreeing to sexual encounters.[198]

16.93 The VLRC has argued that a purely subjective approach to an accused's mental state 'does nothing to discourage the *assumption* of consent in ambiguous situations'.[199] While 'honest belief' is rarely the main or predominant issue in sexual offence proceedings, the VLRC argued that the centrality of consent to sexual assault trials means that it invariably plays some role in how the legal system, its key players and jury members, understand and approach consent.[200] For these and other reasons, the VLRC recommended that the mental element should be changed to ensure that an accused takes reasonable steps to ascertain that the complainant was consenting. In addition, the VLRC recommended that a mandatory jury direction on consent should be required by legislation.[201] Only the latter of these recommendations has been implemented.[202]

16.94 In contrast, the MCCOC recommended that criminal liability for sexual offences should be determined on the basis of the subjective mental state of the accused. That is,

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192 Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [7.98].
193 J Tempkin, 'The Limits of Reckless Rape' (1983) *Criminal Law Review* 5, 15–16.
194 Ibid.
195 Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003) [7.99].
196 Ibid.
197 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), 69.
198 See, eg, discussion in M Randall, 'Sexual Assault in Spousal Relationships,"Continuous Consent" and the Law, Honest but Mistaken Judicial Beliefs'' (2008) 32 *University of Manitoba Law Journal* 144.
199 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [8.15] (emphasis in original).
200 Ibid, [8.22]–[8.25].
201 *Crimes Act 1958* (Vic) s 37AA. This approach was also recommended by Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), 85.
202 M King, 'Reckless Rape in Victoria' 32 *Melbourne University Law Review* 1007, 1010.

that an accused should not be found guilty of sexual penetration without consent 'unless the prosecution proves' that the accused:

- knew that the victim was not consenting;
- was 'reckless to the absence of consent'; or
- 'failed to give any thought to the question of consent'.[203]

16.95 As such, the MCCOC approach permits an accused to rely on an honest, albeit unreasonable, belief in consent. Its reasons for doing so were based on the fact that the extent to which such a belief is unreasonable goes to the question of whether it has been established as a genuine or honest belief in consent. The MCCOC, like the VLRC, recommended that juries be directed in relation to whether the mistake or belief in consent was reasonable in all the circumstances.[204]

16.96 The Commissions' preliminary view is that the issues are best addressed by adopting the current NSW formulation of honest and reasonable belief. In addition, legislation should require that judges direct juries in relation to the evidence presented about that belief and whether the accused took any steps to ascertain whether consent was indeed present. Jury directions of this kind are discussed in the next section of this chapter.

16.97 The insertion of an objective element, or the modification of the subjective element by requiring reasonable steps to ascertain consent, has also been adopted by various overseas jurisdictions, for example in New Zealand,[205] the United Kingdom[206] and Canada.[207] In the United Kingdom it is simply provided that a person commits rape when 'A does not reasonably believe that B consents'.[208] It is also the basic position in the Australian criminal code jurisdictions.[209]

16.98 The Commissions are also concerned that ambiguity in relation to honest belief may be more likely to arise in the context of sexual assault occurring in a longstanding sexual relationship. This is likely to create difficulties at trial for such cases. For example, where the accused and complainant have an ongoing relationship, the defence

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203 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), 67.
204 Ibid, 85.
205 *Crimes Act 1961* (NZ) s 128(2).
206 *Sexual Offences Act 2003* (UK) s 1. See also s 75(1).
207 Criminal Code RSC 1985 C-46 s 273.2 However, see discussion of the effectiveness of these provisions in the context of sexual assault by a current or former intimate partner in M Randall, 'Sexual Assault in Spousal Relationships,"Continuous Consent" and the Law, Honest but Mistaken Judicial Beliefs'' (2008) 32 *University of Manitoba Law Journal* 144.
208 *Sexual Offences Act 2003* (UK) s 1.
209 See discussion in Criminal Justice Sexual Offences Taskforce (NSW), *Responding to Sexual Assault: The Way Forward* (2005), 49.

of honest and mistaken belief and its subjective nature may permit accused persons to concoct a mistaken belief, making the prosecution's task of disproving the belief very difficult. The Commissions are interested in comment on how the defence of honest belief affects decisions made by the police and prosecutors about the likely prospects of a successful prosecution.

Proposal 16–4 Commonwealth, state and territory sexual offences legislation should provide that a person who performs a sexual act with another person, without the consent of the other person, knows that the other person does not consent to the act if the person has no reasonable grounds for believing that the other person consents. For the purpose of making any such finding, the trier of fact must have regard to all the circumstances of the case including any steps taken by the person to ascertain whether the other person consents, but not including any self-induced intoxication of the person.

Question 16–7 Is an honest belief in consent more likely to be raised in cases where the complainant has or has had an intimate relationship with the accused? If so, will the insertion of an objective element assist in these cases? Are other measures required to clarify or restrict the defence of honest belief in these cases?

Jury directions about consent

16.99 Judicial directions to the jury on consent can provide an important mechanism for addressing the fact that some 'jurors and judges continue to bring to bear stereotypical views of sexual roles in their assessment of consent'.[210] Such directions have been considered to be an important mechanism to reinforce the communicative model of consent, and to directly respond to continuing myths and misconceptions about sexual violence—for example, that lack of consent is conveyed by physical resistance and that 'true victims' sustain injuries. As the VLRC stated:

> The jury direction performs an educative function by clarifying the law and establishing standards of behaviour for sexual relations which are based on principles of communication and respect.[211]

16.100 Jury directions on consent have been legislated in Victoria and the Northern Territory. The MCCOC also recommended mandatory jury directions on consent in relevant cases.[212]

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210 Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [7.3].
211 Ibid, [7.61].
212 See discussion in Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), 263–264.

16.101 The Victorian model, introduced in 1991 and subsequently amended on a number of occasions,[213] has been referred to as 'the most significant and progressive reform'.[214] In Victoria, the judge must direct the jury on consent only where it is 'relevant to the facts in issue in a proceeding'.[215] The judge must relate any such direction to 'the facts in issue in the proceeding' and the 'elements of the offence being tried ... so as to aid the jury's comprehension of the direction'.[216] The matters about which the judge must direct the jury include the meaning of consent (free agreement) and the circumstances that vitiate consent, as well as:

> (d) the fact that the person did not say or do anything to indicate free agreement to a sexual act at the time which the act took place is enough to show that the act took place without that person's free agreement;
>
> (e) that the jury is not to regard a person as having freely agreed to a sexual act just because—
>
> (i) she or he did not protest or physically resist; or
>
> (ii) she or he did not sustain physical injury; or
>
> (iii) on that or an earlier occasion, she or he freely agreed to engage in another sexual act (whether or not of the same type) with that person, or a sexual act with another person.[217]

16.102 The Victorian model is, however, the subject of considerable controversy in the literature and the case law.[218] Concerns include that the directions may be seen to usurp the function of the jury in deciding the factual issue of consent, that they present an inaccurate picture of sexual activity and how people agree to such activity, that they are convoluted and confusing, and in some cases may contradict other aspects of the law—for example, in terms of the subjective test for an honest belief in consent.

16.103 The Northern Territory approach is similar, but of more limited scope. The judge must give a direction in a relevant case that a person is not to be taken as having consented to sexual intercourse simply because the person:

> (a) did not protest or physically resist;
>
> (b) did not sustain physical injury; or

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213 Between 2001 and 2004 the VLRC reviewed the law concerning sexual offences and recommended further reform of jury directions about consent. These recommendations were subsequently enacted, see *Crimes (Sexual Offences) Act 2006* (Vic).

214 S Bronitt and B McSherry, *Principles of Criminal Law* (2nd ed, 2005), 572.

215 *Crimes Act 1958* (Vic) s 37.

216 Ibid s 37.

217 Ibid s 37AAA.

218 See discussion in J Willis, 'Legislatively Mandated Jury Directions in Sexual Offence Cases' (2006) 30 *Criminal Law Journal* 357, 357.

> (c) had, on that or an earlier occasion, consented to:
>
> (i) sexual intercourse; or
>
> (ii) an act of gross indecency,
>
> whether or not of the same type, with the accused.[219]

16.104 The legislation of some other jurisdictions states that the absence of physical resistance by a victim is not to be regarded, on its own, as consent to sexual intercourse although it does not require a specific direction to the jury in this regard.[220]

16.105 The Victorian legislation also mandatorily requires a judge to direct juries about the accused's knowledge and awareness about the presence of consent where the defence raises in evidence, or asserts that, the accused believed that the victim was consenting to the sexual act.[221] In such circumstances, the judge must direct the jury that:

> in considering whether the offence has been proved beyond reasonable doubt that the accused was aware that the complainant was not consenting, the jury must consider –
>
> (a) any evidence of that belief; and
>
> (b) whether that belief was reasonable in all the relevant circumstances having regard to—
>
> (i) [in a case where one of the circumstances that vitiate consent exists] whether the accused was aware that that circumstance existed in relation to the complainant; and
>
> (ii) whether the accused took any steps to ascertain whether the complainant was consenting or might not be consenting, and if so, the nature of those steps; and
>
> (iii) any other relevant matters.[222]

16.106 The Queensland Taskforce on Women and the Criminal Code did not favour 'compulsory' jury directions. It did, however, follow the Victorian model to the extent of recommending that the jury should be directed to consider the steps taken by the accused to ensure that the complainant was consenting, in cases where honest and reasonable belief in consent had been raised.[223]

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219 *Criminal Code* (NT) s 192A. This was introduced in the Northern Territory in 1994.

220 *Crimes Act 1900* (NSW) s 61HA(7); *Criminal Code* (WA) s 319(2); *Crimes Act 1900* (ACT) s 67(2). See also *Criminal Code* (Tas) s 2A(2)(a) which states that a person does not freely agree if a person 'does not say or do anything to communicate consent'.

221 *Crimes Act 1958* (Vic) s 37AA.

222 Ibid.

223 Taskforce on Women and the Criminal Code (Qld), *Report of the Taskforce on Women and the Criminal Code* (2000), Rec 64.3.

16.107 The MCCOC recommended a provision which follows the Victorian model, except for a significant amendment to the first clause.[224] This provision stated:

> (1) … the judge must, in a relevant case, direct the jury (if any) that a person is not to be regarded as having consented to a sexual act just because:
>
> (a) The person did not say or do anything to indicate that she or he did not consent; or
>
> (b) The person did not protest or physically resist; or
>
> (c) The person did not sustain physical injury; or
>
> (d) On that or an earlier occasion, the person consented to engage in a sexual act (whether or not of the same type) with that person, or a sexual act with another person.
>
> (2) …the judge must, in a relevant case, direct the jury (if any) that in determining whether the accused was under a mistaken belief that a person consented to a sexual act the jury may consider whether the mistaken belief was reasonable in the circumstances.[225]

16.108 Most of the submissions received by the MCCOC generally supported its approach. Some considered the Victorian model should be followed more closely.[226]

Commissions' views

16.109 Research indicates that jurors find consent a difficult concept to understand and apply, and that jurors' pre-existing attitudes have been found to influence their judgments *more than* the facts of the case and the manner in which the evidence was given.[227] For this reason, the Commissions provisionally support enacting positive directions on consent: what it is, when it is absent, and about the relevance of physical resistance and injury. Such directions may assist to reinforce the communicative model of consent and provide positive messages to the community about standards of sexual behaviour. In addition, they may operate as potentially powerful tools of cultural change for those involved in the prosecution of sexual offences.

16.110 Three models to achieve these policy objectives have been outlined above: the Victorian, Northern Territory and MCCOC models. The Commissions' preliminary view is in favour of the Victorian model because it is the most comprehensive approach and more detailed than that advocated by the MCCOC—particularly in relation to the defence of an honest belief in consent.

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224 This recommendation was made before the term 'normally' was removed from *Crimes Act 1958* (Vic) s 37(1)(a). See discussion of problems with the term 'normally' in Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [7.34]–[7.40].

225 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), app 2, cl 5.2.43.

226 Ibid, 265.

227 N Taylor, *Juror Attitudes and Biases in Sexual Assault Cases* (2007), 3–5.

Proposal 16–5 State and territory legislation should provide that a direction must be made to the jury on consent in sexual offence proceedings where it is relevant to a fact in issue. Such directions must be related to the facts in issue and the elements of the offence and expressed in such a way as to aid the comprehension of the jury. Such directions should cover:

(a) the meaning of consent (as defined in the legislation);

(b) the circumstances that vitiate consent, and that if the jury finds beyond reasonable doubt that one of these circumstances exists then the complainant was not consenting;

(c) the fact that the person did not say or do anything to indicate free agreement to a sexual act when the act took place is enough to show that the act took place without that person's free agreement; and

(d) that the jury is not to regard a person as having freely agreed to a sexual act just because she or he did not protest or physically resist, did not sustain physical injury, or freely agreed to engage in another sexual act (whether or not of the same type) with that person, or a sexual act with another person, on an earlier occasion.

Where the defence asserts that the accused believed that the complainant was consenting to the sexual act then the judge must direct the jury to consider:

(e) any evidence of that belief; and

(f) whether that belief was reasonable in all the relevant circumstances having regard to (in a case where one of the circumstances that vitiate consent exists) whether the accused was aware that that circumstance existed in relation to the complainant;

(g) whether the accused took any steps to ascertain whether the complainant was consenting or might not be consenting, and if so, the nature of those steps; and

(h) any other relevant matters.

Guiding principles and objects clauses

16.111 The report, *Time for Action*, drew attention to the important role that guiding principles can play in the interpretation of the law relating to sexual offences and in the application of the rules of evidence in sexual offence proceedings.[228] Victoria is the only Australian jurisdiction which provides an objects statement and guiding principles in relation to sexual offences and related procedural and evidential matters.

16.112 The *Crimes Act 1958* (Vic) provides that the objectives of its sexual offences provisions are:

> (a) to uphold the fundamental right of every person to make decisions about his or her sexual behaviour and to choose not to engage in sexual activity;
>
> (b) to protect children and persons with a cognitive impairment from sexual exploitation.[229]

16.113 In addition, guiding principles were included within the legislation, which set out the facts that the court should have regard to when interpreting the various sexual offences in that Act. These are that:

> (a) there is a high incidence of sexual violence within society; and
>
> (b) sexual offences are significantly under-reported; and
>
> (c) a significant number of sexual offences are committed against women, children and other vulnerable persons including persons with a cognitive impairment; and
>
> (d) sexual offenders are commonly known to their victims; and
>
> (e) sexual offences often occur in circumstances where there is unlikely to be any physical signs of an offence having occurred.[230]

16.114 An identical provision is to be found in the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) to assist the court when interpreting the provisions relating to confidential communications,[231] and in the *Criminal Procedure Act 2009* (Vic) to assist the court when interpreting the provisions relating in whole or in part to sexual offences. [232]

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228 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), 111–112.

229 *Crimes Act 1958* (Vic) s 37A.

230 Ibid s 37B.

231 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32AB.

232 In *DPP v Theophanous* [2009] VSC 325, the Supreme Court of Victoria considered the applicability of the guiding principles contained in, what was then, the *Evidence Act 1958* (Vic) s 32AB. This case considered, in part, whether the magistrate had applied those guiding principles when allowing the publication of certain parts of the complainant's evidence given in a committal proceeding. The court rejected the argument that s 32AB, and its intention to encourage the reporting of sexual assault, would necessarily mean that there could be no publication of evidence from a sexual assault proceeding.

16.115 These objects statements and guiding principles were introduced following the recommendations of the VLRC.[233] The VLRC saw such provisions as an important educative tool, addressing the need for cultural change and the implementation gap discussed in Chapter 15. The VLRC articulated three main arguments for including guiding principles:

> The criminal law has both a regulatory and an educative function. It should emphasise that people have a right to make decisions about their sexual activity and to choose not to engage in sexual activity. The interpretation clause will ensure that the provisions of sexual offences laws are interpreted consistently with the goals of the legislation.
>
> A statement of principles of interpretation will give added weight to any directions or instructions that a judge gives to the jury. The judge and jury can refer to the principles to shed light on where any ambiguity may exist in the interpretation of particular sections.
>
> Sexual assault continues to be under-reported, and the serious social harm of sexual assault has only recently begun to be given the recognition that it deserves. The unique nature and context of sexual assault should be clearly stated by the legislature, so that this underwrites the interpretation of the particular provisions in the legislation.[234]

16.116 Some states and territories have also incorporated objects clauses or guiding principles in their family violence protection order legislation. This is discussed in Chapters 3 and 4. While there is some question about the extent to which such provisions have been effective in practice,[235] such principles may provide an important symbolic statement about the nature of such violence, the community's lack of tolerance for such violence, and the response of the law.[236]

16.117 The Commissions agree that these statements can perform an important symbolic and educative role in the application and interpretation of the law, as well as for the general community. While much more is required than simply a statement of guiding principles to change culture, it does provide an important opportunity for governments and legal players to articulate their understanding of sexual violence and a benchmark against which to assess the implementation of the law and procedure.

16.118 The objectives and principles articulated in the Victorian legislation are an instructive starting point for similar provisions in other jurisdictions. Other matters mentioned in *Time for Action* could be incorporated to provide a focus on particularly vulnerable groups of women and give sexual assault visibility as a form of family

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233 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), Recs 105, 106, 107.

234 Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [8.88]. See also [8.87].

235 In the family violence context see J Wangmann, '"She Said …" "He said …" : Cross Applications in NSW Apprehended Domestic Violence Order Proceedings', *Thesis*, University of Sydney, 2009, 55–56.

236 In the family violence context see R Hunter, 'Women's Experience in Court: The Implementation of Feminist Law Reforms in Civil Proceedings Concerning Domestic Violence', *Thesis*, Stanford University, 2006, 64; R Hunter and J Stubbs, 'Model Laws or Missed Opportunity?' (1999) 24 *Alternative Law Journal* 12, 12.

violence. *Time for Action* recommended that Indigenous women and women with intellectual disabilities should be specifically recognised as victims of sexual violence, and that there should be specific acknowledgement that sexual violence constitutes family violence—as it is precisely these cases that criminal justice systems deal with least effectively.[237]

Proposal 16–6 State and territory sexual offences legislation should include a statement that the objectives of the legislation are to:

(a) uphold the fundamental right of every person to make decisions about his or her sexual behaviour and to choose not to engage in sexual activity;

(b) protect children and persons with a cognitive impairment from sexual exploitation.

Proposal 16–7 State and territory sexual offences, criminal procedure or evidence legislation, should provide for guiding principles, to which courts should have regard when interpreting provisions relating to sexual offences. At a minimum, these guiding principles should refer to the following:

(a) there is a high incidence of sexual violence within society;

(b) sexual offences are significantly under-reported;

(c) a significant number of sexual offences are committed against women, children and other vulnerable persons, including persons with a cognitive impairment;

(d) sexual offenders are commonly known to their victims; and

(e) sexual offences often occur in circumstances where there are unlikely to be any physical signs of an offence having occurred.

Question 16–8 Should such a statement of guiding principles make reference to any other factors, such as recognising vulnerable groups of women, or specifically acknowledging that sexual violence constitutes a form of family violence?

237 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), 112.

17. Reporting, Prosecution and Pre-trial Processes

Contents

Introduction

17.1 The Terms of Reference for this Inquiry require the Commissions to inquire and report on 'the impact of inconsistent interpretation or application of laws in cases of sexual assault occurring in a family/domestic violence context, including rules of evidence, on victims of such violence'.

17.2 This chapter, and Chapter 18, highlight ways in which particular laws and procedures operate for victims of sexual assault. Australian jurisdictions take different approaches to law and procedure in the areas discussed. Both chapters examine which approaches best recognise the nature of sexual violence, and address the negative experience of complainants, particularly children, in the criminal justice system. Where it is possible to identify certain approaches as more promising and progressive than others, the Commissions propose that Commonwealth, state and territory governments should implement consistent measures of these kinds.

17.3 This chapter begins by mapping out the key 'decision points' in the prosecution of sexual assault offences. These decision points extend from reporting to the police, through the handling of cases by various offices of the Director of Public Prosecutions (DPP) and to procedures involved in the trial of sexual offences. At each of these decision points, cases are filtered out, including because of the demands imposed on complainants. This process—referred to as 'attrition'—may lead to offences not being reported and cases being unnecessarily withdrawn or dismissed.

17.4 This and the following chapter examine selected developments aimed at reducing attrition and improving the experiences of women and children who have suffered a sexual assault. The Commissions are interested in hearing about the range of positive developments and innovations that have been instituted and whether they have been successful in encouraging reporting and reducing attrition—particularly in cases of sexual assault perpetrated in a family violence context.

17.5 This chapter discusses some of the problems that may lead to attrition of sexual assault cases at the reporting, investigation, prosecution and other stages before trial. The following chapter focuses on issues that arise at trial, notably in relation to the application of laws of evidence, the giving of jury warnings and the cross-examination of complainants and other witnesses in sexual offence proceedings.

17.6 The focus of this aspect of the Inquiry is sexual assault perpetrated in a family violence context—that is, for those who have been sexually assaulted by a current or former intimate partner (spouse, de facto, boyfriend) or family member. However, most of issues apply to all sexual assault proceedings, regardless of the relationship between the complainant and the perpetrator.

17.7 Many areas of law and procedure relating to sexual offence proceedings are not addressed. A comprehensive review is not possible within the time frame for this Inquiry. The Terms of Reference also have a more specific focus. The Commissions acknowledge that reform in this area has been substantial over the last three decades and, therefore, welcome submissions in regard to any legislative or procedural change considered to have improved legal responses to sexual assault perpetrated in a family violence context, or outcomes for victims.

Decision points

17.8 The way in which complaints of sexual assault move forward within the criminal justice system is complex and there are multiple points where decisions are made, which may result in a complaint not proceeding:

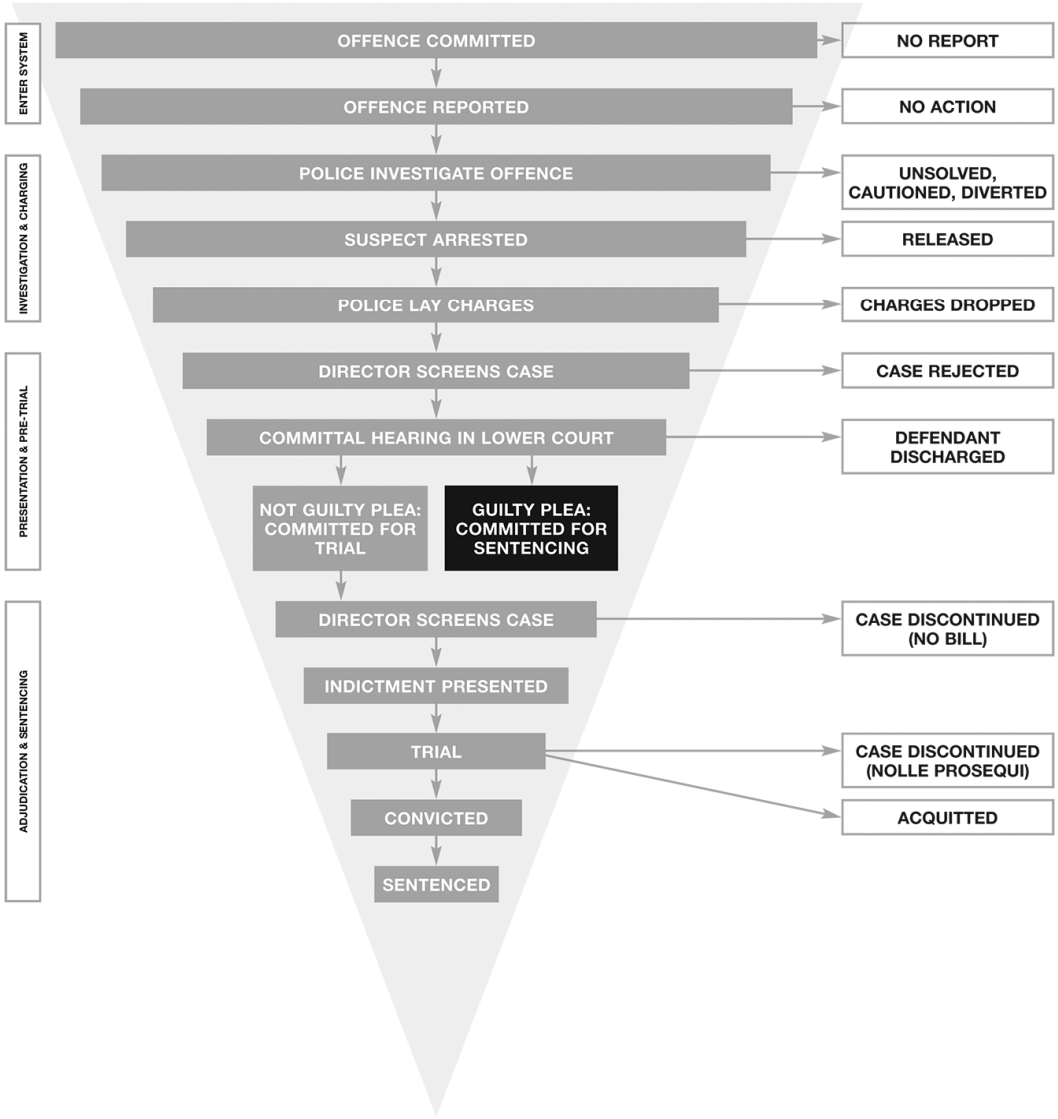
> From the point where a victim decides to report a sexual offence to the police—and the majority never do—various decision makers exercise discretion at multiple decision points, based on a range of criteria, so that only a small proportion of all sex crimes ever reach trial and conviction … This filtering of cases begins with police decisions to record and investigate a complaint and to charge a suspect with the offence. The exercise of police discretionary powers means that they are perhaps the most significant gatekeepers to the criminal justice system.
>
> Once the police charge a suspect, DPP lawyers review the file to determine whether the case should be prosecuted. Cases that proceed are subject to continuous reassessment because the circumstances of the case can change over time. In addition different evidentiary standards apply at each decision-making stage: the police decision to charge is based on the *prima facie* test, which is a more inclusive standard than the *reasonable prospects* test applied by the prosecutor, while the jury's decision to convict is based on the stringent standard of *beyond reasonable doubt*.[1]

17.9 These multiple decision points are summarised in the following diagram extracted from the 2004 report *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study*.[2]

1 D Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004), 5 (references omitted, emphasis in original).

2 Ibid, 6.

Figure 1: Decision Points for Indictable Sexual Offences



Attrition in sexual assault cases

17.10 Research has established that only a small proportion of sexual assaults enter the criminal justice system and those that do face a range of barriers and filtering systems that mean that few result in a charge, prosecution, or conviction.[3] This steady process of attrition has been the subject of much concern, and is documented in many reports.[4] Numerous reforms over the last three decades—including legal and procedural reforms and policy changes within government agencies—have been intended, at least in part, to address factors and barriers that have contributed to victims making decisions to withdraw or key decision-makers making determinations that cases not proceed.

17.11 The National Council to Reduce Violence Against Women and their Children (National Council) reported that its consultations, and the available evidence base, suggest that, in some jurisdictions, 'concerns remain that the criminal law is under-utilised in cases of domestic and family violence'.[5] The National Council observed that:

> The limited use of the criminal law may serve to undermine the effectiveness of the formalised procedures, policies and laws. It is important to recognise that criminal law should be a practical option in the community's response to domestic and family violence and should work in conjunction with the civil law reform in different statutory regimes. The factors that operate to 'filter out' the use of the criminal law should be recognised and addressed.[6]

Statistics on attrition rates

17.12 Numerous reports on sexual offences and the legal system have found that the number of sexual assault cases that reach the point of adjudication is minimal.[7] Few sexual assaults are reported to the police. Reporting, and under-reporting, of sexual assault is discussed in Chapter 15.

17.13 Reports of sexual assault are then subject to a range of decisions about whether an offence has been committed, whether there is enough evidence to sustain a charge and the likelihood of conviction, all of which may serve to filter cases out. In addition,

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3 Criminal Justice Sexual Offences Taskforce (NSW Attorney General's Department), *Responding to Sexual Assault: The Way Forward* (2005), 8.

4 See, eg, Ibid, 8–17; 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), 37–43.

5 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), 113.

6 Ibid.

7 See, eg, Australian Bureau of Statistics, *Sexual Assault in Australia: A Statistical Overview* (2004); J Mouzos and T Makkai, *Women's Experiences of Male Violence: Findings of the Australian Component of the International Violence Against Women Survey* (2004) Australian Institute of Criminology, 102.57 citing the findings of the 2002 National Crime and Safety Survey; Australian Institute of Criminology, 'Guilty Outcomes in Reported Sexual Assault and Related Offence Incidents' (Press Release, 18 December 2007).

the complainant faces decisions about whether to engage with, or continue to engage with, the legal system. The Victorian Law Reform Commission (VLRC) found in 2004 that:

> less than one in six reports to police of rape and less than one in seven reports of incest or sexual penetration of a child proceeded to prosecution. Even if an offence is reported and the defendant is prosecuted, guilty pleas and conviction rates are lower than for other criminal offences.[8]

17.14 Denise Lievore concluded that the available Australian studies, taken together, indicated that:

- case attrition is highest at the police stage, but prosecutors regularly exercise their discretion to discontinue cases;
- in recent years there has been an increase in the numbers of persons charged with sexual assault, but this is not reflected in conviction rates;
- the proportion of defendants pleading guilty to sexual assault is low relative to other offence types; and
- the high proportion of cases proceeding to trial is reflected in high numbers of acquittals compared to other offences.[9]

17.15 Some of the published statistics on attrition rates at various points are set out below. The figures relate to data collection across different time periods, jurisdictions and sample sizes, so it is difficult to draw any firm conclusions from them.

Investigation

- A 2000–03 Victorian study found that police did not proceed with more than 60% of sexual assault investigations.[10] Offenders were charged in only 15% of cases.[11]
- An Australian Bureau of Statistics (ABS) report noted that, for incidents of sexual assault recorded by police in 2002, offenders were proceeded against for approximately one in four victims of sexual assault.[12]

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8 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [1.6].

9 D Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004), 3.

10 Of these cases, 15% of rape complaints were withdrawn; and 46% resulted in no further police action: Victorian Government Statewide Steering Committee to Reduce Sexual Assault, *Study of Reported Rapes in Victoria 2000–2003: Summary Research Report* (2006), 5. Offenders were proportionately more likely to be a current or former partner of the victim in cases where the complaint was subsequently withdrawn compared to cases where charges were laid.

11 Ibid.

12 Measured at six months from the date the incident became known to the police: Australian Bureau of Statistics, *Sexual Assault in Australia: A Statistical Overview* (2004), 54.

- New South Wales research showed that only 28% of sexual and indecent assaults against children and 30% of those against adults, reported to NSW police in 2004 were 'cleared' within six months.[13]

- A 2003 South Australian study noted that 40% of child sexual assault incidents reported in 2000–01 had not been cleared by police when followed up a year later; and 23% of cases were cleared other than through a suspect being apprehended, including because the victim requested no further action.[14]

- In 2007, the Australian Institute of Criminology (AIC) estimated that less than 20% of sexual offence incidents which are reported to the police result in charges being laid and criminal proceedings being instigated.[15]

Prosecution

- The VLRC concluded that, based on 1997–99 cases, fewer than one in six reports to police of rape and fewer than one in seven reports of incest or sexual penetration of a child proceeded to prosecution.[16]

- NSW research found that it was common for incidents to be recorded as cleared by the police, even though there had been no criminal proceedings commenced through the issuing and filing of a court attendance notice.[17] Among all sexual offences reported to police, criminal proceedings are initiated in only 15% of incidents involving child victims and 19% of incidents involving adult victims.[18]

- A 2003 South Australian study found that 27% of reports of child sexual assault incidents proceeded to prosecution.[19]

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13 J Fitzgerald, 'The Attrition of Sexual Offences from the New South Wales Criminal Justice System' (2006) 92 *Crime and Justice Bulletin* 3, 3. A cleared criminal incident is one that police are no longer investigating, either because they have commenced criminal proceedings against a suspect or the complaint has been withdrawn. Incidents that are not cleared are unlikely to proceed any further.

14 J Wundersitz, *Child Sexual Assault: Tracking from Police Incident Report to Finalisation in Court* (2003) Office of Crime Statistics and Research, 9.

15 Australian Institute of Criminology, 'Guilty Outcomes in Reported Sexual Assault and Related Offence Incidents' (Press Release, 18 December 2007).

16 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [1.6].

17 Within 180 days of reporting, criminal proceedings had been commenced against a person of interest in 53% of cleared incidents involving a child victim and in 59% of incidents involving and adult victim: J Fitzgerald, 'The Attrition of Sexual Offences from the New South Wales Criminal Justice System' (2006) 92 *Crime and Justice Bulletin* 3, 4.

18 Ibid. The odds of criminal proceedings being commenced were higher where: the victim was aged over five years; reporting of the incident occurred within ten years of its occurrence; the offender was known to the victim; the victim was female; and aggravating circumstances were present: J Fitzgerald, 'The Attrition of Sexual Offences from the New South Wales Criminal Justice System' (2006) 92 *Crime and Justice Bulletin* 3, 7.

19 J Wundersitz, *Child Sexual Assault: Tracking from Police Incident Report to Finalisation in Court* (2003) Office of Crime Statistics and Research, 9.

Trial

- The ABS report, which used a larger sample (1,567 defendants), reported that, for 2002–03, 60% of sexual assault defendants entered a guilty plea, 20% pleaded not guilty and were convicted and 19% were acquitted.[20] Defendants in higher criminal courts, with a principal offence of sexual assault and related offences, were three times more likely to have an acquittal outcome (20%) than defendants for all offences (7%).[21]

- NSW research found that 44% of persons prosecuted for a sexual offence against a child, and 42% of persons prosecuted for a sexual offence against an adult, were found guilty on at least one count.[22]

- South Australian research found that less than 10% of cases reported to South Australian police in 2000–01 resulted in a conviction on at least one of the offences arising from a reported child sexual assault incident.[23]

17.16 Improved data collection in relation to the reporting and prosecution of sexual assault, including in a family violence context, is clearly desirable. Better statistics on attrition rates and outcomes in sexual assault cases are critical to identifying problems, and designing and monitoring solutions, in relation to how the criminal justice system deals with sexual assault.

17.17 Bodies like the Australian Centre for the Study of Sexual Assault (ACSSA) and the AIC, along with state and territory counterparts, have an important role to play in this regard. One of the roles of ACSSA, in particular, is to 'improve access to current information on sexual assault in order to assist policymakers and others interested in this area to develop evidence-based strategies that respond to, and ultimately reduce, the incidence of sexual assault'. Another body, the Australian Domestic and Family Violence Clearinghouse plays a role in providing information about domestic and family violence issues and practice, including through an online good practice database.

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20 Australian Bureau of Statistics, *Sexual Assault in Australia: A Statistical Overview* (2004), 77.

21 Ibid, 54.

22 J Fitzgerald, 'The Attrition of Sexual Offences from the New South Wales Criminal Justice System' (2006) 92 *Crime and Justice Bulletin* 3, 4.

23 J Wundersitz, *Child Sexual Assault: Tracking from Police Incident Report to Finalisation in Court* (2003) Office of Crime Statistics and Research, 9.

Proposal 17–1 The Australian Centre for the Study of Sexual Assault, the Australian Institute of Criminology and similar state and territory agencies should prioritise the collection of comprehensive data on attrition rates and outcomes in sexual assault cases, including in relation to sexual assault perpetrated in a family violence context.

Recognising a sexual assault

17.18 The first step in engaging with the criminal justice system involves the complainant understanding that what happened to them constitutes a sexual offence. As discussed in Chapter 15, many women may find it difficult to recognise what an intimate partner has done to them as a sexual assault. For example, some women may continue to think that rape in marriage is not a criminal offence. In addition, there is a wide range of acts of sexual violence that a woman or child may experience as part of family violence,[24] some of which are against the various criminal laws, and others which are not.

17.19 Where victims do recognise what happened to them as a criminal offence, they may decide not to make a report to the police. Numerous surveys have documented that few women report sexual assaults to the police.[25] The reasons women do not report sexual assaults to the police include considerations related to: the relationship that they have with the perpetrator; fear of the perpetrator; how serious the victim perceives the assault to be; lack of confidence in the criminal justice system to assist; and notions of privacy, shame and stigma.

17.20 Where sexual assault occurs in a family violence context, the reasons for not reporting may include that it is easier to get a civil protection order rather than to be involved in a criminal prosecution. Economic dependence and potential homelessness may also be factors discouraging the reporting of sexual assault in a family violence context.

17.21 Certain groups of women may face additional barriers in reporting. Indigenous women may encounter family and community pressures concerning speaking out about violence in their community. Indigenous women may also be reluctant to report to the police due to mistrust of the police, past inappropriate police responses, a lack of police available in their community, the normalisation of violence which may make it

24 See discussion of the continuum of sexual violence in Ch 15.

25 See, eg, Australian Bureau of Statistics, *Sexual Assault in Australia: A Statistical Overview* (2004), 57; J Mouzos and T Makkai, *Women's Experiences of Male Violence: Findings of the Australian Component of the International Violence Against Women Survey* (2004) Australian Institute of Criminology, 102.

difficult to identify the harm suffered as a criminal offence, and fear of retribution from the perpetrator and his family.[26]

17.22 Women from culturally and linguistically diverse backgrounds or women who have come to Australia from other countries may not be aware of their legal rights in Australia—for example, that sexual assault by a spouse is against the law—and may have a negative perception of the police gained from their country of origin or fears about their immigration status. Women with a disability may lack physical access to the police to make a report or may be dependent upon the perpetrator for their care, making it very difficult to speak out.

17.23 More generally, women and other victims of sexual assault may lack knowledge about the options that they have, and the mechanisms that are available to assist them in reporting sexual violence and going on to engage with the criminal justice system.

Reporting to the police

17.24 The next step in engaging with the criminal justice system about a sexual offence is to make a report to the police, or have the offence notified to the police in some way (for example via a parent, teacher, doctor or neighbour).[27]

17.25 For those sexual assaults that are reported, the response of the police is vital to decision making about whether a woman or child will continue to pursue their complaint—a key hurdle. As the VLRC observed:

> How the police are perceived by people who report an assault and the quality and consistency of their investigative and decision-making practices will have a major impact on reporting and prosecution patterns.[28]

17.26 It is recognised that, in addition to investigating complaints of sexual assault and apprehending and prosecuting offenders, the function of police should include protecting and supporting victims.[29] Complainants should, for instance, receive appropriate support to enable them to make statements and obtain forensic medical examinations and referral to other support services. For example, when a victim of sexual assaults reports to the NSW Police, they are to be offered referral to a NSW Health sexual assault counsellor.[30]

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26 See 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), 96.

27 See discussion in Ibid, 97.

28 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), 104.

29 See, eg, Queensland Police Service, *Reporting to Police* <www.police.qld.gov.au/programs/crimePrevention/adultassault/report/> at 21 January 2010.

30 NSW Police Force, *Adult Sexual Assault* <www.police.nsw.gov.au> at 17 March 2010. Other aspects of victim support and liaison are discussed in Chs 19–20.

Specialised police responses

17.27 Specialised police responses to sexual assault have developed in recognition that 'providing support helped victims recover, minimised further trauma for them, and gave them greater confidence to participate in criminal proceedings as witnesses'.[31]

17.28 Some police services provide 'a fully integrated environment for victims of sexual offences',[32] facilitating interviews, forensic examinations and the provision of support for victims. For example, in the ACT, the Sexual Assault and Child Abuse Team (SACAT) provides that

> Victims can be medically examined in a purpose-built suite, which has an en suite attached to it so that victims can wash after their examination. A bedroom is provided so that they can rest if they need to. There is also an interview room, a lounge area, and a playroom for children, where officers can build rapport with children prior to interviewing. The investigators' workspace is separated from these rooms. The interview room has equipment for video-recording interviews and is linked to another room where child protection officers can observe interviews with child victims.[33]

17.29 SACAT also retains a Sexual Assault Victim Liaison Officer, whose role is intended to improve the experience of victims in the criminal justice system. This role includes keeping victims informed of the progress of the investigation and any criminal proceedings and to respond to their concerns about interactions with police and the criminal justice system.[34]

17.30 Similar approaches are used in other states and territories—in part to minimise attrition rates by improving evidence gathering and the response of the police to complainants of sexual assault.[35]

Specialised investigation

17.31 Since the late 1980s, policing practices have changed to recognise the difficulties in investigating sex offences, particularly those committed by serial offenders. This has seen the establishment of specialist squads around Australia to police serial sex offenders, other types of serious sex offending and online sex offences. In addition, specialist policing aims to minimise attrition rates by improving evidence gathering and the response of police to victims of sexual assault.

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31 Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, *Responding to Sexual Assault: The Challenge of Change* (2005), 14. Before the establishment of a specialised ACT Sexual Assault Unit 'a lack of specialisation, training and sensitivity towards victims of sexual offences had led to poor responses on the part of the police': Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, *Responding to Sexual Assault: The Challenge of Change* (2005), 14.

32 Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, *Responding to Sexual Assault: The Challenge of Change* (2005), 14.

33 Ibid, 14.

34 Ibid, 17.

35 See Ch 19.

17.32 There can be specialist approaches to investigation with or without specialist approaches to interviewing and forensically examining victims. Generally, it appears that police services have two forms of dedicated responses to the investigation of adult and child sexual assault: first, the organisation of police into a squad or team with specialist training to investigate sexual assault and, secondly, the creation of dedicated sexual offences units in order to interview victims and help coordinate police and child protection system responses.

17.33 The roles and functions of specialist investigation squads are similar around Australia. The first specialist policing service was established in the ACT in 1988. Its successor unit, SACAT, is responsible for investigating:

- serious sexual assaults including those committed by serial offenders;
- all physical and sexual child abuse committed against a person under the age of 16 years, including intra-familial offences;
- historical sex offences that required a commitment of resources for a lengthy period of time; and
- offences relating to internet crime including child pornography.

17.34 There are also specialist sex crimes squads in:

- NSW—the Sex Crimes Squad;
- Victoria—the Sexual Crimes Squad;
- Western Australia—the Sex Crime Division; and
- South Australia—the Sexual Crime Investigation Branch.

17.35 All the specialist police squads in Australia share protocols for policing sex offences and each police department administers the Australian National Child Offender Register in order to track the whereabouts and activities of registered sex offenders. Each specialist squad also has an important function in tracking those who use and disseminate child pornography on the internet as well as those offenders who attempt to groom children over the internet via chatrooms.

17.36 Most specialist police squads appear to be more focused on, and dedicated to, the offences of extra-familial offenders rather than those that occur in a family violence context. The extent to which specialist police squads alone can increase the policing

and apprehension of sex offenders is difficult to assess. Police have indicated that reform must be linked to providing additional training and resources.[36]

Question 17–1 Have specialist police squads for sex crimes increased the policing and apprehension of sexual assault offenders, including in a family violence context?

Question 17–2 To what extent is the work of specialist police hampered by lack of training and resources? In what ways can improvements be made?

Police and integrated agency responses

17.37 Specialised police units also have roles in integrating police responses with those of other government agencies involved in child protection.[37]

17.38 For example, NSW Police has recently established the Child Wellbeing Unit, which commenced operation in January 2010.[38] The role of the Child Wellbeing Unit is to help police officers identify whether or not a child is at risk of harm and needs to be referred to the Department of Community Services. If not, the Unit advises police how to help the child and their family gain access to the services they need.[39]

17.39 Previously, the NSW Child Protection and Sex Crimes Squad included the Joint Investigative Review Teams (JIRTs), but these are now under a separate command. These teams include trained staff from police and the Departments of Health and Community Services. JIRTs investigate most child sexual abuse cases and cases involving serious physical abuse and neglect.

17.40 Victoria Police has a Sexual Offences and Child Abuse Coordination Office which collaborates with government and non-government agencies in relation to coordinated approaches to family violence, sexual assault and child abuse. In January 2007, Sexual Offences and Child Abuse Investigation Teams (SOCITs) and Multidisciplinary Centres (MDCs) were established to improve government and police responses to sexual assault.[40]

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36 ACT Policing, *Consultation*, Canberra, 22 December 2009.

37 These integrated agency responses to child protection are discussed in Ch 13.

38 The unit is part of PoliceLink, the former Police Assistance Line.

39 NSW Police Force, *Children—Sex Crimes Squad* <www.police.nsw.gov.au/community_issues/children> at 14 March 2010

40 The MDC is a specialist program that includes specialist police investigators, SOCITs, Child Protection, Centres Against Sexual Assault and the Victorian Institute of Forensic Medicine 'to provide an integrated response to victims of sexual assault': Government of Victoria Department of Human Services, *Good Practice: A Statewide Snapshot 2009* (2009), 2.

17.41 The SOCITs are staffed by specialist police investigators and specialist sexual assault counsellors. The SOCIT is a victim-centred service delivery and investigative model,[41] which aims to enhance the chances of prosecution and victim satisfaction with the handling of cases. It was developed by Victoria Police in response to the VLRC's 2004 report on sexual offences.[42]

17.42 The SOCIT approach may be particularly instructive in relation to dealing with intra-familial sexual abuse because it works with the non-offending parent, provides counselling support to the family during the emotional turmoil of a police investigation, and refers the family to other services and long-term counselling. This is important where the police investigation results in an offending parent being charged or imprisoned or subject to non-contact orders which can result in loss of income for the family. In addition, the SOCIT is able to work proactively with schools, counsellors and other agencies before interviewing the victim to improve the experience and outcome for the victim.

17.43 In Western Australia, the Child Assessment and Interview Team (CAIT) has similar functions. The CAITs are staffed by Department of Child Protection caseworkers and specialist police officers who jointly interview child abuse victims.

Commissions' views

17.44 The Commissions have heard that specialised police responses to sexual assault are important for complainants. Police services should provide specialised training for investigators of sexual assault aimed at, for example, increasing awareness of the concerns and needs of victims, and on evidence collection.

17.45 The nature of the specialised police roles in relation to family violence generally, in each jurisdiction, are summarised in Chapter 20. In that chapter, the Commissions propose that each state and territory police force should ensure that: victims have access to a primary contact person within the police, who specialises in, and is trained in, family violence issues; a police officer is designated as a primary point of contact for government and non-government agencies involved in the family violence system; specially trained police have responsibility for supervising, monitoring or assuring the quality of police responses to family violence incidents, and providing advice and guidance to operational police in this regard; and there is a central forum or unit responsible for policy and strategy concerning family violence within the police.[43] The co-location of sexual assault and family violence police units may also be desirable. Co-location may ensure exchange of information and facilitate multiple responses (criminal and civil) to family violence.

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41 Victoria Police, *Living Free from Violence—Upholding the Right: Victoria Police Strategy to Reduce Violence Against Women and Children 2009–2014* (2009), 19.

42 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004).

43 See Proposal 20–1.

17.46 However, not all sexual assault offences are dealt with by specialist police or units and considerable barriers may exist for complainants of sexual assault, particularly in rural, remote and Indigenous communities, including problems with access to police and forensic examination facilities.

Question 17–3 Are specialised police and integrated agency responses effective in reducing the attrition of sexual assault cases during the police investigation phase? If not, what further measures should be taken?

Question 17–4 What impact are specialised police units having on improving collection of admissible evidence and support for victims of sexual assault in a family violence context?

Question 17–5 Should specialised sexual assault police units be established in jurisdictions that do not have them?

The prosecution phase

17.47 The decision whether to commence or continue prosecution of sexual assault offences is a significant aspect of the criminal justice process. The DPPs in each of the Commonwealth, states and territories exercise considerable discretion in deciding both whether to prosecute alleged offenders and how any such prosecution should proceed. This discretion is subject to prosecution policies or guidelines in each jurisdiction. The exercise of prosecutorial discretion has nevertheless been characterised as 'one of the most important but least understood aspects of the administration of criminal justice'.[44]

The decision to prosecute

17.48 Each of the Australian jurisdictions has adopted similar criteria for the exercise of the discretion to prosecute an alleged offender. While there is variation between policies, prosecutorial discretion is guided by two primary considerations: first, the sufficiency of the evidence and, secondly, the public interest.

17.49 The first consideration informing the decision is whether the evidence is sufficient to justify the institution or continuation of a prosecution. There must be enough admissible, substantial and reliable evidence not only to support a prima facie case but also to provide a reasonable prospect of a conviction being secured.[45]

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44 D Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004), 1.

45 Office of the Director of Public Prosecutions (Cth), *Prosecution Policy for the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*, cls 2.4–2.5; Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, cl 4(2); Office of the Director of Public Prosecutions (Vic), *Prosecution Policies and Guidelines*, cl 2.1.3; Office of the Director of Public Prosecutions (Qld), *Director's Guidelines*, cl 4(i); Office of the Director of Public Prosecutions (SA),

17.50 An evaluation as to whether there is a reasonable prospect of conviction requires an assessment of a number of factors including: the availability, competence, credibility and reliability of witnesses; the likely impression that the witnesses will make on the judge or jury; the admissibility of evidence such as a confession by the accused; and any lines of defence open to the accused.[46]

17.51 Once the prosecutor is satisfied that the evidence is sufficient to justify the institution or continuation of a prosecution, the second key consideration is whether it is in the public interest to pursue the prosecution.[47] The factors which are taken into account in determining the public interest are multifaceted and non-exhaustive. These include: the seriousness or triviality of the alleged offence; mitigating or aggravating circumstances impacting upon the appropriateness of the prosecution; the age, mental state, physical health or vulnerability of the alleged offender or victim; the period of time elapsed since the offence; the background and prior convictions of the alleged offender; the attitude of the victim of the alleged offence to the prosecution; the actual or potential harm occasioned by the alleged offence; the length and expense of a trial; and the necessity to maintain public confidence in the administration of justice.[48]

Prosecution Policy, 3; Office of the Director of Public Prosecutions (WA), *Statement of Prosecution Policy and Guidelines* (2005), cl 24; Office of the Director of Public Prosecutions (Tas), *Prosecution Guidelines*; Office of the Director of Public Prosecutions (ACT), *Prosecution Policy*, cl 2.3; Office of the Director of Public Prosecutions (NT), *Guidelines*, cl 2.1.

46 Office of the Director of Public Prosecutions (Cth), *Prosecution Policy for the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*, cls 2.6–2.7; Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, cl 4(2); Office of the Director of Public Prosecutions (Vic), *Prosecution Policies and Guidelines*, cls 2.1.4–2.1.5; Office of the Director of Public Prosecutions (Qld), *Director's Guidelines*, cl 4(i); Office of the Director of Public Prosecutions (SA), *Prosecution Policy*, 3; Office of the Director of Public Prosecutions (WA), *Statement of Prosecution Policy and Guidelines* (2005), cl 29; Office of the Director of Public Prosecutions (Tas), *Prosecution Guidelines*; Office of the Director of Public Prosecutions (ACT), *Prosecution Policy*, cl 2.4; Office of the Director of Public Prosecutions (NT), *Guidelines*, cl 2.4.

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

48 Office of the Director of Public Prosecutions (Cth), *Prosecution Policy for the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*, cls 2.9–2.10; Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, cl 4(3); Office of the Director of Public Prosecutions (Vic), *Prosecution Policies and Guidelines*, cl 2.1.10; Office of the Director of Public Prosecutions (Qld), *Director's Guidelines*, cl 4(ii); Office of the Director of Public Prosecutions (WA), *Statement of Prosecution Policy and Guidelines* (2005), cl 31; Office of the Director of Public Prosecutions (SA), *Prosecution Policy*, 4; Office of the Director of Public Prosecutions (Tas),

17.52 Guidelines also specify a number of factors that must not influence a decision to prosecute. These include: the race, religion, sex or beliefs of the alleged offender; personal feelings concerning the alleged offender or victim; possible political advantage to the Government or a political group; or the possible personal or professional effect of the decision to prosecute on those making that decision.[49]

17.53 While the attrition of sexual assault cases is 'highest at the police stage ... prosecutors regularly exercise their discretion to discontinue cases'.[50] The exercise of prosecutorial discretion is one of the key points of attrition for sexual assault cases. DPPs are regularly subject to criticism for the exercise of their discretion in adult and child sexual assault matters. This has often been due to the lack of public transparency in how these decisions are made.

Prosecution of sexual offences

17.54 In recent years considerable attention has been focused on the way in which sexual offences are prosecuted.[51] In particular, an important quantitative study by Lievore on the exercise of prosecutorial discretion in adult sexual assault cases across the Australian jurisdictions was published in 2004.

17.55 The Lievore study analysed 141 case files from five jurisdictions in which the primary charge was rape or the equivalent sexual assault offence. This involved 148 victims and 152 defendants. Overwhelmingly the victims in this study were women (99%).[52] Most had been sexually assaulted by someone known to them (76%) with 15% having been assaulted by a current partner, 15% by a family member, 11% by a former partner and 35% by another known person.[53]

Prosecution Guidelines; Office of the Director of Public Prosecutions (ACT), *Prosecution Policy*, cl 2.5; Office of the Director of Public Prosecutions (NT), *Guidelines*, cl 2.5.

49 Office of the Director of Public Prosecutions (Cth), *Prosecution Policy for the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*, cl 2.13; Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, cls 4(i)–(v); Office of the Director of Public Prosecutions (Vic), *Prosecution Policies and Guidelines*, cl 2.1.12; Office of the Director of Public Prosecutions (Qld), *Director's Guidelines*, cl 4(iii); Office of the Director of Public Prosecutions (WA), *Statement of Prosecution Policy and Guidelines* (2005), cl 33; Office of the Director of Public Prosecutions (SA), *Prosecution Policy*, 6; Office of the Director of Public Prosecutions (Tas), *Prosecution Guidelines*; Office of the Director of Public Prosecutions (ACT), *Prosecution Policy*, cl 2.7; Office of the Director of Public Prosecutions (NT), *Guidelines*, cl 2.7.

50 D Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004), 3.

51 See, eg, Western Australian Community Development and Justice Standing Committee, *Inquiry into the Prosecution of Assaults and Sexual Offences* (2008); Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, *Responding to Sexual Assault: The Challenge of Change* (2005); D Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004); Crime and Misconduct Commission (Qld), *Seeking Justice: An Inquiry into How Sexual Offences are Handled by the Queensland Criminal Justice System* (2003); G Samuels, *Review of the New South Wales Director of Public Prosecutions' Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts* (2002).

52 D Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004), 25.

53 Ibid, 28–29.

17.56 Fifty-three of the cases in this study were withdrawn (38 prior to indictment; 15 after indictment). These involved 21 defendants known to the victim, 11 current partners, nine ex-partners, seven strangers and five family members. Almost half of the cases (24) were withdrawn because the victim did not wish to proceed, and in the remaining 29 cases the decision was based on prosecutorial assessment of the prospect of conviction and victim credibility.

17.57 Importantly the files indicated that 'the prosecutors believed that the victims who chose to withdraw from prosecution were telling the truth'.[54] Some of the reasons why particular victims sought to withdraw included:

- Two indigenous victims who alleged that they were assaulted by family members withdrew because their families had dealt with the matter. It is not clear what this means.
- A woman who was afraid of her partner refused to testify against him.
- The victim did not want her partner to go to jail; she simply wanted an apprehended violence order.
- A woman who was allegedly sexually assaulted by her partner felt sick at the thought of giving evidence at the committal hearing. The file contained a note that there was little prospect of success.

  ...
- A woman did not want to face the emotional trauma of giving evidence against her ex partner.
- The victim was terrified of her ex partner and there was a history of domestic violence in the relationship. She could not go through with the trial despite being informed about protective measures available.
- The victim alleged that she was sexually assaulted and threatened with a knife by her ex-partner when he visited her house to see their children. She was terrified of the defendant and changed her story, saying that she consented to sex.[55]

17.58 There were significant differences between the cases that were withdrawn and those that proceeded. In those that proceeded, the victim was more likely to have been injured, to have expressed non-consent either in words or through resistance, the assault was more severe in some way (for example, it involved a weapon), additional evidence was available, the defendant used force, the defendant was 'non-Caucasian',[56] and the defendant was a stranger.[57]

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54 Ibid, 30.
55 Ibid, 30.
56 'This finding should be considered in the light of the large proportions of Indigenous defendants in the Northern Territory and Western Australian samples': Ibid, 33.
57 Ibid, 32–33.

17.59 In terms of outcomes, 33% of cases were finalised by guilty plea (half of these pleas were entered after negotiations which resulted in the level of the charges or number of charges being reduced); and 29% of cases proceeded to trial (38% of which resulted in a guilty verdict).[58] Importantly, for the purposes of this Inquiry, cases 'involving strangers and other known defendants were more likely than cases involving intimate or family relationships to proceed through the criminal justice process and to end in conviction'.[59]

17.60 Some of the conclusions of the Lievore study are particularly relevant to cases involving sexual assault in a family violence context and to the range of evidence law and other issues discussed in Chapter 18.

> There is ample empirical evidence, including the results of this study, that attrition of sexual assault cases at the prosecution stage is usually related to evidentiary matters, which are most complex in cases where the victim and the defendant are acquainted. These cases usually come down to word against word, with little or no corroborating evidence. The defence usually centres on consent or the defendant's mistaken belief in consent, which is more likely to succeed if there has been prior consensual sex. Cases involving current or former partners are often discontinued due to victim withdrawals and insufficient prospects of conviction. It is understandable then that experienced prosecutors, who are mindful of the limits imposed by the substantive, evidence and procedure laws of sexual assault, would assess the prospects of conviction by considering prior relationship in combination with other factors, such as the strength of the evidence. At the same time, it is also clear that cultural assumptions about consensual sex impact on legal definitions of consent and the conduct of trials.[60]

Charge and fact bargaining

17.61 While the police make initial decisions about what charges are to be laid against a person, the prosecution also has the discretion to lay additional charges and amend the charges in a number of ways, including by reducing them in terms of the number of charges and the seriousness of the charges.

17.62 While the critical question generally centres on what charges the evidence can support, there may also be negotiation between the defence and the prosecution known as 'charge and fact bargaining' whereby the number and level of charges may be reduced in return for the defendant entering a guilty plea to some or all charges.[61] Such bargaining may also involve the prosecution agreeing to present a recommendation for sentence, including on the basis of an agreed summary of what happened.

17.63 Lievore found that half of the guilty pleas in her study (33% of cases in her study were finalised this way) resulted through negotiations to reduce the level or

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58 Ibid, 37.
59 Ibid.
60 Ibid, 49.
61 See discussion in Ibid, 9–10; G Samuels, *Review of the New South Wales Director of Public Prosecutions' Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts* (2002).

number of the charges.[62] Interviews with Crown Prosecutors revealed that they 'routinely look for opportunities to negotiate charges rather than risk an acquittal'.[63]

17.64 While charge and fact bargaining may be criticised as placing the interests of expediency over those of justice, these processes can also be seen as vital to the administration of the legal system.

> Charge negotiations are a legitimate means of resolving criminal litigation. The process is widely viewed as fundamental to the efficient operation of an under-resourced system and comprises a relatively informal process that incorporates both adversarial and cooperative aspects. In a situation of uncertainty, the prosecution and defence exchange risks and benefits to achieve mutually satisfactory goals. Prosecutors avoid a costly trial and the risk of an acquittal, while the defendant avoids the risk of additional charges or facing a maximum sentence. [64]

17.65 Some victims express dissatisfaction about charge negotiation and fact bargaining, often because they are not consulted about the process or the outcome. As discussed in more detail below, while it may be desirable for the prosecution to seek the views of a complainant before charge or fact bargaining, this is not always required.[65] An example of how charge bargaining may be perceived by victims was provided, in the course of the present Inquiry, by a women's legal service coordinator.

> [There was] one case where [a young] Indigenous … woman went through the whole process of providing evidence against her ex-partner for assaulting her. There were eight charges pending and each involved a serious domestic violence incident. The matter was resolved by the prosecution doing a deal with the defence. They agreed to dropping five charges and three were downgraded so that the ex-partner ended up with only a four month suspended sentence. The victim was not consulted and neither were we as the victim's advocate in the matter. To have something like that happen sends a negative message not only to that particular woman but to all other women. Essentially, although the law may in essence appear to be colour blind, in practice it is not always colour blind. Before an Indigenous or Culturally and Linguistically Diverse woman can even get her matter to trial she needs to convince the police to proceed with her matter and then she needs to navigate the complicated pre-trial processes. This is all before the matter proceeds to trial where the woman may have to counter issues/stereotypes that intersect between racism and sexism. On top of this, their access to justice is also hampered by the lack of suitable interpreters and by the general lack of cultural sensitivity and awareness of professionals within system.

The views of victims

17.66 Prosecutorial guidelines take into account the interests of victims in various ways. There is some variation across jurisdictions in relation to the extent to which regard must be had to the wishes of victims in instituting or continuing the prosecution of an alleged offender, or in charge and fact bargaining.

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62 D Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004), 1.

63 Ibid, 2.

64 Ibid, 9.

65 See G Samuels, *Review of the New South Wales Director of Public Prosecutions' Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts* (2002).

17.67 The guidelines in each jurisdiction stipulate that one of the factors that may be relevant in determining whether the public interest requires a prosecution, includes the attitude of the alleged victim to a prosecution.[66] Most jurisdictions have additional guidelines stipulating requirements to engage witnesses in decision-making processes. For example:

- The Commonwealth guidelines state that the views of victims may be taken into account where they are available and where it is appropriate in determining whether it is in the public interest to commence or discontinue a prosecution, agree to a charge negotiation or decline to proceed with a prosecution after committal.[67]

- The NSW guidelines state that the victim must be advised whenever the DPP is considering whether or not to discontinue a prosecution and the victim's views must be sought. The victim should also be consulted where the DPP is considering whether to reduce a charge in scope or severity, where charge negotiations are undertaken, or where a statement of agreed facts is being prepared. The views of the victim about the acceptance of a plea of guilty and the contents of a statement of agreed facts will be taken into account before final decisions are made but those views are not alone determinative.[68]

- The Victorian legislation and guidelines state that the DPP is obliged to have regard to the need to ensure that the prosecutorial system gives appropriate consideration to the concerns of the victims of crime.[69] In exercising the power to discontinue a prosecution, the views of the victim or, where appropriate, the relatives of the victim are sought. Their views are taken into account but are not determinative.[70]

Specific provisions in relation to sexual assault

17.68 Some DPP policies and guidelines contain specific provisions in relation to victims of sexual assault.

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66 Office of the Director of Public Prosecutions (Cth), *Prosecution Policy for the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*, cl 2.10(o); Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, cls 4(3.20); Office of the Director of Public Prosecutions (Vic), *Prosecution Policies and Guidelines*, cl 2.1.10(n); Office of the Director of Public Prosecutions (Qld), *Director's Guidelines*, cl 4(ii)(l); Office of the Director of Public Prosecutions (WA), *Statement of Prosecution Policy and Guidelines* (2005), cl 31(k); Office of the Director of Public Prosecutions (SA), *Prosecution Policy*, cl 5(o); Office of the Director of Public Prosecutions (Tas), *Prosecution Guidelines*; Office of the Director of Public Prosecutions (ACT), *Prosecution Policy*, cl 2.5(q); Office of the Director of Public Prosecutions (NT), *Guidelines*, cl 2.5(21).

67 Office of the Director of Public Prosecutions (Cth), *Prosecution Policy for the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*, cls 4.6, 6.18(l), 6.23. See also cl 5.3.

68 See Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, cls 7, 9, 19, 20.

69 *Public Prosecutions Act 1994* (Vic), ss 24(c), 36(3), 38(3).

70 Office of the Director of Public Prosecutions (Vic), *Prosecution Policies and Guidelines*, cls 2.3.7, 7.1.1.

17.69 The NSW guidelines provide that requests by victims of sexual offences to discontinue proceedings, where freely made, should be accorded significant weight. The guidelines note, however, that the expressed wishes of victims may not coincide with the general public interest. In such cases, particularly where there is other evidence implicating the accused person, there is a history of similar offending or where the gravity of the alleged offence requires it, the general public interest must prevail.[71]

17.70 The Victorian guidelines provide that in the great majority of cases involving allegations of sexual offences, the public interest will strongly suggest that the prosecution should proceed.[72] The guidelines also specify that careful attention must be given to the public interest test in 'boyfriend/girlfriend' cases involving sexual offences.[73] In these cases, the guidelines note that, although the evidence indicates that 'an offence has technically been committed', the objective circumstances of the offence in combination with the personal circumstances of the complainant and offender do not satisfy the 'public interest test'.[74]

17.71 The Queensland guidelines contain a range of provisions dealing with sexual offences, including child sex offences. Where there is sufficient reliable evidence to warrant a prosecution, the guidelines provide that there will seldom be any doubt that the prosecution is in the public interest.[75]

17.72 The Northern Territory guidelines note that prosecutions that involve offences committed in the context of family violence, including sexual assault, require special attention. The guidelines cover the procedures which must be followed where a victim indicates that they do not wish to give evidence.[76] The guidelines note that suitable prosecutions should proceed without the evidence of an unwilling victim.[77]

Information and assistance

17.73 Australian jurisdictions all recognise that victims of crimes are entitled to receive information about the prosecution of the alleged offender. Services are in place to keep victims and witnesses informed and to assist them with navigating the criminal justice process. In each state and territory, witness and victim support services offer some or all of the following services:

- assisting clients to understand the legal process and court procedures;

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71 Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, cl 19.
72 Office of the Director of Public Prosecutions (Vic), *Prosecution Policies and Guidelines*, cl 2.9.1.
73 Ibid, cl 2.9.2.
74 Ibid. The guideline provides a list of factors to which consideration should be given when deciding whether prosecution is in the public interest, which relate to the subjective features of the complainant and the alleged offender and the nature of their relationship.
75 Office of the Director of Public Prosecutions (Qld), *Director's Guidelines*, cl 5(iv).
76 Office of the Director of Public Prosecutions (NT), *Guidelines*, cl 21.
77 Ibid, cl 21.3.

- offering tours of court to familiarise clients;
- providing information on the status and progress of prosecution proceedings;
- accompanying clients to court and while they are waiting to give evidence;
- explaining the responsibility and rights of witnesses/victims;
- liaising between clients and prosecutors or police;
- referring clients to appropriate welfare, health, counselling and other support services or providing such services directly;
- assisting with victims' compensation claims; and
- assisting with the preparation of victim impact statements.

17.74 The Commonwealth Victims of Crime Policy provides that victims should, on request, be kept informed in a timely manner about the progress of a prosecution.[78] Where a victim is required to give evidence, any inconvenience to the victim should be minimised as far as possible and victims should be advised about their role as a witness.[79]

17.75 New South Wales guidelines provide that victims, whether witnesses or not, should have explained to them, at an early stage of proceedings, the prosecution process and their role in it.[80] The New South Wales Charter of Victims' Rights, contained within the *Victims' Rights Act 1996* (NSW), provides for numerous safeguards to be afforded to victims. Victims are to be informed about the investigation of the alleged crime, the prosecution of the accused, the outcome of any bail applications, and their role as a witness in the trial.[81] Although a victim is entitled to make a formal complaint if the Charter is not complied with, non-compliance does not give victims any civil cause of action or legal right.[82]

17.76 The NSW DPP is required to seek the services of the Witness Assistance Service as early as possible in cases involving sexual assault, domestic violence or child victims and witnesses. The Service can assist with providing information, identifying special needs of victims and witnesses, referring victims for counselling and support, providing court preparation and coordinating court support.[83]

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78 Office of the Director of Public Prosecutions (Cth), *Victims of Crime Policy* (2010), cls 4–6.
79 Ibid, cl 5.
80 Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, cl 19.
81 *Victims' Rights Act 1996* (NSW) s 6.
82 Ibid, s 8.
83 Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, cl 19.

17.77 In 2006, the Victorian Government passed the *Victims' Charter Act 2006* (Vic), which sets out principles governing how participants in the criminal justice system, including the OPP, should respond to victims of crime.[84] The Charter principles set out the rights of the victim to be informed of the progress of any investigation, prosecution or bail application involving the alleged offender.[85] In addition, the Charter provides that victims should be provided with information about the court process, their role as a witness and their entitlements to support services. While the Act does not create legal rights or give rise to any civil cause of action, victims can complain to the OPP if the Charter principles have not been upheld.[86]

17.78 The Victorian OPP has a Witness Assistance Service which is available to all prosecution witnesses and victims of crime who are involved in cases handled by the OPP. This service provides information and support, and is staffed by professionals experienced in witness and victim support. The role of the service is to ensure that witnesses have been made aware of their rights and the processes they are likely to experience, and to ensure they are kept aware of the progress of their case.[87]

Commissions' views

17.79 The available data appear to indicate that substantial numbers of sexual assault cases are discontinued by prosecutors—both before and after indictment. Many of these, perhaps up to half, are withdrawn because of the attitude of the victim. While some of these cases would also have encountered evidentiary issues—and hence may have been subject to 'subtle' encouragement to withdraw—others feared re-victimisation from the defendant or the court process, and it is likely many withdraw in the context of ongoing family violence.

17.80 This suggests that it may be possible, and desirable, to reduce attrition rates at the prosecution stage by providing additional support and information to victims. Lievore identified a number of measures that could be implemented to benefit prosecutors and complainants. These include:

- inter-sectoral training between prosecution agencies, victim support services, and forensic services;

- helping victims to 'see' their cases through a legal lens, so that they understand why cases are discontinued, as well as helping prosecutors to remember that most people do not think in a legal manner;

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84 Office of the Director of Public Prosecutions (Vic), *Prosecution Policies and Guidelines*, cl 7.2.1.

85 *Victims' Charter Act 2006* (Vic) ss 6–10.

86 Office of the Director of Public Prosecutions (Vic), *Prosecution Policies and Guidelines*, cl 7.2.8; *Victims' Charter Act 2006* (Vic) ss 20–22.

87 Office of the Director of Public Prosecutions (Vic), *Prosecution Policies and Guidelines*, cl 7.1.2.

- greater education of the community about not delaying reporting, not showering, and having a medical examination immediately after the attack; and

- witness assistance services and sexual assault centres to take on greater advocacy, training and educational roles.[88]

17.81 The Commissions are interested in comments on whether these, or other, steps should be taken to reduce the attrition of sexual assault cases during the prosecution phase, including in relation to sexual assault perpetrated in a family violence context.

17.82 In addition, it may be possible to identify best practice in the policies and guidelines of DPPs in dealing with sexual assault cases, including, for example, in relation to referral of victims and witnesses to relevant support services; consultation with victims in relation to prosecutorial decisions; and the provision of information and assistance more generally.

17.83 The Commissions are especially interested to learn whether any policies, practices or guidelines should be introduced to deal with sexual assault perpetrated in a family violence context.

Proposal 17–2 Commonwealth, state and territory Directors of Public Prosecution should ensure that prosecutorial guidelines and policies:

(a) facilitate the referral of victims and witnesses of sexual assault to appropriate welfare, health, counselling and other support services;

(b) require consultation with victims of sexual assault about key prosecutorial decisions including whether to prosecute, discontinue a prosecution or agree to a charge or fact bargain;

(c) require the ongoing provision of information to victims of sexual assault about the status and progress of proceedings;

(d) facilitate the provision of assistance to victims and witnesses of sexual assault in understanding the legal and court process;

(e) ensure that family violence protection orders or stalking intervention orders are sought in all relevant circumstances; and

(f) require referral of victims and witnesses of sexual assault of victims to providers of personal legal advice in related areas, such as family law and victims' compensation.

88 D Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004), 53.

Question 17–6 What measures should be taken to reduce the attrition of sexual assault cases during the prosecution phase, including in relation to sexual assault committed in a family violence context?

Question 17–7 Are there any further prosecutorial guidelines and policies that could be introduced to reduce the attrition of cases of sexual assault committed in a family violence context?

Committals

17.84 Before an adult charged with an indictable sexual offence can be sent for trial, a committal hearing may be held.[89] Committal hearings or proceedings are a preliminary examination of the evidence by a magistrate or other judicial officer. Where the judicial officer finds there is sufficient evidence to support a conviction, the accused is committed to stand trial in a higher court.

17.85 At the committal stage, the defendant may apply to have witnesses produced for cross-examination. In many cases a committal hearing will be determined on the basis of documentary evidence alone, which is referred to as a 'paper' or 'hand-up' committal.

17.86 The purposes of committal proceedings include ensuring the defendant knows the case against him or her and that a trial is justified.[90] The process has also come to provide an opportunity for the parties to: test evidence; filter out weak cases; refute evidence; identify early pleas; clarify issues before trial; and refine charges.[91]

17.87 Four key issues for complainants in sexual offence proceedings have been identified as arising from the committal process:

- The victim is required to give evidence not once but twice and be subject to cross-examination at both committal and trial, exacerbating the stress of the court proceedings.
- Cross-examination of complainants at committal is often more rigorous and intimidating because there is no jury present.
- The experience of cross-examination at committal often leads complainants to seek to have the proceedings discontinued.

89 That is, unless an ex-officio indictment is presented.

90 See, eg, J Willis and D Brereton, *The Committal in Australia* (1990); *Barton v The Queen* (1980) 147 CLR 75, 99; *Grassby v The Queen* (1989) 168 CLR 1, 15.

91 Queensland Department of Justice and Attorney-General, *Review of the Civil and Criminal Justice System in Queensland* (2008), 162.

- The final disposition of the proceeding is delayed.[92]

17.88 The following discussion considers options for reform to minimise the impact of cross-examination at committal on victims of sexual assault.

Cross-examination at committal

17.89 All state and territory jurisdictions place restrictions on the right to cross-examine witnesses at committal hearings.[93]

17.90 Committal proceedings in NSW for all indictable offences proceed by way of tendering the written statements of adult prosecution witnesses, unless the magistrate directs the witness to attend the committal hearing.[94] The magistrate must be satisfied that there are 'substantial reasons' for the witness to attend (unless the other party agreed to the witness attending). Regardless of whether a written statement or recording has been made and can be tendered, a complainant in a sexual offence who has a cognitive impairment or was under 16 years at the time of the alleged acts or who is under the age of 18 years at the time of the trial cannot be directed to attend the committal proceedings.[95]

17.91 In Victoria, leave to cross-examine in a committal for a sexual offence will not be granted where the complainant is a child or person with a cognitive impairment and they made a written or recorded statement which was served in the hand-up brief. Other witnesses, including adult complainants of sexual assault, may only be cross-examined with the court's leave. Before leave may be granted, the defence must identify the issue on which they want the witness to be cross-examined and provide a reason why the evidence of the witness is relevant to that issue. The court must then be satisfied of those matters and that the cross-examination of the witness on that issue is justified having regard to a list of factors.[96] Special mentions are held for this purpose.

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92 Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, *Responding to Sexual Assault: The Challenge of Change* (2005), 120.

93 *Criminal Procedure Act 1986* (NSW) s 91; *Criminal Procedure Act 2009* (Vic) ss 123–124; *Evidence (Protection of Children) Amendment Act 2003* (Qld) ss 21AG, 21AI; *Summary Procedure Act 1921 (SA)* s 106(3); *Magistrates Court Act 1930* (ACT) s 90AB; *Justices Act 1928* (NT) s 105AA. Western Australia and Tasmania have effectively abolished committal hearings and committal to the higher court takes place administratively.

94 *Criminal Procedure Act 1986* (NSW) s 91; ch 3, div 2.

95 Ibid s 91(7A)–(8).

96 *Criminal Procedure Act 2009* (Vic) ss 123–124. See also *Summary Procedure Act 1921* (SA) s 106(3), which provides that leave to call a child under the age of 12 years for oral examination must not be granted unless the court is satisfied that the interests of justice cannot be adequately served except by doing so.

17.92 The Queensland[97] and Northern Territory[98] Governments have both recently expressed an intention to enact further restrictions on the attendance of complainants at committal hearings, in accordance with review recommendations.

Commissions' views

17.93 The Commissions agree that there is 'little or no benefit in requiring that complainants give evidence twice'.[99] There should be a complete prohibition in all states and territories on complainants in sexual offence proceedings being required to attend committal hearings in person. This conclusion is consistent with the recommendations in *Seen and Heard: Priority for Children in the Legal Process* (ALRC 84). In ALRC 84, the ALRC and the Human Rights and Equal Opportunity Commission (HREOC) recommended that child witnesses should not give evidence in person at any committal hearing.[100] The rationale in support of the prohibition on children attending applies equally to adult complainants.

Proposal 17–3 State and territory legislation should prohibit any complainant in sexual assault proceedings from being required to attend to give evidence at committal proceedings. Alternatively, child complainants should not be required to attend committal proceedings and, for adult complainants, the court should be satisfied that there are special reasons for the complainant to attend.

Joint or separate trial

17.94 Sexual assault cases—especially those within a family violence context—commonly involve multiple incidents and multiple complainants. The following discussion deals with situations where there are two or more complainants who have allegedly been sexually assaulted by the same defendant—for example, in a family context, a number of siblings may allege that a parent has sexually abused them.

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97 Queensland Department of Justice and Attorney-General, *Review of the Civil and Criminal Justice System in Queensland* (2008). Recommendation 45 of that report recommended restrictions on the right to cross-examine witnesses. The Queensland Government has indicated its general agreement with the recommendations in respect of committals and has expressed its intention to implement them by statutory amendment: Queensland Government, *The Queensland Government's Response to the Review of the Civil and Criminal Justice System in Queensland* (2009), 12–13.

98 Northern Territory Law Reform Committee, *Report on Committals*, Report 34 (2009). Recommendation 10 favoured a model based on *Criminal Procedure Act 2009* (Vic) s 124. On 10 December 2009, Delia Lawrie, the Attorney-General of the Northern Territory, announced that the government would adopt all recommendations contained in the report: D Lawrie (NT Attorney-General), 'New Process for Committal Hearings' (Press Release, 10 December 2009).

99 Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, *Responding to Sexual Assault: The Challenge of Change* (2005), 130.

100 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), 319, Rec 95.

17.95 In such situations, the prosecution is likely to make a pre-trial application to have the counts against the defendant heard in a joint trial, rather than separate trials. The defence, in contrast, is more likely to apply for separate trials for each offence. The power to order a joint trial is discretionary and is exercised in order to prevent prejudice to the defendant.[101] There is no limit to the circumstances which will justify separate trials. However, two factors which have received detailed consideration by the High Court are: charges where evidence in relation to one count is not admissible in relation to another, but is prejudicial; and where the charges are for sexual offences.[102]

17.96 The threshold question for holding a joint trial is whether or not each complainant's evidence will be admissible in respect of the charges involving the other complainant or complainants (that is, whether such evidence is cross-admissible). Laws of evidence affecting the admissibility of tendency or coincidence evidence (under the uniform Evidence Acts), and as propensity or similar fact evidence at common law, are relevant in this context. The nature and admissibility of these kinds of evidence is discussed in detail in Chapter 18.

17.97 Decisions to hold separate trials or refuse to admit relevant tendency or propensity evidence about a defendant's sexual behaviour are considerable barriers to the successful prosecution of sex offences.[103]

Implications of joint and separate trials

17.98 When deciding whether to order joint or separate trials, a trial judge needs to determine whether each complainant's evidence will be cross-admissible. The Tasmania Law Reform Institute (TLRI) and the VLRC have noted the possibility of prejudice to defendants arising from joint trials, because jurors 'might use evidence relating to an offence charged in one count to decide that the person has also committed a different offence, even though there may be insufficient evidence to support a conviction for the second offence'.[104] It is commonly believed that jurors will:

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101 *Criminal Procedure Act 1986* (NSW) s 21(2); *Criminal Procedure Act 2009* (Vic) s 194; *Criminal Code* (Qld) s 597A(1AA); *Criminal Procedure Act 2004* (WA) s 133; *Criminal Law Consolidation Act 1935* (SA) s 278(2a); *Criminal Code* (Tas) s 326(3); *Crimes Act 1900* (ACT) s 264; *Criminal Code* (NT) s 341.

102 See ThomsonReuters, *The Laws of Australia* (2010), vol 11 Criminal Procedure, 11.7, [39] (as at 22 March 2010). See, eg, *De Jesus v The Queen* (1986) 61 ALJR 1; *Sutton v The Queen* (1984) 152 CLR 528.

103 In NSW, Gallagher and Hickey compared the outcomes of joint trials with the outcomes from separate trials involving multiple complainants against the same accused. They found that 'the proportion of guilty and not guilty verdicts [was] quite close when there was one trial, while for multiple trials, the vast majority result[ed] in not guilty verdicts': P Gallagher and J Hickey, *Child Sexual Assault: An Analysis of Matters Determined in the District Court of New South Wales during 1994* (1997) Judicial Commission of New South Wales, 20. The study examined the prosecution of 158 child sex offences in joint trials and 43 such offences in separate trials.

104 Tasmania Law Reform Institute, *Evidence Act 2001 Sections 97, 98 & 101 and Hoch's Case: Admissibility of Tendency and Coincidence Evidence in Sexual Assault Cases with Multiple Complainants*, Issues Paper 15 (2009), [3.3.14]; quoting Victorian Law Reform Commission, *Sexual Offences: Discussion Paper* (2001), [8.51].

> assume that past behaviour is an accurate guide to contemporary conduct, and knowledge of other misconduct may cause the jury to be biased against the accused. In regard to some offences, such as sexual offences committed against children, the nature of the offence is said to heighten the potential for prejudice to … the accused by admitting propensity evidence.[105]

17.99 This view needs to be balanced against the research on juries that shows that a significant proportion of both jurors and jury-eligible citizens believe in various myths and hold a range of prejudices and misconceptions about women and children who report sexual assault. These include the beliefs that: delay in complaint is evidence of fabrication; sexual assault will result in physical evidence and injury; a rape victim would scream and shout; a rape victim would be visibly upset in court; children are easily manipulated into giving false reports of sexual abuse; and a victim of sexual abuse will avoid the offender.[106]

17.100 Coupled with this is evidence from a study, by Dr Suzanne Blackwell, which found that '92 percent of defence counsel … utilized one or more of the misconceptions about child sexual assault as the platform for the defence case during cross-examination of the child complainant and in opening or closing addresses to the jury'.[107] Blackwell also reported that the jurors in her New Zealand study did not regard the child's evidence-in-chief as 'evidence' and 'require[d] a high threshold of corroborative evidence to convict even if they believed the child complainant'.[108]

17.101 The evidence from Blackwell's study and other jury studies suggests that child sexual assault complainants are at a considerable disadvantage as witnesses in criminal trials. Because of low conviction rates in sexual assault trials, juror beliefs about sexual assault and adults' experiences as complainants in sexual assault trials,[109] adult complainants are likely to be similarly disadvantaged.

17.102 Separate trials create an artificial individualised context in which the charges relating to each complainant are heard separately rather than in context. This is

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105 Tasmania Law Reform Institute, *Evidence Act 2001 Sections 97, 98 & 101 and Hoch's Case: Admissibility of Tendency and Coincidence Evidence in Sexual Assault Cases with Multiple Complainants*, Issues Paper 15 (2009), [3.3.16]; footnotes omitted.

106 N Taylor and J Joudo, *The Impact of Pre-recorded Video and Closed Circuit Television Testimony by Adult Sexual Assault Complainants on Jury Decision-Making: An Experimental Study* (2005), 59; A Cossins, 'Children, Sexual Abuse and Suggestibility: What Laypeople Think They Know and What the Literature Tells Us' (2008) 15 *Psychiatry, Psychology and Law* 153, 156; A Cossins, J Goodman-Delahunty and K O'Brien, 'Uncertainty and Misconceptions about Child Sexual Abuse: Implications for the Criminal Justice System' (2009) 16 *Psychiatry, Psychology and Law* 435, 440. See also D Koski, 'Jury Decisionmaking in Rape Trials: A Review and Empirical Assessment' (2002) 38 *Criminal Law Bulletin* 21.

107 S Blackwell, 'Child Sexual Abuse on Trial in New Zealand' (Paper presented at Criminal Law Symposium of the New Zealand Law Society, Wellington, 14 November 2008).

108 Ibid, 15–16.

109 See generally J Bargen, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault, Gender Bias and the Law Project* (1996); M Heenan and H McKelvie, *The Crimes Rape Act 1991: An Evaluation Report* (1997); J Fitzgerald, 'The Attrition of Sexual Offences from the New South Wales Criminal Justice System' (2006) 92 *Crime and Justice Bulletin* 3.

particularly the case where complainants come from the same family. The jury may not know that other children in the family have also made similar complaints. The prosecution case 'will be considerably weakened'.[110] Separate trials are said, therefore, to 'confer a significant tactical advantage on the accused'.

> The defendant will be able to conduct his defence in each trial in isolation from the other charges and will be able to more convincingly argue that each complainant has fabricated her/his evidence due to lack of corroborating evidence from other victims, thus increasing the likelihood of acquittal.[111]

A presumption of joint trial?

17.103 In 1997, Victoria established a presumption in favour of joint trial in sexual offence cases. At the same time, Victoria introduced provisions intended to overcome the test for admissibility of propensity evidence at common law.[112] The presumption is now located in s 194(2) of the *Criminal Procedure Act 2009* (Vic) and provides that:

> (2) … if in accordance with this Act 2 or more charges for sexual offences are joined in the same indictment, it is presumed that those charges are to be tried together.
>
> (3) The presumption created by subsection (2) is not rebutted merely because evidence on one charge is inadmissible on another charge.

17.104 In 2008, South Australia introduced a similar provision. Section 278(2a) of the *Criminal Law Consolidation Act 1935* (SA) states:

> (2a) if, in accordance with this Act, 2 or more counts charging sexual offences involving different alleged victims are joined in the same information, the following provisions apply:
>
> (a) subject to paragraph (b), those counts are to be tried together;
>
> (b) the judge may order a separate trial of a count relating to a particular alleged victim if (and only if) evidence relating to that count is not admissible in relation to each other count relating to a different alleged victim;

17.105 The South Australian provision modifies rules for the admissibility of evidence in sexual offence cases, in response to common law restrictions on propensity and similar fact evidence. These modifications, and those in other jurisdictions, are discussed in more detail in Chapter 18.

17.106 NSW and Queensland have considered, but specifically recommended against, the adoption of a presumption of joint trial due to concerns that juries may

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110 National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 185.

111 Ibid.

112 That is, as applied by the High Court in *Hoch v The Queen* (1988) 165 CLR 292; *Pfennig v The Queen* (1995) 182 CLR 461.

improperly use evidence in relation to one count when considering another count.[113] There are different views on the extent to which this concern may be able to be addressed through appropriate directions to the jury.

17.107 The Victorian reforms were evaluated by the VLRC in its 2004 *Sexual Offences* report. The VLRC reported that the new legislation had made it easier for sexual offence matters involving multiple complainants to be heard together.[114] The Victorian Court of Appeal had recognised that the 'mischief' to which the new provisions were directed is 'the rule of practice that had developed whereby severance was almost automatically granted' and now started from the presumption that such matters will be heard together.[115]

Commissions' views

17.108 Judges are placed in a difficult position when they make decisions about joint or separate trials in sexual offences cases. If the judge rules in favour of a joint trial which results in one or more convictions, it is said to be 'almost inevitable' that there will be an appeal against both the joinder and the trial judge's decision to admit the tendency, propensity or similar fact evidence.[116] If the appeal is successful, this 'will result in re-trials with all the attendant emotional costs to the complainants and financial costs to the State and the defendant'.[117]

17.109 In ALRC 84, the ALRC and HREOC noted that 'when the complainant's credibility is attacked' in a separate trial:

> evidence that would support his or her credibility is disallowed and the jury are kept in ignorance of the fact that there are multiple allegations of abuse against the accused. As one submission noted, '[this] is a situation which would appear to offend common sense and experience, and has the potential to cause real injustice'.[118]

17.110 Further, if separate trials are held, children involved may have to give evidence numerous times in their own trial, as well as in other trials, a process which can multiply the emotional stress experienced by child and adolescent complainants.[119] Child complainants may have protection as complainants, which may not be extended

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113 Criminal Justice Sexual Offences Taskforce (NSW Attorney General's Department), *Responding to Sexual Assault: The Way Forward* (2005), 85; Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report No 55 (Part 2) (2000), 400.

114 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), 251.

115 Ibid, 251.

116 National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 186.

117 Ibid.

118 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), 334–335.

119 Ibid, 334. For example, although a complainant's evidence may be held to be generally inadmissible in relation to the charges involving other complainants, portions of a complainant's evidence may be admissible for a non-tendency or non-propensity purpose. See also Tasmania Law Reform Institute, *Evidence Act 2001 Sections 97, 98 & 101 and Hoch's Case: Admissibility of Tendency and Coincidence Evidence in Sexual Assault Cases with Multiple Complainants*, Issues Paper 15 (2009), [3.2.2], [3.2.4].

to them as witnesses in separate trials, despite facing the same accused.[120] Adult victims of sexual offences in a family violence context also face additional trauma, especially as the pattern of offending is often long term rather than centred on one specific incident.

17.111 The Commissions consider that, in order to reduce trauma for complainants in sexual assault cases, there should be legislation creating a presumption in favour of joint trial of multiple allegations against the same defendant, based on the Victorian provisions.

Proposal 17–4 Commonwealth, state and territory legislation should:

(a) create a presumption that when two or more charges for sexual offences are joined in the same indictment, it is presumed that those charges are to be tried together; and

(b) state that this presumption is not rebutted merely because evidence on one charge is inadmissible on another charge.

Consent and joint trial

17.112 The High Court's decision in *Phillips v The Queen*[121] (*Phillips*) is considered to have application to all sexual assault trials where there are multiple complaints of sexual assault against the same defendant and where consent is a fact in issue.[122] In such a situation, the issue raised by *Phillips* is whether the evidence of the other complainants are *relevant* to whether or not the first complainant consented to sexual relations with the defendant.

17.113 If not, arguably multiple complaints of sexual assault can never be heard in a joint trial where consent is a fact in issue. *Phillips* involved a joint trial with six complainants. The High Court held that the evidence of each complainant was not cross-admissible in relation to the counts involving the other complainants on the grounds of lack of relevance. Phillips was a serial offender who was later convicted of other counts of sexual assault while awaiting the outcome of his High Court appeal.[123]

120 For example, in relation to the means of giving evidence or the coverage of vulnerable witness protections.

121 *Phillips v The Queen* (2006) 225 CLR 303.

122 See Tasmania Law Reform Institute, *Evidence Act 2001 Sections 97, 98 & 101 and Hoch's Case: Admissibility of Tendency and Coincidence Evidence in Sexual Assault Cases with Multiple Complainants*, Issues Paper 15 (2009), Part 6, 52–58; National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 231–251.

123 D Hamer, 'Similar Fact Reasoning in Phillips: Artificial, Disjointed and Pernicious' (2007) 30 *UNSW Law Journal* 609, 610.

17.114 The TLRI and the National Child Sexual Assault Reform Committee[124] have both reviewed the impact of the decision in *Phillips*,[125] and the decision has also been the subject of academic criticism.[126]

17.115 There is some case law to show that *Phillips* is being applied to prevent joint trials being held in relation to multiple allegations of sexual assaults against the same accused.[127]

Question 17–8 What impact has *Phillips v The Queen* had on the prosecution of sexual assaults where there are multiple complaints against the same defendant and consent is a fact in issue?

Question 17–9 Is there a need to introduce reforms to overturn the decision in *Phillips v The Queen*?

Pre-recorded evidence

17.116 The focus of the Commission's interest in pre-trial processes in sexual assault proceedings is on reform to reduce the trauma caused to complainants of sexual assault. In this context, one key process is the use of pre-recorded evidence, which may lessen or eliminate the need for complainants to give evidence in person at the trial. Pre-recorded evidence is recorded before the trial but the use of the evidence in court is part of the trial process and is an aspect of vulnerable witness protection. Vulnerable witness protection, in the specific context of cross-examination, is discussed in Chapter 18.

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124 The National Child Sexual Assault Reform Committee was formed in 2000 and comprises Directors of Public Prosecutions, judges, Children's Commissioners, academics, Legal Aid representatives, senior police officers, Crime Commissioners and others. The Terms of Reference of the Committee direct it, in summary, to (i) document the best practice (or minimum) standards in each Australian jurisdiction for the conduct of the child sexual assault trial; (ii) document the outcomes of prosecuting child sex offences in each Australian jurisdiction in terms of reporting, attrition and conviction rates; and (iii) research and consider alternative models for prosecuting child sex offences: National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 6–7.

125 Tasmania Law Reform Institute, *Evidence Act 2001 Sections 97, 98 & 101 and Hoch's Case: Admissibility of Tendency and Coincidence Evidence in Sexual Assault Cases with Multiple Complainants*, Issues Paper 15 (2009), Part 6, 52–58; National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 231–251.

126 See, eg, J Gans, 'Similar Facts After Phillips' (2006) *Criminal Law Journal* 30, 224–245; D Hamer, 'Similar Fact Reasoning in Phillips: Artificial, Disjointed and Pernicious' (2007) 30 *UNSW Law Journal* 609.

127 *R v Forbes* [2006] ACTSC 47; *MAP* [2006] QCA 220; *Hakeem* [2006] VSC 265.

17.117 Pre-recorded evidence used in criminal proceedings can be categorised into two distinct forms:

- the initial interview between police and the witness admitted as evidence-in-chief;
- the entirety of the witness's evidence, including cross-examination.[128]

17.118 Commonwealth, state and territory legislation provides for the use of pre-recorded evidence in criminal hearings and trials.[129] The legislation generally applies to sexual offence proceedings, but may extend to other criminal proceedings. The use of pre-recorded evidence generally applies to child witnesses and witnesses who are 'cognitively' or 'intellectually' impaired. The provisions sometimes extend to any 'special' witness who, in the court's opinion, requires protection. A key issue for this Inquiry is whether such provisions should be extended to cover all adult complainants of sexual assault.

Evidence of interview

17.119 One form of pre-recorded evidence involves audiovisual recording of an interview with the victim, which is typically done shortly after the initial disclosure. The person is interviewed by police or child protection workers, the interview is recorded, and the videotape of the interview is played at the hearing or trial as the person's evidence-in-chief.

17.120 This method of taking pre-recorded evidence applies, for example, under Commonwealth, NSW and Victorian legislation.[130] The Commonwealth legislation states that

> (1) A video recording of an interview of a child witness in a proceeding may be admitted as evidence in chief if:
>
> (a) a constable, or a person of a kind specified in the regulations, conducted the interview; and
>
> (b) the court gives leave.[131]

128 Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, *Responding to Sexual Assault: The Challenge of Change* (2005), 130. The following description of pre-recorded evidence is drawn in part from this report.

129 *Crimes Act 1914* (Cth) s 15YM; *Criminal Procedure Act 1986* (NSW) ss 306S(2), 306U(1)–(2); *Criminal Procedure Act 2009* (Vic) ss 366–368; *Evidence Act 1977* (Qld) pt 2, div 4, 4A; *Evidence Act 1929* (SA) ss 13, 13A, 13C; *Evidence Act 1906* (WA) ss 106A–106T; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) pt 4, div 4.2A, 4.2B; *Evidence Act 1939* (NT) s 21E.

130 *Crimes Act 1914* (Cth) s 15YM; *Criminal Procedure Act 1986* (NSW) ss 306R, 306U.

131 *Crimes Act 1914* (Cth) s 15YM.

17.121 In NSW, the *Criminal Procedure Act 1986* (NSW) provides that:

> (1) A vulnerable person is entitled to give, and may give, evidence in chief of a previous representation to which this Division applies made by the person wholly or partly in the form of a recording made by an investigating official of the interview in the course of which the previous representation was made and that is viewed or heard, or both, by the court …[132]

17.122 Similarly, in Victoria, legislation provides that a 'witness may give evidence-in-chief (wholly or partly) in the form of an audio or audiovisual recording of the witness answering questions' put to him or her by a member of Victoria Police, or other person authorised in writing by the Chief Commissioner of Police who has successfully completed a training course on the relevant procedures.[133]

17.123 These provisions do not apply to complainants in sexual offence proceedings generally. The Commonwealth provisions apply only to child witnesses, and the NSW and Victorian provisions to children and cognitively impaired witnesses.[134]

Pre-recording other evidence

17.124 The second form of pre-recorded evidence involves the pre-recording of the entirety of a witness's evidence. At a pre-trial hearing the witness gives evidence via closed-circuit television from a remote room. The judge, prosecutor, defence lawyer and accused are all in the courtroom. There is no jury. The witness gives evidence and is cross-examined and re-examined, and this is videotaped. Some months later the trial is held. The witness does not attend the trial, and the jury is played the videotape of the witness's evidence.

17.125 This method of taking pre-recorded evidence applies, for example, under Victorian, Queensland, Western Australian, South Australian, ACT and Northern Territory legislation.[135]

17.126 Notably, in Victoria, the whole of the evidence (including cross-examination and re-examination) of young[136] or cognitively impaired complainants in sexual offence proceedings must be given at a special hearing, recorded as an audiovisual

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132 *Criminal Procedure Act 1986* (NSW) s 306U. 'Vulnerable person' means a child or a cognitively impaired person: s 306M.

133 *Criminal Procedure Act 2009* (Vic) s 367; *Criminal Procedure Regulations 2009* (Vic) r 5.

134 The Victorian provision applies only to witnesses in sexual offence and assault matters: *Criminal Procedure Act 2009* (Vic) s 366.

135 Ibid s 368; *Evidence Act 1977* (Qld) pt 2, divs 4, 4A; *Evidence Act 1906* (WA) s 106HB; *Evidence Act 1929* (SA) s 13A; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) div 4.2B; *Evidence Act 1939* (NT) s 21E.

136 Under the age of 18 years.

recording; and presented to the court in the form of that recording.[137] This has become known as the 'VATE' process (video or audio taping of evidence).

17.127 At the special hearing, the accused and his or her legal practitioner are to be present in the courtroom, but the accused is not to be in the same room as the complainant when the complainant's evidence is being taken. Rather, the accused is entitled to see and hear the complainant while the complainant is giving evidence (using closed-circuit television or other facilities) and to have at all times the means of communicating with his or her legal practitioner.[138]

17.128 The VATE recording is admissible in evidence as if its contents were the direct testimony of the complainant in the proceeding; and unless the relevant court otherwise orders, in any new trial of, or appeal from, the proceeding; or another proceeding in the same court for the charge for a sexual offence or a charge for a related offence.[139]

17.129 Some legislation deals with both forms of pre-recorded evidence—pre-recorded evidence of interview; and other evidence. For example, in the ACT, audiovisual recordings of a witness answering questions of a 'prescribed person in relation to the investigation of a sexual or violent offence' may be admitted as evidence.[140] In addition, prosecution witnesses in relation to sexual offence proceedings may give evidence in chief at a pre-trial hearing and an audiovisual recording of this evidence may be admitted as the witness's evidence at the trial.[141]

17.130 While the Victorian VATE provisions apply only to young or cognitively impaired complainants in sexual offence proceedings, in other jurisdictions, adult complainants of sexual assault may also be covered in some circumstances.[142] For example, the Queensland provisions apply to any 'special witness', defined to include any person who in the court's opinion:

> (i) would, as a result of a mental, intellectual or physical impairment or a relevant matter, be likely to be disadvantaged as a witness; or
>
> (ii) would be likely to suffer severe emotional trauma; or
>
> (iii) would be likely to be so intimidated as to be disadvantaged as a witness;

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137 *Criminal Procedure Act 2009* (Vic) ss 369–370. On the application of the prosecution, the court may direct that the complainant is to give direct testimony in the proceeding if the court is satisfied that the complainant is aware of the right to have his or her evidence taken at a special hearing and is able and wishes to give direct testimony in the proceeding: s 370(2).

138 Ibid s 372.

139 Ibid s 374.

140 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 40E, 40F.

141 Ibid ss 40P, 40Q, 40S.

142 *Evidence Act 1977* (Qld) pt 2 divs 4, 4A; *Evidence Act 1906* (WA) s 106R; *Evidence Act 1929* (SA) ss 4 'vulnerable witness', 13A.

> if required to give evidence in accordance with the usual rules and practice of the court.[143]

17.131 Similarly, in South Australia, pre-recorded evidence may be used in relation to the evidence of:

> (c) a witness who is the alleged victim of an offence to which the proceedings relate—
>
> (i) where the offence is a serious offence against the person; or
>
> (ii) in any other case—where, because of the circumstances of the witness or the circumstances of the case, the witness would, in the opinion of the court, be specially disadvantaged if not treated as a vulnerable witness; or
>
> (d) a witness who—
>
> (i) has been subjected to threats of violence or retribution in connection with the proceedings; or
>
> (ii) has reasonable grounds to fear violence or retribution in connection with the proceedings;
>
> (ii) has reasonable grounds to fear violence or retribution in connection with the proceedings …[144]

Benefits and drawbacks

17.132 Pre-recorded evidence has been described as offering the following benefits:

- improving the quality of evidence;
- facilitating pre-trial decisions by the prosecution and the defence;
- helping with the scheduling and conduct of the trial; and
- minimising system abuse of child witnesses.[145]

17.133 The drawbacks to pre-trial pre-recorded testimony are said to include that:

- it is unfair to require the defence to cross-examine the main prosecution witness before the formal trial has begun;

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143 *Evidence Act 1977* (Qld) s 21A(1). Where a special witness is to give or is giving evidence in any proceeding, the court may, among other things, order that 'a video-taped recording of the evidence of the special witness or any portion of it be made under such conditions as are specified in the order and that the video-taped evidence be viewed and heard in the proceeding instead of the direct testimony of the special witness' and such evidence is to be admissible as if given orally at trial: *Evidence Act 1977* (Qld) s 21A(2)(e), (6).

144 *Evidence Act 1929* (SA) s 4, 'vulnerable witness'.

145 Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, *Responding to Sexual Assault: The Challenge of Change* (2005), 132–133.

- defence lawyers are concerned that they cannot prepare to cross-examine the most important prosecution witness until shortly before the trial is scheduled;
- video technology lacks the immediacy and persuasiveness of a child's live-in-court testimony; and
- there can be problems with the technology.[146]

17.134 Appropriate training of interviewers is essential if the benefits of pre-recorded evidence are to be obtained. This is highlighted by one case study, provided by a respondent to an *ALRC Family Violence Inquiry E-newsletter*.

> My son at age three years made clear disclosures to me of sexual abuse (digital penetration, ejaculation) after an 'access' visit with his father, ordered by the Family Court. This had been going on before he was verbal enough to make disclosures. The [police response] team were not at all skilled with a child as young as him. I was asked to leave the room; my son was first asked the standard question, 'Do you know the difference between lies and truth?'. A video camera on a tripod was in a small room in front of him and a tape recorder placed on a table in front of him. Not surprisingly, he was terrified. He couldn't answer any questions and simply screamed hysterically until I was asked to return. We were both very shaken by the experience. My son told me he thought they were going to 'do something' to him. I felt terrible for my son and this was our only chance to validate his experiences. Under the circumstances the team made it even more unlikely that my son could speak out. He should have been interviewed by a child therapist, given time to form a relationship, the interviewer should have been the opposite gender; and any recording devices should have been hidden. The interview should be focused on his needs—not adult needs. I feel that everything possible was done to prevent disclosure. This child may have been filmed by the 'father' while being abused—how would this child then feel with a video camera put in front of him and then left by his mother with strangers?
>
> The policeman and woman were well intentioned good people. I had the impression they were just going through the motions—the process itself was intended to fail—it was so cruel and horrible.[147]

Commissions' views

17.135 The majority of states and territories have enacted regimes for the comprehensive pre-recording of evidence for child victims of sexual assault (and those who are cognitively or intellectually impaired).

17.136 In the Commissions' view, all Australian jurisdictions should adopt comprehensive provisions dealing with pre-recorded evidence in sexual offence proceedings. These provisions should allow the tendering of audiovisual records of

146 Ibid, 133–134.
147 *Comment in response to ALRC Family Violence Inquiry E-newsletter* (January 2010), 13 January 2010.

interview between police and complainants of sexual assault as the complainant's evidence-in-chief and apply to all victims of sexual assault (adults and children).[148]

17.137 In addition, child victims of sexual assault and victims of sexual assault who are vulnerable as a result of mental or physical impairment should be allowed to provide an audiovisual record of evidence at a pre-trial hearing attended by the judge, the prosecutor, the defence lawyer, the defendant and any other person the court deems appropriate.

17.138 Adult victims of sexual assault should also be permitted to provide evidence in this way, by order of the court. Audiovisual evidence should be recorded and replayed at the trial as the witness's evidence in chief. Recorded evidence should be available for use at any re-trial following an appeal or in other proceedings in appropriate circumstances.

17.139 The Commissions note that such legislation should be supported by investment in up-to-date technology and a comprehensive training program for interviewers. All participants in the criminal justice system should receive training in relation to the new provisions, including the rationale for them.[149]

Proposal 17–5 Commonwealth, state and territory legislation should allow the tendering of pre-recorded audiovisual material of interview between investigators and a sexual assault complainant as the complainant's evidence-in-chief.

Proposal 17–6 Commonwealth, state and territory legislation should permit child victims of sexual assault and victims of sexual assault who are vulnerable as a result of mental or physical impairment to provide an audiovisual record of evidence at a pre-trial hearing attended by the judge, the prosecutor, the defence lawyer, the defendant and any other person the court deems appropriate. Adult victims of sexual assault should also be permitted to provide evidence in this way, by order of the court. Audiovisual evidence should be replayed at the trial as the witness's evidence. Recorded evidence should be available for use at any re-trial following an appeal or in other proceedings in appropriate circumstances.

148 The cross-examination of children and other vulnerable witnesses in sexual assault cases is briefly discussed in Ch 18.

149 See Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, *Responding to Sexual Assault: The Challenge of Change* (2005), Rec 6.3.

Proposal 17–7 Commonwealth, state and territory governments should ensure that participants in the criminal justice system receive comprehensive education about legislation authorising the use of pre-recorded evidence in sexual assault proceedings, and training in relation to interviewing victims of sexual assault and creating pre-recorded evidence.

18. Trial Processes

Contents

Introduction

18.1 The previous chapter discussed some of the problems that may lead to attrition of sexual assault cases at the reporting, investigation, prosecution and other stages before cases reach trial. This chapter examines selected issues that arise in the trial of sexual assault cases in relation to the application of the laws of evidence, the giving of jury warnings and the cross-examination of complainants and other witnesses in sexual assault proceedings.

18.2 These issues have been selected because the application of law in these areas has a direct and significant impact on the experiences in the criminal justice system of women and children who have suffered sexual assault. The way in which these aspects of the law are applied may lead to cases being withdrawn at a late stage or tried without the full evidentiary picture being before the jury. The procedures required at trial may make complainants reluctant to continue to give evidence in sexual assault proceedings.

Evidence issues

18.3 Evidence issues of particular concern in the context of sexual offence proceedings include the law and procedure relating to: evidence of sexual reputation and experience; the disclosure of confidential counselling communications; expert opinion evidence and children; tendency and coincidence evidence; relationship evidence; and evidence of recent and delayed complaint.

18.4 While these issues may appear disparate, there are some common themes—notably those relating to consent and credibility. Evidence issues often arise where the defence is seeking to adduce evidence to show that sexual activity was consensual and, in doing so, to undermine the credibility of the complainant. This can sometimes result in unjustifiable trauma to complainants. In other contexts, the policy challenge is posed by evidence of prior misconduct by the defendant, which is highly prejudicial and may carry a risk of wrongful conviction. At the same time, it can be highly important and probative evidence.[1]

18.5 The rules of evidence vary between jurisdictions depending, in particular, on whether the uniform Evidence Acts apply. In this Consultation Paper, the term ‘uniform Evidence Acts’ refers to legislation based on the Model Uniform Evidence Bill, which was considered and endorsed by the Standing Committee of Attorneys-General (SCAG) in July 2007, or on the *Evidence Act 1995* (Cth) and *Evidence Act*

1 See Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102, NSWLRC Report 112, VLRC FR (2005), [11.15].

1995 (NSW). The Model Uniform Evidence Bill is based on these Acts, with amendments recommended in *Uniform Evidence Law* (ALRC 102).[2]

18.6 The uniform Evidence Acts jurisdictions are the Commonwealth, NSW, Victoria, Tasmania, the ACT (which applies the Commonwealth legislation) and Norfolk Island.[3] There are minor differences in the uniform Evidence Acts applying in these jurisdictions.[4] The uniform Evidence Acts work in conjunction with evidentiary provisions contained in a range of other Commonwealth, state and territory legislation.

18.7 As discussed in ALRC 102, the uniform Evidence Acts in their entirety are not a code of the law of evidence. The enactment of the Acts resulted in substantial changes to the common law in some areas. In other areas the common law remains an important reference assisting application of the uniform Evidence Acts. Stated simply, the uniform Evidence Acts govern admissibility issues, but reference to the common law can facilitate an understanding of underlying concepts and helps to identify the changes brought about by the Acts.[5]

18.8 In other jurisdictions, referred to for convenience as 'common law evidence jurisdictions', the common law has also been modified by statute in significant and varying ways, including in relation to the admissibility of evidence in sexual assault proceedings.

Sexual reputation and experience

18.9 In ALRC 102, the ALRC, Victorian Law Reform Commission (VLRC) and New South Wales Law Reform Commission (NSWLRC) considered the state and territory legislation intended to:

- prohibit the admission of evidence of a complainant's sexual reputation;
- prevent the use of sexual history evidence to establish the complainant as a 'type' of person who is more likely to consent to sexual activity; and
- exclude the use of a complainant's sexual history as an indicator of the complainant's truthfulness.[6]

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2 Ibid, [11.15].

3 The corresponding legislation comprises: *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2008* (Vic); *Evidence Act 2001* (Tas); *Evidence Act 2004* (NI).

4 For example, the Tasmanian Act has a number of sections not found in the Commonwealth or NSW legislation, such as those dealing with procedures for proving certain matters, certain privileges, certain matters concerning witnesses and rape shield provisions.

5 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102, NSWLRC Report 112, VLRC FR (2005), [2.4]–[2.10].

6 Ibid, [20.11]–[20.40].

18.10 Those provisions were collectively referred to as 'rape shield laws' in that report. The focus of that discussion was the relationship between rape shield laws and the uniform Evidence Acts and whether the uniform Evidence Acts should be amended to include specific provisions dealing with the admission of evidence of sexual reputation or experience. The ALRC, VLRC and NSWLRC concluded that the provisions should remain outside the Acts.[7]

18.11 Australian jurisdictions vary in relation to the substantive bases upon which sexual history evidence may be admitted and the procedure by which questions of admissibility are determined by the court. The application of these laws may have an inconsistent impact on victims of sexual assault. A number of commentators assert that the experience of testifying at trial may cause complainants almost as much trauma as the actual assault,[8] and the anticipated admission of sexual history evidence may contribute to the reluctance of many women to report sexual assaults to the police.[9] The key policy objective of proposed reforms in this area is to reduce the negative impact of the criminal justice system on victims of sexual assault, while not impinging on the rights of the accused to a fair trial.

18.12 State and territory exclusionary rules generally limit the cross-examination of complainants and the admission of evidence of a complainant's sexual reputation and prior sexual history in proceedings in which a person stands charged with a sexual offence.[10] The Commonwealth provisions apply to every child witness in sexual assault proceedings.[11]

18.13 The exclusionary rules do not, therefore, cover evidence about the sexual reputation or prior sexual history of the following groups:

- in the Commonwealth jurisdiction, adult sexual assault complainants in sexual assault proceedings;
- in all jurisdictions, adult sexual assault victims who are witnesses but not the complainants in sexual assault proceedings; and
- in the state and territory jurisdictions, child witnesses who are not complainants in a sexual assault proceeding.

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7 Ibid, [20.37]–[20.40].

8 See, eg, S Bronitt and T Henning, 'Rape Victims on Trial: Regulating the Use and Abuse of Sexual History Evidence' in P Easteal (ed) *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998) 76, 81.

9 See, eg, J Bargen and E Fishwick, *Sexual Assault Law Reform: A National Perspective* (1995), 75.

10 *Criminal Procedure Act 2009* (Vic) s 339(1); *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4; *Evidence Act 1906* (WA) s 36A; *Evidence Act 1929* (SA) s 34L(1); *Evidence Act 2001* (Tas) s 194M(1); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 49; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4.

11 *Crimes Act 1914* (Cth) ss 15Y, 15YB, 15YC.

Question 18–1 Should Commonwealth, state and territory evidence law and procedural rules limit cross-examination and the admission of evidence about the sexual reputation and prior sexual history of all witnesses in sexual assault proceedings?

Terminology

18.14 Australian legislation purports to regulate the admission and use of evidence of each of the following:

- the general reputation of the complainant with respect to chastity;[12]
- sexual reputation;[13]
- reputation with respect to sexual activities;[14]
- disposition of the complainant in sexual matters[15] or evidence that raises inferences about a complainant's general disposition;[16]
- sexual history;[17]
- sexual experience[18] or sexual experiences;[19] and
- experience with respect to sexual activities,[20] sexual activity[21] or sexual activities.[22]

18.15 Statutory and judicial guidance[23] about the meaning and boundaries of each of these terms and the kinds of evidence covered is limited. In practice, the ambiguity is

12 *Criminal Procedure Act 2009* (Vic) s 341. Section 4(1)(b) of the *Sexual Offences (Evidence and Procedure) Act 1983* (NT) uses a similar phrase: 'the complainant's general reputation as to chastity'.
13 *Criminal Procedure Act 1986* (NSW) s 293(2); *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(1); *Evidence Act 1906* (WA) s 36B; *Evidence Act 1929* (SA) s 34L(1)(a); *Evidence Act 2001* (Tas) s 194M(1)(a); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 50.
14 *Crimes Act 1914* (Cth) s 15YB.
15 *Evidence Act 1906* (WA) s 36BA; *Evidence Act 2001* (Tas) s 194M(6)(b).
16 *Crimes Act 1914* (Cth) s 15YC; *Criminal Procedure Act 2009* (Vic) s 352(a); *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(4); *Evidence Act 1929* (SA) s 34L(3); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 53(2); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(2)(a).
17 *Criminal Procedure Act 2009* (Vic) ss 340, 343.
18 Ibid s 293(4); *Evidence Act 2001* (Tas) s 194M(1)(b).
19 *Evidence Act 1906* (WA) s 36BC.
20 *Crimes Act 1914* (Cth) s 15YC.
21 *Criminal Procedure Act 1986* (NSW) s 293(3); *Criminal Law (Sexual Offences) Act 1978 (Qld)* s 4(2).
22 *Criminal Procedure Act 2009* (Vic) s 342; *Evidence Act 1929* (SA) s 34L(1)(b); *Evidence (Miscellaneous Provisions) Act 1991 (ACT)* s 51; *Sexual Offences (Evidence and Procedure) Act 1983 (NT)* s 4(1)(b).

likely to inhibit the ability of judicial officers and practitioners to apply and observe the current legislative provisions.[24] It is particularly important that sexual *reputation* evidence is clearly distinguishable from sexual *experience* evidence because sexual reputation evidence is inadmissible in most jurisdictions whereas sexual experience evidence may be admissible.

18.16 The High Court in *Bull v The Queen*[25] suggested that 'reputation' primarily concerns the public estimation and general opinion that others have of a person's tendencies or propensities.[26] Some matters that could be considered as raising the sexual reputation of the complainant include assertions about a complainant engaging in prostitution, that a complainant is believed or known to be promiscuous and other references to the complainant's sexual proclivities asserted to be commonly known.[27]

18.17 Some jurisdictions refer to evidence of 'disposition of the complainant in sexual matters' and evidence that raises inferences about a complainant's general disposition.[28] A complainant's 'disposition' differs from their reputation because disposition refers to tendencies or propensities that are intrinsic to the individual which exist independently of public or general opinion. Those intrinsic tendencies or propensities are 'part of the character of the person so that given a relevant set of conditions or circumstances the person concerned has a tendency or propensity to act in a particular way'.[29] As such, evidence of 'disposition' appears to refer to 'any characteristics of the complainant which suggest that he or she is the "kind of person" who would have engaged in the conduct in question'.[30]

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23 The leading case of *Bull v The Queen* (2000) 201 CLR 443, [54]–[64] discusses the distinctions between evidence relating to the 'sexual reputation', 'disposition of the complainant in sexual matters', 'sexual experience' and 'sexual experiences'.

24 For example, an empirical study undertaken in relation to sexual assault hearings in the District Court of New South Wales over a one year period between 1 May 1994 and 30 April 1995 concluded that sexual reputation evidence cannot be clearly distinguished from sexual experience evidence: J Bargen, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault, Gender Bias and the Law Project* (1996), 11. In the context of the Western Australian legislation, 'a difficulty arises because evidence of a complainant's sexual experiences, which is made admissible by s 36BC, will often, but not necessarily, also be evidence relating to a person's sexual disposition' which shall not be adduced or elicited by or on behalf of an accused: *Bull v The Queen* (2000) 201 CLR 443, [61].

25 *Bull v The Queen* (2000) 201 CLR 443, [58].

26 See also, *R v McGarvey (1987) 10 NSWLR 632* in relation to 'reputation for promiscuity'.

27 See, eg, J Bargen, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault, Gender Bias and the Law Project* (1996), 229. See also, R Bonney, *Crimes (Sexual Assault) Amendment Act 1981—Monitoring and Evaluation* NSW Bureau of Crime and Statistics and Research-Crime and Justice Bulletin, Interim Report No 3—Court Procedures (1987).

28 *Evidence Act 1906 (WA)* s 36BA. Other jurisdictions deal with evidence that gives rise to inferences about the complainant's general disposition by providing that it must not be regarded as having substantial relevance to an issue only by raising such an inference: *Crimes Act 1914* (Cth) s 15YC; *Criminal Procedure Act 2009* (Vic) s 352(a); *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(4); *Evidence Act 1929* (SA) s 34L(3); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(2)(a).

29 *Bull v The Queen* (2000) 201 CLR 443, [58].

30 Ibid, [59].

18.18 'Sexual history evidence' is a term only used by the *Criminal Procedure Act 2009* (Vic) and is defined by s 340 of that Act to mean:

> evidence that relates to or tends to establish the fact that the complainant—
>
> (a) was accustomed to engaging in sexual activities; or
>
> (b) had freely agreed to engage in sexual activity (other than that to which the charge relates) with the accused person or another person.

18.19 Western Australia is the only jurisdiction which uses the plural 'sexual experiences', in contrast to the singular—'sexual experience'—which is used by the New South Wales and Tasmanian legislation. It has been held the use of the plural is significant because it captures evidence of 'any occasion or episode of sexual activity' rather than evidence that 'tends to prove the state of … [the complainant's] sexual experience'.[31]

18.20 That analysis suggests a link or overlap between the concepts of sexual activity or activities and sexual experience or experiences.[32] It may also give rise to an argument that there is a conceptual difference between evidence of a complainant's 'sexual activity' and a complainant's 'sexual activities'.

Commissions' view

18.21 In the Commissions' view, legislative reform may be required to better enable the judiciary and practitioners to distinguish between kinds of prior sexual history evidence. It is essential that prior sexual history evidence be correctly identified as being either of sexual reputation, sexual disposition or sexual experience because different tests of admissibility apply in respect of each. It is important that the relevant test of admissibility is applied to each kind of prior sexual history so that the public policy which informs the legislation is given effect in practice.

18.22 The statutory prohibitions and restrictions in relation to the admission of evidence regarding a complainant's sexual reputation, sexual disposition and sexual experience have been enacted to curtail reasoning according to what have been called the 'twin myths'.[33] That is,

> to forbid any chain of 'reasoning' that asserts that, because the complainant has a certain sexual reputation or a certain disposition in sexual matters or has had certain sexual experiences, he or she is the 'kind of person' who would be more likely to consent to the acts the subject of the charge … [and] to forbid

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31 Ibid, [62].

32 Most legislative schemes regulate either evidence of 'sexual activity' or 'sexual activities' on the one hand, and 'sexual experience' or 'sexual experiences' on the other. However, s 15YC of the *Crimes Act 1914* (Cth) regulates 'experience with respect to sexual activities' and s 293 of the *Criminal Procedure Act 1986* (NSW) explicitly regulates both evidence of the complainant's 'sexual experience or … sexual activity' and the lack of either kinds of evidence.

33 S Chapman, 'Section 276 of the Criminal Code and the Admissibility of "Sexual Activity" Evidence' (1999) 25 *Queen's Law Journal* 121.

> the chain of 'reasoning' that asserts that, because a complainant has a particular sexual reputation or disposition in sexual matters or has had certain sexual experiences, he or she is less worthy of belief than a complainant without those features.[34]

18.23 Judicial and practitioner education and training is also important to encourage a consistent approach to the classification of evidence as 'sexual reputation', 'sexual disposition' or 'sexual experience' evidence, promoting compliance with existing legislative regimes. However, education and training about issues arising in sexual assault trials alone is likely to be insufficient to prevent inappropriate admission of evidence about complainants' prior sexual history.

Question 18–2 How best can judicial officers and legal practitioners be assisted to develop a consistent approach to the classification of evidence as being either of 'sexual reputation', 'sexual disposition' and 'sexual experience' (or 'sexual activities')?

Sexual reputation

18.24 Evidence relating to the complainant's sexual reputation is inadmissible in all Australian states and the ACT.[35] No exceptions apply to these exclusionary rules. Evidence of sexual reputation is excluded on the basis that, 'even if relevant and therefore admissible, [it] is too far removed from evidence of actual events or circumstances for its admission to be justified in any circumstances'.[36]

18.25 In the Northern Territory, evidence relating to the complainant's general reputation as to chastity may be elicited or led with the leave of the court. Leave is not granted unless the evidence has substantial relevance to the facts in issue.[37]

18.26 In Commonwealth legislation, evidence of a child witness or child complainant's sexual reputation is admissible in a proceeding if the court is satisfied that the evidence is substantially relevant to the facts in issue.[38]

18.27 The key issue in practice in relation to excluding evidence of sexual reputation is that such evidence is not consistently identified and may be admitted if inappropriately conceived as evidence of sexual experience. This issue is addressed in

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34 *Bull v The Queen* (2000) 201 CLR 443, [53].

35 *Criminal Procedure Act 1986* (NSW) s 293(2); *Criminal Procedure Act 2009* (Vic) s 341; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(1); *Evidence Act 1906* (WA) s 36B; *Evidence Act 1929* (SA) s 34L(1)(a); *Evidence Act 2001* (Tas) s 194M(1)(a); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 50.

36 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), 219.

37 *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4.

38 *Crimes Act 1914* (Cth) s 15YB.

the previous discussion about sexual history evidence terminology and the associated proposals for reform.

Commissions' views

18.28 The policy basis for excluding evidence of sexual reputation is widely accepted. However, the Commonwealth and Northern Territory tests of admissibility do not give the policy full effect. The Victorian legislation is instructive in this regard. Commonwealth, state and territory legislation should, in the Commissions' view, provide that the court must not allow any questions as to, or admit any evidence of, the sexual reputation of the complainant.[39]

Proposal 18–1 Commonwealth, state and territory legislation should provide that a court must not allow any questions as to, or admit any evidence of, the sexual reputation of the complainant.

Sexual experience

18.29 Australian jurisdictions have adopted different approaches in relation to the admission of evidence of the complainant's 'sexual activities', 'sexual activity', 'sexual experiences' and 'sexual experience'.

Mandatory and discretionary models

18.30 The most important distinction is between the mandatory model of NSW and the discretionary models of the other jurisdictions. In NSW, such evidence is inadmissible unless it falls within specific statutory exceptions. In the 'discretionary' jurisdictions, admissibility is a matter for the judicial officer's discretion, the exercise of which is subject to legislative conditions.

18.31 Within the 'discretionary models' two further distinction may be drawn, first:

> In Victoria, Western Australia, the Northern Territory and Tasmania, the sexual experience provisions apply (expressly or by implication) to prior sexual experience between the complainant and the accused. In the remaining jurisdictions, the sexual experience or conduct provisions do not apply to 'recent' sexual activity between the complainant and the accused.[40]

18.32 The second distinction is that, of the discretionary models, Victoria alone introduces and defines the term 'sexual history evidence'.[41] A non-discretionary

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39 *Criminal Procedure Act 2009* (Vic) s 341.

40 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102, NSWLRC Report 112, VLRC FR (2005), [20.12]–[20.18].

41 *Criminal Procedure Act 2009* (Vic) s 340.

exclusionary rule prohibits the admission of such evidence in specific circumstances.[42] The Victorian approach to determining and limiting the admissibility of 'sexual history evidence' is discussed below.

Commissions' views

18.33 Whether a mandatory or discretionary model better serves to admit evidence genuinely relevant to the accused's defence and limit the harassment of victims of sexual assault by cross-examination about their prior sexual activities is a debate of particular significance for victims of sexual assault because of the special problems in relation to the prosecution of sexual offences.

18.34 Concerns about the appropriate model have been canvassed in reports by the Model Criminal Code Officers Committee of SCAG (MCCOC), the NSWLRC and VLRC.[43] These reports considered the relative merits of the mandatory and discretionary approaches and whether the NSW approach is too restrictive—so that it excludes material relevant to the accused's defence. Each report favoured a structured discretionary model.[44]

18.35 In the Commissions' view, the relevant issues related to each approach—for both complainants and accused persons—have been sufficiently canvassed and appropriately evaluated by these earlier reports. The Commissions agree that a discretionary model ought to apply to determine the admissibility of prior sexual activities evidence. The discussion that follows focuses on identifying the optimal form of a discretionary model.

18.36 The Commissions would be interested in comment about the practical application of laws concerning the admission of evidence of sexual history in cases involving sexual assault perpetrated in a family violence context.

18.37 In particular, the Commissions would like to know whether evidence of a complainant's prior sexual history is admitted more or less often in proceedings where the charge arises from a family violence context, as compared to other proceedings, and why this might be so. For example, defendants in family violence contexts may have more knowledge about the previous sexual activities of the complainant. This may mean that the admission of evidence of previous sexual activity has a disproportionate impact on those victims of sexual assault.

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42 Ibid s 343.

43 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004); Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999); New South Wales Law Reform Commission, *Review of Section 409B of the Crimes Act 1900 (NSW)*, Report 87 (1998).

44 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5 Sexual Offences Against the Person* (1999), 243–45; New South Wales Law Reform Commission, *Review of Section 409B of the Crimes Act 1900 (NSW)*, Report 87 (1998), [6.100]–[6.113]; Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), recs 69–71.

Question 18–3 Under discretionary models, is evidence of a complainant's prior sexual history admitted more or less often in proceedings concerning offences perpetrated in a family violence context, as compared to other sexual assault proceedings?

Scope of general exclusion

18.38 The scope of the exclusionary rules in relation to questioning and admitting evidence of the complainant's sexual activities, in all jurisdictions, depends on whether the provisions apply to both evidence of the complainant's:

- prior sexual activities with the accused and with other persons; and
- consensual and non-consensual sexual activities.

18.39 In the ACT, the restriction applies only to evidence about sexual activity with persons other than the accused.[45] In Victoria, Western Australia and Tasmania the sexual experience provisions apply to (expressly or by implication) prior sexual experience between the complainant and the accused.[46] In the remaining jurisdictions, the sexual experience or conduct provisions do not apply to 'recent' sexual activity between the complainant and the accused.[47]

18.40 The Victorian legislation is unique in explicitly restricting questions and evidence as to both the consensual and non-consensual sexual activities of the complainant.[48] Prior to making explicit the application of the legislative scheme to prior non-consensual sexual activity evidence, some complainants were required to give evidence or be cross-examined about earlier incidents of child sexual abuse or sexual assault without the court considering whether the evidence should be admitted on the grounds set out in the legislation.[49] The VLRC noted that:

> in many cases the main purpose of this type of cross-examination is to unsettle the complainant by suggesting he or she is prone to lie or is mentally unstable ...
>
> Many complainants find it difficult to understand why the defence should be able to cross-examine them about prior abuse when evidence about the

45 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 51(2).

46 *Criminal Procedure Act 2009* (Vic) s 342; *Evidence Act 1906* (WA) s 36BC(1); *Evidence Act 2001* (Tas) s 194M(1)(b).

47 *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(4) and *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(3) (acts which are 'substantially contemporaneous'); *Evidence Act 1929* (SA) s 34L(1)(b) ('recent sexual activities with the accused').

48 *Criminal Procedure Act 2009* (Vic) s 342. See also, Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), Rec 68.

49 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [4.44].

> accused's prior sexual behaviour is rarely admissible and the accused is entitled to exercise the right to remain silent.[50]

18.41 In all jurisdictions the sexual experience provisions regulate the cross-examination of witnesses and adducing and admission of evidence of a complainants' sexual history by any party. The exception is Western Australia where the provisions apply only in relation to defence evidence.[51]

Commissions' views

18.42 To adequately safeguard complainants of sexual assault occurring in a family violence context against irrelevant and harassing cross-examination—and any distress, humiliation and embarrassment a complainant may suffer as a result of the admission of evidence of their sexual activities—the exclusionary rule in relation to the admission of evidence of a complainant's sexual activities must have a broad application.

18.43 In the Commissions' view, an exclusionary rule of broad application to evidence of complainants' sexual activities is unlikely to cause injustice to the accused. Under the discretionary models, any evidence covered by the exclusionary rule may be admitted, and the complainant may be cross-examined as to such evidence, with the leave of the court. The circumstances in which the leave of the court may be granted are discussed below.

18.44 For these reasons, the Commissions support the enactment of legislation similar to s 342 of the *Criminal Procedure Act 2009* (Vic), which states:

> The complainant must not be cross-examined, and the court must not admit any evidence, as to the sexual activities (whether consensual or nonconsensual) of the complainant (other than those to which the charge relates), without the leave of the court.

18.45 That provision, by implication, applies to evidence of the complainant's prior sexual activities both with the accused and with other persons, irrespective of whether that activity was recent or otherwise. Any unfairness to the accused may be overcome by the court exercising its discretion to permit questioning about or admit evidence of, for example, recent sexual activities between the complainant and the accused if it is satisfied that the evidence meets the tests for admission.

18.46 The provision applies explicitly to questions and evidence as to both the consensual and non-consensual sexual activities of the complainant. This seems desirable because 'survivors of sexual abuse should be offered the same protection from investigation into their sexual history as other complainants'.[52]

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50 Ibid, 201–202.

51 *Evidence Act 1906* (WA) ss 36A–36BC.

52 New South Wales Law Reform Commission, *Review of Section 409B of the Crimes Act 1900 (NSW)*, Report 87 (1998), [6.122].

18.47 The Commissions consider that the statutory restrictions on questions and evidence concerning the complainant's sexual activities should apply to questioning and the adducing of evidence by any party.

Proposal 18–2 Commonwealth, state and territory legislation should provide that complainants of sexual assault must not be cross-examined, and the court must not admit any evidence, as to the sexual activities (whether consensual or non-consensual) of the complainant other than those to which the charge relates, without the leave of the court.

Test for admission

18.48 In all states and territories, other than NSW, sexual experience evidence is inadmissible, subject to a judicial officer's discretion to grant leave. Generally the court must be satisfied that the evidence is of 'substantial relevance to a fact in issue' before leave may be granted to cross-examine or admit evidence as to the complainant's prior sexual history.[53]

18.49 In Victoria, the 'substantial relevance to a fact in issue' threshold is supplemented by the requirement that the interests of justice allow the cross-examination or admission of the evidence having regard to a list of factors.[54] One such factor is 'whether the probative value of the evidence outweighs the distress, humiliation and embarrassment that the complainant may experience'.[55]

18.50 Western Australia and Tasmania do not provide a list of factors which must be considered in the interests of justice but—similar to Victoria—supplement the 'substantial relevance to a fact in issue' criterion with the second criterion that the 'probative value of that evidence outweighs any distress, humiliation or embarrassment'.[56]

18.51 South Australia is the only jurisdiction which applies a test of 'substantial probative value' taking into account the 'principle that alleged victims of sexual offences should not be subjected to unnecessary distress, humiliation or embarrassment

53 *Crimes Act 1914* (Cth) s 15YC(2)(a). Note however that s 15YC(2)(b) provides that the court must not give leave if the evidence relates to the credibility of a child witness and is to be adduced in cross-examination of the child unless the court is satisfied that the evidence has substantial probative value. See also *Criminal Procedure Act 2009* (Vic) s 349; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4; *Evidence Act 1906* (WA) s 36BC; *Evidence Act 2001* (Tas) s 194M; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 53; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(1).

54 *Criminal Procedure Act 2009* (Vic) s 349.

55 Ibid s 349(a).

56 *Evidence Act 1906* (WA) s 36BC; *Evidence Act 2001* (Tas) s 194M.

through the asking of questions or admission of evidence', without also requiring the evidence or cross-examination to have substantial relevance to a fact in issue.[57]

18.52 The Queensland and ACT legislation also provides that leave to permit or receive sexual experience evidence—sought to be elicited or led—may be granted where the evidence is a 'proper matter for cross-examination as to credit'.[58] Despite providing for the admissibility of sexual experience evidence in this way, Queensland and the ACT, like most jurisdictions, provide that sexual history evidence is not admissible as part of cross-examination about the complainant's credibility unless there are special circumstances that mean 'it would be likely to substantially impair confidence' in the reliability of the complainant's evidence.[59] In addition, the Queensland legislation provides that a complainant is not to be regarded as a less credible witness only because the complainant has engaged in sexual activity.[60] The Western Australian and Tasmanian legislation takes a different approach pursuant to which sexual history evidence is not admissible for the sole purpose of cross-examination about the complainant's credibility.[61]

18.53 In relation to the admission of evidence relating to the disposition of the complainant in sexual matters, in the Commonwealth, Victoria, Queensland, South Australia and the Northern Territory such evidence must not be regarded as substantially relevant or of substantial probative value—as the case may be—merely because of any inference it may raise about general disposition.[62] The Western Australian legislation provides that such evidence is inadmissible.[63]

Commissions' views

18.54 Section 349 of the *Criminal Procedure Act 2009* (Vic) is consistent with the recommendations of the VLRC's 2004 report, *Sexual Offences*.[64] The VLRC's recommendations were largely consistent with a recommendation of the NSWLRC's report, *Reform of Section 409B* (NSWLRC 87),[65] which was not implemented.

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57 *Evidence Act 1929* (SA) s 34L(2).

58 *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(3); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 53(1).

59 *Crimes Act 1914* (Cth) s 15YC; *Criminal Procedure Act 2009* (Vic) s 352(b); *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4; *Evidence Act 1929* (SA) s 34L; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 53; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(1).

60 *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(5).

61 *Evidence Act 1906* (WA) s 36BC; *Evidence Act 2001* (Tas) s 194M.

62 *Crimes Act 1914* (Cth) s 15YC; *Criminal Procedure Act 2009* (Vic) s 352(a); *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(4); *Evidence Act 1929* (SA) s 34L(3); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(2)(a).

63 *Evidence Act 1906* (WA) s 36BA. For an example of a recent case applying this provision see *VOT v State of Western Australia* (2008) 37 WAR 129.

64 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), Recs 69–73.

65 New South Wales Law Reform Commission, *Review of Section 409B of the Crimes Act 1900 (NSW)*, Report 87 (1998), Rec 2

18.55 The focus of the Commissions is to identify a model governing the admission of sexual history evidence which adequately safeguards complainants against irrelevant and harassing cross-examination, while still allowing admission of evidence which is relevant to the case of the defence. Generally, there appears good reason to follow the similar policy and recommendations of these prior reports.

18.56 In relation to the threshold test for the admissibility of evidence about complainants' sexual activities, the VLRC recommended that such evidence should only be admissible where it is of 'substantial relevance' to a fact in issue.[66]

18.57 In the Commissions' view, however, a preferable approach would be to provide that such evidence should only be admissible where, as well as satisfying a general relevance test,[67] the evidence has significant probative value to a fact in issue. A significant probative value test is preferred because it is more consistent with the approach of the uniform Evidence Acts in relation to exclusionary rules, including those concerning tendency and coincidence evidence.[68]

18.58 The probative value of the evidence should be weighed against the interests of justice to allow the cross-examination or to admit the evidence. Such an approach appropriately takes account of the needs and rights of both complainants and accused persons.

18.59 A non-exhaustive list of factors should be provided, which the court must consider as part of the balancing exercise of weighing the probative value of the evidence against the danger of prejudice to the proper administration of justice. The proposed factors reflect s 349 of the *Criminal Procedure Act 2009* (Vic), except for the fact the list is non-exhaustive.[69] The factors, which seek to balance the considerations of fairness to the accused with the need to protect the complainant from distress, humiliation and embarrassment resulting from an invasion of his or her sexual privacy, are as follows:

- the distress, humiliation, or embarrassment which the complainant may suffer as a result of the cross-examination or the admission of the evidence, in view of the age of the complainant and the number and nature of the questions that the complainant is likely to be asked;

- the risk that the evidence may arouse in the jury discriminatory belief or bias, prejudice, sympathy or hostility;

- the need to respect the complainant's personal dignity and privacy;

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66 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), Rec 69.

67 That is, under uniform Evidence Acts ss 55–56.

68 See, eg, uniform Evidence Acts ss 97, 98, 135.

69 The VLRC considered that a non-exhaustive list 'would leave open the possibility that sexual activity evidence could be introduced inappropriately': Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [5.58].

- the right of the accused to make a full answer and defence; and
- any other factor which the court considers relevant.

18.60 Commentators have raised concerns, in the context of the counselling communication privilege, that it is difficult to imagine how a judicial officer who determines that evidence has 'substantial probative value' could exclude the evidence on the basis that it is outweighed by interests in favour of protecting the complainant.[70]

18.61 One response to this criticism is the requirement that leave to admit evidence of a complainant's sexual activities not be given unless its probative value 'substantially' outweighs the danger of unfair prejudice to the proper administration of justice. This places a heavy onus on the party seeking to admit the sexual experience evidence and should ensure that its admission will only be justified in a 'clear case'.[71]

Proposal 18–3 Commonwealth, state and territory legislation should provide that the court shall not grant leave for complainants of sexual assault to be cross-examined about their sexual activities unless it is satisfied that:

(a) the evidence has significant probative value to a fact in issue; and

(b) the probative value of the evidence substantially outweighs the danger of unfair prejudice to the proper administration of justice, taking into account the matters in Proposal 18–4 below.

Proposal 18–4 Commonwealth, state and territory legislation should provide that the court, in deciding whether the probative value of the evidence substantially outweighs the danger of unfair prejudice to the proper administration of justice, must have regard to:

(a) the distress, humiliation, or embarrassment which the complainant may suffer as a result of the cross-examination or the admission of the evidence, in view of the age of the complainant and the number and nature of the questions that the complainant is likely to be asked;

(b) the risk that the evidence may arouse in the jury discriminatory belief or bias, prejudice, sympathy or hostility;

(c) the need to respect the complainant's personal dignity and privacy;

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70 A Cossins, 'Tipping the Scales in Her Favour: The Need to Protect Counselling Records in Sexual Assault Trials' in P Easteal (ed) *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998) 94, 106.

71 See, S Odgers, *Uniform Evidence Law* (8th ed, 2009), [1.3.14540].

(d) the right of the accused to make a full answer and defence; and

(e) any other factor which the court considers relevant.

Limitations on admissibility for specific purposes

18.62 Proposals 18–3 and 18–4 do not address the admission of evidence about a complainant's sexual experience where it:

- may raise an inference that the complainant is the type of person who is more likely to have consented to the sexual activity to which the charge relates;
- may raise an inference as to the complainant's general disposition; or
- relates to the complainant's credibility as a witness.

18.63 Victorian legislation explicitly addresses these questions of admissibility in respect of 'sexual history evidence'.[72] The statutory definition of this term is reproduced above. It encompasses some evidence which may also be described as evidence of 'the general reputation of the complainant with respect to chastity'[73] or evidence as to the 'sexual activities'[74] of the complainant.[75] Section 343 of the *Criminal Procedure Act 2009* (Vic) provides that:

> Sexual history evidence is not admissible to support an inference that the complainant is the type of person who is more likely to have consented to the sexual activity to which the charge relates.[76]

18.64 Section 352 of the *Criminal Procedure Act 2009* (Vic) provides that:

> Sexual history evidence is not to be regarded—
>
> (a) as having a substantial relevance to the facts in issue by virtue of any inferences it may raise as to general disposition; or
>
> (b) as being proper matter for cross-examination as to credit unless, because of special circumstances, it would be likely materially to impair confidence in the reliability of the evidence of the complainant.

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72 *Criminal Procedure Act 2009* (Vic) s 340.

73 Ibid s 352.

74 Ibid s 342.

75 That is, the *Criminal Procedure Act 2009* (Vic) regulates sexual history evidence (s 340); evidence of the general reputation of the complainant with respect to chastity (s 352); and evidence as to the sexual activities of the complainant (s 342). Evidence of the general reputation of the complainant with respect to chastity and evidence as to the sexual activities of the complainant are conceptually distinct. Sexual history evidence conceptually overlaps with evidence of the general reputation of the complainant with respect to chastity and evidence as to the sexual activities of the complainant.

76 *Criminal Procedure Act 2009* (Vic) s 343.

18.65 The manner in which these provisions restrict the admission of sexual history evidence clearly gives effect to the policy objective of forbidding reasoning according to 'twin myths' in respect of sexual assault complainants.[77]

18.66 Victoria is the only jurisdiction in which a non-discretionary prohibition on the admission of sexual history evidence to support an inference that the complainant is a specific type of person applies.

18.67 In relation to evidence relating to the general disposition of the complainant, the Victorian approach is typical of the majority of jurisdictions.[78] In Western Australia such evidence is not permitted to be adduced or elicited by or on behalf of an accused.[79] In NSW and Tasmania, the admissibility of sexual experience evidence that raises inferences about a complainant's disposition in sexual matters is determined by the application of the same test of admissibility as applies to all sexual experience evidence.[80]

18.68 In relation whether evidence is proper matter for cross-examination as to credit, Queensland,[81] the ACT[82] and the Northern Territory[83] each apply the same test for admission as Victoria. The Western Australian approach is similar, preventing evidence relating to the sexual experiences of the complainant from 'being adduced or elicited by or on behalf of an accused unless leave of the court has first been obtained'.[84] The Tasmanian approach is more restrictive, and provides that evidence relevant only to the complainant's credibility does not have direct and substantial relevance to a fact or matter in issue.[85] In the remaining state and territory jurisdictions the admissibility of sexual experience evidence which relates to the credibility of the complainant is determined by general credibility rules.[86] The *Crimes Act 1914* (Cth) takes a different approach, providing that evidence relating to the credibility of a child witness adduced in cross-examination of the child is admissible where it has substantial probative value[87] and then further providing that:

> Without limiting the matters to which the court may have regard in deciding whether the evidence has substantial probative value, it is to have regard to:

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77 S Chapman, 'Section 276 of the Criminal Code and the Admissibility of "Sexual Activity" Evidence' (1999) 25 *Queen's Law Journal* 121.

78 *Crimes Act 1914* (Cth) s 15YC(3); *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(4); *Evidence Act 1929* (SA) s 34L(3); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 53(3); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(2)(a).

79 *Evidence Act 1906* (WA) s 36BA.

80 This is implicit in *Criminal Procedure Act 1986* (NSW) s 293 and explicit in *Evidence Act 2001* (Tas) s 194M(6)(b).

81 *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(5).

82 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 53(3).

83 *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(5).

84 *Evidence Act 1906* (WA) s 36BC.

85 *Evidence Act 2001* (Tas) s 194M(3).

86 *Evidence Act 1995* (NSW) s 102; *Evidence Act 1929* (SA) s 23.

87 *Crimes Act 1914* (Cth) s 15YC(2)(b).

(a) whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth; and

(b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred.[88]

Commissions' views

18.69 The Commissions are interested to hear views about whether the admission of sexual history evidence or sexual experience evidence ought to be limited in line with the Victorian model.[89]

18.70 The prohibition on the admission of sexual experience evidence to support an inference that the complainant is the type of person who is likely to have consented to the sexual activity to which the charge relates is likely to be the most controversial aspect of such a proposal.

18.71 Evidence law permits tendency reasoning in respect of the accused on some occasions. Such a provision would prohibit tendency reasoning in respect of whether the complainant consented to the alleged sexual activity on all occasions and 'expresses the policy that evidence of prior sexual activity is not normally relevant to the issue of consent'.[90] Is it necessary for the legislation to explicitly prohibit such reasoning in respect of complainants because of the many myths and misconceptions that underpin understandings of sexual violence? Would a prohibition on the admission of sexual experience evidence where it raises an inference as to general disposition be sufficient?[91]

18.72 In the Commissions' view, the admission of evidence about a complainant's sexual activity on the grounds that the evidence has significant probative value only in relation to the credibility of the complainant should not be permitted. The admission of evidence on such grounds is likely to 'justify questioning of the complainant on issues which have little or no relevance to the question in issue at trial'.[92] However, where sexual history evidence is genuinely relevant to credibility, and credibility is a fact in issue, sexual history evidence may be a proper matter for cross-examination as to credit. An example of such a circumstance may include where a complainant has previously been convicted of perjury regarding some aspect of her sexual history. For these reasons, the Commissions support the enactment of a provision pursuant to which

88 Ibid s 15YC(4).
89 *Criminal Procedure Act 2009* (Vic) ss 343, 352.
90 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004) [4.65].
91 *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(4) provides that: 'An example of an inference about general disposition' is 'an inference that the complainant, because of having engaged in conduct of a sexual nature, is more likely to have consented to the conduct involved in the offence'.
92 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [4.68]. This conclusion is consistent with *Criminal Procedure Act 2009* (Vic) s 349; *Evidence Act 1906* (WA) ss 36B, 36BA, 36BC; *Evidence Act 2001* (Tas) s 194M(4).

such evidence is excluded, subject to the exercise of the court's discretion to allow its admission.

Question 18–4 Should Commonwealth, state and territory legislative provide that 'sexual history evidence' or sexual experience evidence is not:

(a) admissible to support an inference that the complainant is the type of person who is more likely to have consented to the sexual activity to which the charge relates; and/or

(b) to be regarded as having substantial probative value by virtue of any inference it may raise as to general disposition.

Proposal 18–5 Commonwealth, state and territory legislation should provide that 'sexual history evidence' or sexual experience evidence is not to be regarded as being proper matter for cross-examination as to credit unless, because of special circumstances, it would be likely materially to impair confidence in the reliability of the evidence of the complainant.

Procedural issues

18.73 In all jurisdictions, any question as to the admissibility of sexual history evidence is decided by the court in the absence of the jury.[93] In Victoria, Queensland, the ACT and the Northern Territory, an application for leave may be heard in the absence of the complainant at the accused's request.[94] This approach allows for the full examination of the nature and purpose of proposed evidence by counsel for both sides without causing embarrassment to the complainant[95] and may afford a practical opportunity to limit and frame questions.

18.74 In the Commonwealth, Victorian and ACT jurisdictions, an application for leave is to be made in writing.[96] The Victorian provisions require service of the application on the Office of Public Prosecutions (OPP) or the informant at least seven days before summary hearings, committal hearings and sentencing hearings, and 14 days before

93 *Crimes Act 1914* (Cth) s 15YD(1)(b); *Criminal Procedure Act 1986* (NSW) s 293(7); *Criminal Procedure Act 2009* (Vic) s 348; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(6); *Evidence Act 1906* (WA) s 36BC(1); *Evidence Act 1929* (SA) s 34L(4); *Evidence Act 2001* (Tas) s 194M(1)(b); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 52(b); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(4).

94 *Criminal Procedure Act 2009* (Vic) s 348; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(6); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 52(c); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(4).

95 J Bargen and E Fishwick, *Sexual Assault Law Reform: A National Perspective* (1995), 83.

96 *Crimes Act 1914* (Cth) s 15YD(1)(b); *Criminal Procedure Act 2009* (Vic) s 344; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 52.

trials and special hearings.[97] The written application for leave must set out the initial questions sought to be asked, the scope of the questioning and as well as how the evidence sought to be elicited has substantial relevance to facts in issue or why it is a proper matter for cross-examination as to credit.[98] These procedural controls were imposed after studies showed that the legislation was having a limited effect on the admission of prior sexual history evidence.[99]

18.75 The Victorian OPP pursued a policy of writing to the defence in sexual offence matters and informing them of the procedural requirements imposed under then s 37A of the *Evidence Act 1958* (Vic).[100] As at December 2003, that practice increased the number of written applications for leave but written applications were still only being made in approximately half of cases where they are required.[101] The VLRC recommended the OPP continue that practice.[102]

18.76 There is variation across the jurisdictions as to whether the court is required to record in writing the reasons for granting leave.[103]

Commissions' views

18.77 Ensuring compliance with relevant legislation regulating the admission of evidence of complainants' prior sexual history is a key concern.[104]

18.78 Formalising the procedure by which an application to cross-examine and adduce evidence of a complainant's sexual history is made will encourage judicial officers and legal practitioners to turn their minds to the admissibility issues at an early stage of the proceedings. By requiring an application for leave in writing, and that the application be given to the opposing party before the hearing of the application, the provision proposed below would require counsel to address whether the evidence is probative of the facts in issue. It also gives the opposing party notice of the application and allows time to prepare any counter-arguments.[105]

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97 *Criminal Procedure Act 2009* (Vic) s 344.

98 Ibid s 345.

99 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [4.41].

100 Replaced by *Criminal Procedure Act 2009* (Vic) s 348.

101 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [4.52].

102 Ibid, Rec 74.

103 A court may be required to record in writing the reasons for granting leave, eg: *Crimes Act 1914* (Cth) s 15YD(2); *Criminal Procedure Act 1986* (NSW) s 293(8); *Criminal Procedure Act 2009* (Vic) s 351; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 52; or give reasons only, eg: *Evidence Act 2001* (Tas) s 194M(5); or may be free of any legislative requirement.

104 For instance, empirical research has suggested that questions which raise admissibility issues are often asked without prior application by the defence, objection by the prosecution, reference to the relevant legislation or appropriate judicial intervention: J Bargen, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault, Gender Bias and the Law Project* (1996), 241.

105 New South Wales Law Reform Commission, *Review of Section 409B of the Crimes Act 1900 (NSW)*, Report 87 (1998), [6. 138].

18.79 The court should be required, as recommended by NSWLRC 87, to give reasons for its decision whether or not to grant leave, and, if leave is granted to question the complainant, to state the nature of the evidence which may be elicited by that questioning.[106] The requirement that the court 'state the nature of the evidence which may be elicited by that questioning' is necessary to prevent questioning of the complainant beyond the scope of the evidence which has been ruled admissible.[107]

Proposal 18–6 Commonwealth, state and territory legislation should require an application for leave to admit or adduce sexual history evidence to be:

(a) made in writing; and

(b) filed with the relevant court and served on the informant or the Director of Public Prosecutions within a prescribed minimum number of days,

and prescribe:

(a) the required contents of such an application;

(b) the circumstances in which leave may be granted out of time;

(c) the circumstances in which the requirement that an application for leave be made in writing may be waived; and

(d) that the application is to be determined in the absence of the jury, and if the accused requests, in the absence of the complainant.

Proposal 18–7 Commonwealth, state and territory legislation should require a court to give reasons for its decision whether or not to grant leave, and if leave is granted to question the complainant, to state the nature of the evidence which may be elicited by that questioning.

Proposal 18–8 Commonwealth, state and territory Directors of Public Prosecution should introduce and implement a policy of writing to the defence in sexual assault matters and informing them of the procedural application requirements imposed under the relevant legislation in relation to admitting and adducing sexual experience evidence.

106 Ibid, [6.140].
107 Ibid.

Sexual assault communications privilege

18.80 Sexual assault communications are communications made in the course of a confidential relationship between the victim of a sexual assault and a counsellor. The defence may seek access to this material to assist during their cross-examination of the complainant and other witnesses.

18.81 From the mid-1990s, ongoing reform of sexual assault laws and procedure has included the enactment of legislation to limit the disclosure and use of these communications.[108] Every state and territory—except Queensland—now has specific legislation protecting counselling communications.[109]

18.82 The sexual assault communications privilege[110] has been considered by a number of law reform bodies, including MCCOC,[111] the VLRC,[112] and by the ALRC, VLRC and NSWLRC in ALRC 102.[113] These reports have generally taken the view that the privilege serves the important public interest of encouraging people who have been sexually assaulted to seek therapy and may also encourage people who are sexually assaulted to report the crime to the police.[114]

Current law

18.83 Models of sexual assault communications privilege differ markedly. The main point of divergence is whether the privilege is qualified or absolute. A further differentiation is whether or not the privilege applies in preliminary criminal proceedings, such as committal proceedings.

18.84 The privilege for communications to sexual assault counsellors under s 127B of the *Evidence Act 2001* (Tas) provides absolute protection of the communications unless the complainant consents to their production.

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108 M Heath, *The Law of Sexual Offences Against Adults in Australia* (2005) Australian Institute of Family Studies, 15.

109 For current provisions see: *Criminal Procedure Act 1986* (NSW) ch 6 pt 5 div 2; *Evidence (Miscellaneous Provisions) Act 1958* (Vic) pt 2 div 2A; *Evidence Act 1906* (WA) ss 19A–19M; *Evidence Act 1929* (SA) pt 7 div 9; *Evidence Act 2001* (Tas) s 127B; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) pt 4 div 4.5; *Evidence Act 1939* (NT) pt VIA. Note that Queensland has not enacted specific legislation protecting sexual assault counselling communications.

110 The Terms of Reference refer to the work being undertaken through SCAG in relation to the 'sexual assault communications *immunity* provisions' (emphasis added). The ALRC considered the distinction between privileges and immunities in Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework*, ALRC 111 (2009), [3.20]–[3.22]. See also, J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 108–109.

111 Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5, Fatal Offences Against the Person: Discussion Paper* (1998).

112 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [4.71]–[4.98].

113 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102, NSWLRC Report 112, VLRC FR (2005), [15.45]–[15.84].

114 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [4.71].

18.85 In New South Wales,[115] South Australia,[116] the Northern Territory[117] and the ACT[118] there is an absolute prohibition against requiring the production of counselling communications in preliminary criminal proceedings and against the use of counselling communication in such proceedings. Otherwise, the privilege that applies in all jurisdictions, except Tasmania, is qualified, both in relation to the production of documents and the use of notes in evidence.[119]

18.86 One of the main issues in relation to the scope of the privilege is that, in many jurisdictions, the current restrictions on admission of sexual assault counselling communications do not prevent a defence lawyer from issuing a subpoena requiring a person to produce counselling notes.[120] As a result subpoenas are frequently used to 'require counsellors to attend and give evidence or produce notes' and '[p]rivate counsellors who are unaware that the law protects confidential counselling communications may produce records, rather than appearing in court to resist a subpoena'.[121]

18.87 Other factors that affect the scope of the privilege, and which are defined or dealt with inconsistently across the jurisdictions, include:

- the scope of the communications protected;[122]
- whether preliminary examination by a judicial officer—to determine questions of leave to produce or adduce protected confidences—is a mandatory or discretionary requirement;[123]
- the thresholds of which the court must be satisfied before ordering production;[124]
- the factors the court must take into account for the purposes of the public interest balancing test;[125] and
- the express exemptions to the privilege.[126]

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115 *Criminal Procedure Act 1986* (NSW) s 297.
116 *Evidence Act 1929* (SA) s 67F.
117 *Evidence Act 1939* (NT) s 56B.
118 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 57.
119 See also, *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32C; *Evidence Act 1906* (WA) s 19C.
120 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [4.74].
121 Ibid.
122 See, eg, *Evidence Act 1906* (WA) s 19A cf *Evidence Act 1929* (SA) s 67D.
123 See, eg, *Criminal Procedure Act 1986* (NSW) s 298(1)(a) cf *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32C(6).
124 See, eg, *Criminal Procedure Act 1986 (NSW)* s 298(3),(4) cf *Evidence Act 1906* (WA) s 19E.
125 See, eg, *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32D(2) cf *Evidence Act 1929* (SA) s 67F(5)–(6).
126 See, eg, *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32E cf *Evidence Act 1939* (NT) s 56F.

Further reform of sexual assault communications privilege

18.88 As a second phase of evidence law reforms, following on from ALRC 102, SCAG is developing, through the Evidence Working Group and Parliamentary Counsels' Committee, proposed amendments to the uniform Evidence Acts dealing with sexual assault communications privilege provisions. Model provisions are expected to be drafted later in 2010.

18.89 The Terms of Reference instruct the ALRC, in undertaking this inquiry, to be 'careful not to duplicate … the work being undertaken through SCAG on the harmonisation of uniform evidence laws, in particular the development of model sexual assault communications immunity provisions'. For this reason, the following consideration of the sexual assault communications privilege is not focused on the harmonisation of these provisions but on problems with how they operate in practice.

18.90 In particular, there are concerns that, in practice, sexual assault communications privileges do not achieve the intended policy objective of protecting the public interest in maintaining the confidentiality of the counselling relationship and its therapeutic benefits.[127]

18.91 Women's Legal Services NSW has identified the following continuing problems for victims of sexual assault and counsellors pursuant to existing sexual assault communications privilege provisions:

- some counselling services do not inform sexual assault victims that their counselling notes have been subpoenaed;
- some counselling services produce material to the court without raising an objection or claiming the privilege;
- some counselling services give sexual assault victims inaccurate advice about the privilege;
- sexual assault victims may not receive written notice of the subpoenaed documents;
- sexual assault victims have difficulty obtaining legal assistance to uphold their privilege;
- sexual assault victims who seek to uphold their privilege often require legal representation at short notice and the legal representation retained may only gain limited access to relevant materials;

127 Women's Legal Services NSW, *Consultation*, Sydney, 20 January 2010.

- judicial officers permit reliance on improperly obtained confidences to support arguments about admissibility;

- the party seeking access to protected confidences re-ventilate arguments about admissibility before trial judges—after a judicial officer presiding at an interlocutory hearing has made a ruling—and trial judges may overrule the decision;

- sexual assault victims have reported feelings of violation due to the legal processes associated with seeking disclosure of their counselling records and seeking to uphold their privilege.[128]

18.92 Many of these problems appear to arise because the privilege is legally that of the sexual assault victim,[129] but the privileged documents sought to be produced and admitted belong to counselling services or individual counsellors responsible for their creation.

18.93 A qualified sexual assault communications privilege serves the broader public interest of ensuring the legal system is fair both to the accused and the complainant.[130] However, sexual assault victims, who are unrepresented in criminal proceedings, may not be in a position to claim or seek to enforce the privilege.

18.94 This difficulty has generated debate about whether victim advocates should be employed in the criminal justice process to make submissions as to rulings on the sexual assault communications privilege.[131] It is beyond the scope of the current Inquiry to consider that debate, which would require detailed consideration of difficulties inherent in reconciling the role of a separate legal representative with the current constraints of the adversarial system. The NSW Criminal Justice Sexual Offences Taskforce observed that:

> Whilst there may be some merit to utilising independent legal representation in matters arising under the sexual assault communications privilege, as this is a privilege that belongs to the complainant, the proposal, as it currently stands, appears to create more problems than it may solve.[132]

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128 Ibid. Women's Legal Services NSW coordinates the Sexual Assault Communications Pro Bono Referral Pilot in the Downing Centre (SCAP Pilot)—a New South Wales Local Court. The Pilot brings together three pro bono firms, the NSW Bar Association and the Office of Director of Public Prosecutions to provide referrals and free legal representation to enable complainants in sexual assault trials to claim and uphold the right to the protection of the sexual assault communications privilege.

129 For example, as the 'protected confider' who made the 'counselling communication': *Criminal Procedure Act 1986 (NSW)* ss 295, 296.

130 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102, NSWLRC Report 112, VLRC FR (2005), [15.81].

131 See, eg, Criminal Justice Sexual Offences Taskforce (NSW Attorney General's Department), *Responding to Sexual Assault: The Way Forward* (2005), 179–180.

132 Ibid, 180.

Assisting complainants to invoke the privilege

18.95 Implementing some or all of the following measures may assist sexual assault victims to invoke a sexual assault communications privilege:[133]

- requiring the party seeking production to provide notice in writing to each other party and if the sexual assault complainant is not a party—the sexual assault complainant;
- requiring that any such written notice issued be accompanied by a pro forma fact sheet on the privilege and providing contact details for assistance;
- educating defence counsel about their obligation to identify records potentially giving rise to the privilege to encourage compliance with any such written notice provisions;
- providing counsellors with education about the sexual assault communications privilege and next steps if they are served with a subpoena;[134]
- requiring that subpoenas be issued with a pro forma fact sheet on the privilege, providing contact details for legal assistance;
- improving access to free legal assistance about the sexual assault communications privilege;
- requiring that the court issuing a subpoena provide a copy of all subpoenas to the prosecution;
- educating prosecutors: to identify possible claims of the sexual assault communications privilege arising out of subpoenas; to inform the court of any such possible claims of the sexual assault communications privilege during the pre-trial processes; where subpoenas are served at short notice during a trial, to query short service applications; to inform the court where documents containing protected confidences are improperly adduced, admitted or used in the course of proceedings;
- educating defence counsel generally about the sexual assault communications privilege with a view to limiting the use of improperly obtained protected confidences;

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133 These proposed practices reflect the views of Women's Legal Services NSW as contained in: Women's Legal Services NSW, *The NSW Sexual Assault Communications Privilege: Current Procedure and Issues for Reform: Submission to the NSW Attorney-General's Department* (2008).

134 See, eg, Women's Legal Services NSW, *Counsellors and Subpoenas: A Practical Guide for Counsellors Served with Subpoenas* (2004).

- educating judicial officers about the impact of sexual assault on complainants, the role of counselling in alleviating victims' trauma and the desirability of encouraging people who have been sexually assaulted to seek therapy; and

- educating judicial officers about complainants' difficulties—legal and personal—where an application for leave to produce or adduce a sexual assault communication is considered twice—by a judicial officer at an interlocutory hearing and again by the trial judge.

18.96 The Commissions are interested in comments on whether any such measures should be implemented to assist complainants in sexual assault proceedings to invoke a sexual assault communications privilege.

Question 18–5 In sexual assault proceedings, the sexual assault communications privilege must generally be invoked by the complainant, who is legally unrepresented. Assuming complainants continue to be unrepresented in such sexual assault proceedings, what procedures and services would best assist them to invoke the privilege?

Expert opinion evidence and children

18.97 There is a considerable body of research that shows that jurors and jury-eligible citizens hold a number of misconceptions about children's ability to give truthful evidence and how children react to sexual abuse.[135] The most common misconceptions include that:

- children are easily manipulated into giving false reports of sexual abuse;

- child sexual abuse will result in physical damage and evidence;

- a typical victim would resist, cry out for help or escape the offender;

- delay in complaint is uncommon and evidence of lying; and

- inconsistencies in a child's report is evidence of lying.[136]

18.98 The only published Australian study on juror misconceptions found that fewer than half of the 659 participants provided accurate responses to two thirds of the

135 An extensive summary of the literature on jurors' and laypersons' misconceptions can be found in A Cossins, 'Children, Sexual Abuse and Suggestibility: What Laypeople Think They Know and What the Literature Tells Us' (2008) 15 *Psychiatry, Psychology and Law* 153.

136 Ibid, 156.

questions that tested their knowledge about children and child sexual abuse, 'indicating that the most critical information about [child sexual abuse] cases is outside the experience and common knowledge of laypeople'.[137]

18.99 The key question posed by the literature on jurors' and laypeople's misconceptions about child sexual abuse is whether expert witnesses are needed in child sexual assault trials 'to educate jurors about children's memory, suggestibility, and reactions to abuse'.[138]

18.100 Compared to the United States, Australian jurisdictions have had limited experience with admitting expert witness evidence about children.[139] The general approach under the common law opinion rule 'has been to exclude such evidence on the grounds that the behaviour of child sexual abuse victims is within the common knowledge or ordinary experience of the jury'.[140]

18.101 However, many professionals recognise that some of the responses of children to sexual abuse are counterintuitive from a layperson's perspective, such as delay in complaint, secrecy, protecting the offender and maintaining an emotional bond with the offender.[141] Rather than the jury relying on its commonsense or collective experience, it is arguable that expert testimony about the behaviour of sexually abused children is necessary 'to restore a complainant's credibility from a debit balance because of jury misapprehension, back to a zero or neutral balance',[142] especially where the behaviour in question appears to a jury to be inconsistent with sexual abuse.

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137 A Cossins, J Goodman-Delahunty and K O'Brien, 'Uncertainty and Misconceptions about Child Sexual Abuse: Implications for the Criminal Justice System' (2009) 16 *Psychiatry, Psychology and Law* 435, 445. Certain individuals (notably male jurors) may be more prone to holding erroneous beliefs about children's reports of sexual abuse and particular compositions of juries, based on gender, age and education levels, may require educative expert opinion evidence, a finding that has been reported in a number of different studies: See also A Cossins, 'Children, Sexual Abuse and Suggestibility: What Laypeople Think They Know and What the Literature Tells Us' (2008) 15 *Psychiatry, Psychology and Law* 153, 156.

138 J Quas, W Thompson and K Clarke-Stewart, ' Do Jurors "Know" What Isn't So About Child Witnesses?' (2005) 29 *Law and Human Behaviour* 425, 425.

139 I Freckelton and H Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (4th ed, 2008).

140 A Cossins, 'Children, Sexual Abuse and Suggestibility: What Laypeople Think They Know and What the Literature Tells Us' (2008) 15 *Psychiatry, Psychology and Law* 153, 155. See *S v The Queen* (2001) 125 A Crim R 526; *R v Venning* (1997) 17 SR(WA) 261; *F v The Queen* (1995) 83 A Crim R 502; *C v The Queen* (1993) 70 A Crim R 378; *Ingles v The Queen* (Unreported, Tasmanian Court of Criminal Appeal, 4 May 1993).

141 See A Cossins, 'Children, Sexual Abuse and Suggestibility: What Laypeople Think They Know and What the Literature Tells Us' (2008) 15 *Psychiatry, Psychology and Law* 153.

142 New Zealand Law Commission, *Evidence Code and Commentary* (1999), 67.

Reform of the opinion rule

18.102 There has been a consistent view that legislative reform is needed to allow the admissibility of expert opinion evidence on the behavioural patterns of sexually abused children and children generally.[143]

18.103 The first jurisdiction in Australia to legislate to overcome the limitations of the common law opinion rule was Tasmania. In 2001, a specific provision dealing with the admission of expert witness evidence in child sexual assault trials was included when Tasmania enacted the *Evidence Act 2001* (Tas).[144]

18.104 In ALRC 102, the ALRC, NSWLRC and VLRC noted wide support for amending the common law opinion rule to allow the admission of expert opinion evidence about children.[145] The report highlighted the main problem with admitting expert opinion evidence about the development and behaviour of children—that is, if tendered for a credibility purpose, the credibility rule as well as exceptions to the credibility rule, are obstacles to admission.[146] For this reason, the ALRC, NSWLRC and VLRC made recommendations to amend s 79 of the uniform Evidence Acts to facilitate the admission of such evidence and to introduce a new exception to the credibility rule.[147]

18.105 These amendments were subsequently adopted by the Commonwealth, NSW and Victoria.[148] Section 79(2) of the uniform Evidence Acts confirms that for the purposes of the expert opinion exception to the opinion rule, 'specialised knowledge' includes 'specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse)'.[149] Section 108C of the uniform Evidence Acts provides that the credibility rule does not apply to evidence given by a

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143 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102, NSWLRC Report 112, VLRC FR (2005), [9.156]; Legislative Council Standing Committee on Law and Justice—Parliament of New South Wales, *Report on Child Sexual Assault Prosecutions*, Report No 22 (2002), 123; Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), 329; Royal Commission into the New South Wales Police Service, *Final Report—Volume V: The Paedophile Inquiry* (1997), 1118: See National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 236–238.

144 *Evidence Act 2001* (Tas) s 79A. The Tasmanian Act does not include a provision that permits the admissibility of such evidence as an exception to the credibility rule, as is the case under the Commonwealth, NSW and Victorian Acts: eg, *Evidence Act 1995* (Cth) s 108C; *Evidence Act 1995* (NSW) s 108C; *Evidence Act 2008* (Vic) s 108C.

145 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102, NSWLRC Report 112, VLRC FR (2005), [9.168].

146 Ibid, [9.147].

147 Ibid, recs 9–1, 12–7.

148 *Evidence Amendment Act 2008* (Cth); *Evidence Amendment Act* 2007 (NSW); *Evidence Act 2008* (Vic). At the time of writing, Tasmania had not adopted these amendments.

149 *Evidence Act 1995* (Cth) s 79(2); *Evidence Act 1995* (NSW) s 79(2); *Evidence Act 2008* (Vic) s 79(2).

person concerning the credibility of another witness if the person has specialised knowledge based on the person's training, study or experience (including specialised knowledge of child development and child behaviour) and the evidence 'could substantially affect the assessment of the credibility of a witness'.

Continuing problems

18.106 It has been suggested, however, that these amendments to the uniform Evidence Acts 'are a gateway only, rather than a complete answer to the problem of correcting juror misconceptions'.[150] First, the gateway represented by s 108C is narrow, because the expert opinion evidence has to 'substantially' affect the assessment of the credibility of the complainant in a child sexual assault trial. This may represent a relatively high bar and impose 'a significant limitation on the admissibility of expert evidence admitted solely for its credibility purpose'.[151] Secondly, expert opinion evidence can only be admitted with the leave of the court, which means that the court will need to refer to the matters listed in s 192 of the uniform Evidence Acts before giving leave—and consider defence counsel objections about unfairness to the accused and lengthening the trial.[152]

18.107 In addition, while expert opinion evidence on children's credibility may be desirable, those seeking to adduce such evidence face practical difficulties with the cost and availability of experts. Crown prosecutors noted that it may not be possible to call expert witnesses to give evidence under s 79(2) because such witnesses are not available or because there is no such expert in a particular jurisdiction. For some prosecutors, it may be too costly to fly an expert from interstate. Even if expert opinion evidence is admitted, some experts may take a 'hired gun' approach' to the literature and selectively choose research or misinterpret research to illustrate a particular point.[153]

18.108 While the uniform Evidence Acts reforms were an attempt to address one of the barriers to prosecuting child sex offences, the provisions may be insufficient to address the problem of jurors' misconceptions in child sexual assault trials. For example, it has been argued that:

> the public interest (including the interests of child complainants and their families) in the appropriate conduct of child sexual assault trials, means that it is not enough that law reform measures merely allow for the admission of expert opinion evidence. Such measures will need to produce practical outcomes in the way trials are conducted to ensure that juror misconceptions are not left unchallenged as a matter of luck or chance, depending upon the individual decisions of prosecutors to adduce evidence from expert witnesses

150 A Cossins, 'Children, Sexual Abuse and Suggestibility: What Laypeople Think They Know and What the Literature Tells Us' (2008) 15 *Psychiatry, Psychology and Law* 153, 165.

151 Ibid, 165–166.

152 Ibid, 166.

153 S Blackwell, 'Expert Psychological Evidence in Child Sexual Abuse Trials in New Zealand' (Paper presented at The Children and the Courts Conference, Canberra, 5 November 2005), 8.

or the availability of appropriately qualified expert witnesses in different jurisdictions.[154]

Reform options

18.109 A number of options for further reform of the operation of the opinion rule with respect to expert evidence in child sexual assault trials have been canvassed. Barriers to the admission of such evidence could be lowered, for example, by:

- removing the word, 'substantially', from s108C(1)(b)(ii) of the uniform Evidence Acts; or

- making some categories of expert opinion evidence admissible without leave of the courts, as currently required.

18.110 The National Child Sexual Assault Reform Committee has suggested that, because the prosecution may be unable to lead evidence from an expert witness about children's responses to sexual abuse and their reliability as witnesses, or a trial judge may refuse to give leave for such evidence to be admitted, a mandatory judicial direction, containing the same information that would be given by an expert witness, should be introduced into all Australian jurisdictions. This would counteract juror misconceptions and serve as an alternative to calling expert witnesses.[155] Alternatively, such information might be incorporated in a Bench Book for judicial officers dealing with sexual assault cases.[156]

18.111 On one view, it is clearly to the defendant's advantage for expert evidence not to be admitted in a child sexual assault trial because this allows the defence to exploit all the misconceptions associated with delay in complaint, behavioural disturbances and counterintuitive behaviour.[157] As it is likely that defence counsel will seek to have expert opinion evidence about the behaviour of sexually abused children declared inadmissible or excluded on the grounds that it is prejudicial or within the common knowledge of the jury, it may be more appropriate for a mandatory judicial direction to be given by the judge at the end of the trial.[158]

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154 National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 247.

155 Ibid, 248–251.

156 Such as the bench book recommended in 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), 121.

157 S Blackwell, 'Expert Psychological Evidence in Child Sexual Abuse Trials in New Zealand' (Paper presented at The Children and the Courts Conference, Canberra, 5 November 2005).

158 A recent mock jury study found that both judicial directions and expert evidence were effective in reducing misconceptions about child sexual abuse cases: A Cossins, J Goodman-Delahunty and K O'Brien, *Countering Misconceptions in Child Sexual Assault Cases with Expert Evidence and Judicial Directions*, 25 October 2008.

18.112 New Zealand provides an example of the type of instructions judges are required to give when a witness is a child under the age of 6 years under r 49 of the *Evidence Regulations 2007* (NZ). This regulation states:

> If, in a criminal proceeding tried with a jury in which a witness is a child under the age of 6 years, the Judge is of the opinion that the jury may be assisted by a direction about the evidence of very young children and how the jury should assess that evidence, the Judge may give the jury a direction to the following effect:
>
> (a) even very young children can accurately remember and report things that have happened to them in the past, but because of developmental differences, children may not report their memories in the same manner or to the same extent as an adult would:
>
> (b) this does not mean that a child witness is any more or less reliable than an adult witness:
>
> (c) one difference is that very young children typically say very little without some help to focus on the events in question:
>
> (d) another difference is that, depending on how they are questioned, very young children can be more open to suggestion than other children or adults:
>
> (e) the reliability of the evidence of very young children depends on the way they are questioned, and it is important, when deciding how much weight to give to their evidence, to distinguish between open questions aimed at obtaining answers from children in their own words from leading questions that may put words into their mouths.

18.113 The National Child Sexual Assault Reform Committee has recommended three draft directions that summarise the findings in the psychological literature about children's memory, their reliability as witnesses, their resistance to suggestions of abuse and the importance of examining the way a child is questioned when deciding how much weight to give their evidence.[159]

18.114 The first two of these directions are similar to the NZ direction, and relate to children's abilities as witnesses and apply to the evidence of children under the age of 16 years and under the age of 5 years respectively. The third concerns children's response to sexual abuse and states:

> Directions Concerning Children's Responses to Sexual Abuse
>
> (1) This section applies to proceedings in respect of a prescribed sexual offence.
>
> (2) In a proceeding in which there is a jury and the complainant is under the age of 16 years, the judge must give the jury the following directions:

159 All three recommendations address the typical juror misconceptions that have been identified in the literature: see National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 249–251.

(a) there is no one set of symptoms or behaviours that all sexually abused children display. Depending upon the individual child and their circumstances, some children may exhibit a number of symptoms whereas some children may exhibit none at all;

(b) only rarely does sexual abuse result in physical symptoms and physical evidence that can be detected by a medical examination;

(c) very often victims of sexual abuse do not cry out for help, resist or escape from the offender;

(d) they often delay their complaint of abuse for months or years and there may be a number of reasons why a child will delay their complaint, such as threats to themselves or their loved ones, or fear they will not be believed or they will be blamed. They may feel ashamed, embarrassed or responsible for the abuse. They might want to protect the abuser if it is someone they love or trust and they may not know that the abuse is wrong. They may not have the language to describe what has happened to them, particularly if they are very young;

(e) some children may exhibit particular behaviours as a result of being sexually abused that are counterintuitive and may not appear to make sense to the adult layperson;

(f) the behaviours that have been reported in the scientific literature include: delay in complaint for months or years; disturbed sleep patterns and/or nightmares; bedwetting; disturbed behavioural patterns; learning difficulties, fearfulness and general emotional upset; retraction of the complaint; sexualized behaviour; and ongoing contact and/or affection for the alleged offender;

(g) it is important to remember that, on their own, none of these behaviours are diagnostic of sexual abuse having occurred.[160]

Commissions' views

18.115 There is recognition that, in at least some cases, expert evidence on the development and behaviour of children generally (and those who have been victims of sexual offences in particular) and the implications for the credibility of children as witnesses may be desirable.

18.116 On this basis, whatever the problems in practice, the approach to the admissibility of such evidence taken under the uniform Evidence Acts is clearly an improvement on the position in jurisdictions that have not joined the scheme. For this reason, the Commissions propose below that state and territory evidence legislation should provide that (a) the opinion rule does not apply to evidence of an opinion of a person based on that person's specialised knowledge of child development and child behaviour; and (b) the credibility rule does not apply to such evidence given concerning the credibility of children.

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160 Ibid, Rec 3.5.

18.117 The intention of this proposal is that all states and territories that have not already done so should adopt provisions consistent with ss 79 and 108C of the uniform Evidence Acts. As discussed earlier, the Commissions consider it is preferable that all Australian jurisdictions join the uniform Evidence Acts scheme. Alternatively, reforms in the area of expert opinion evidence could be enacted in evidentiary provisions outside the uniform Evidence Acts—as, for example, in the *Evidence Act 1906* (WA), which already contains modification of common law rules of evidence specific to children's evidence.[161]

18.118 There are concerns about how adducing expert opinion evidence in child sexual assault cases works in practice. The Commissions note that problems with costs or delay attributable to adducing expert opinion evidence and undue partisanship or bias on the part of expert witnesses are not limited to those arising in sexual offence proceedings. These problems have been widely discussed in law reform reports.[162]

18.119 The Commissions are also interested in hearing views on the desirability or otherwise of mandatory jury directions concerning children's abilities as witnesses and children's responses to sexual abuse.

Proposal 18–9 State and territory evidence legislation should provide that

(a) the opinion rule does not apply to evidence of an opinion of a person based on that person's specialised knowledge of child development and child behaviour; and

(b) the credibility rule does not apply to such evidence given concerning the credibility of children.

161 For example, *Evidence Act 1906* (WA) s 106H, modifying the hearsay rule with respect to children's statements.

162 Proposed solutions, in the context of civil proceedings, include the wider use of agreed or court-appointed experts and new mechanisms for the accreditation and accountability of expert witnesses. See, eg, Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, ALRC 89 (1999), ch 6; New South Wales Law Reform Commission, *Expert Witnesses*, Report 109 (2005).

Question 18–6 Should Commonwealth, state and territory legislation provide for mandatory jury directions, containing prescribed information about children's abilities as witnesses or children's responses to sexual abuse?

Tendency and coincidence evidence

18.120 The following section discusses aspects of the law of evidence concerning the admissibility of 'tendency' and 'coincidence' evidence, as defined under the uniform Evidence Acts, and 'propensity' or 'similar fact' evidence at common law. These forms of evidence may include, for example, evidence of prior convictions for sexual offences or prior illegal sexual conduct—often referred to as 'uncharged acts'.

Current law

18.121 Under the uniform Evidence Acts (applicable in NSW, Victoria, Tasmania and the ACT criminal proceedings) evidence about a defendant's prior illegal sexual conduct may be characterised as 'tendency' or 'coincidence' evidence.[163]

18.122 Tendency evidence is evidence 'of the character, reputation or conduct of a person, or a tendency that a person has or had' adduced to prove that the person 'has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind'.[164]

18.123 Coincidence evidence is evidence that '2 or more events occurred' adduced to prove that 'a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events … it is improbable that the events occurred coincidentally'.[165]

18.124 The test for admissibility under the uniform Evidence Acts is whether the tendency or coincidence evidence has significant probative value and its probative value substantially outweighs any prejudicial effect it may have on the defendant.[166]

18.125 At common law, evidence of these kinds is referred to as either 'propensity' or 'similar fact' evidence, depending on the purpose for which it is admitted. In jurisdictions that do not apply the uniform Evidence Acts, the admissibility of these forms of evidence is governed by the common law, as modified by statute in some jurisdictions.

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163 Uniform Evidence Acts, pt 3.6.
164 Ibid s 97.
165 Ibid s 98.
166 Ibid ss 97, 98, 101.

18.126 At common law, as a matter of general principle, evidence of past criminal conduct, including convictions (for sexual offences or otherwise) is not admissible unless there is a 'striking similarity' or 'underlying unity' between the similar facts.[167] Admissibility is governed by the test in *Pfennig v The Queen*—that is, propensity evidence is admissible if its probative value is such that there is no rational view of the evidence that is consistent with the innocence of the accused.[168]

18.127 In Queensland, similar fact evidence must not be ruled inadmissible on the ground 'that it may be the result of collusion or suggestion, and the weight of that evidence is a question for the jury'.[169]

18.128 In Western Australia, the *Evidence Act 1906* (WA) governs the admissibility of propensity and relationship evidence by incorporating a 'significant probative value' test and a public interest test.[170]

18.129 In South Australia, propensity evidence relating to a count of sexual assault is only admissible in a joint trial if it has relevance beyond mere propensity. However, in deciding admissibility, the judge is not to have regard to 'whether or not there is a reasonable explanation in relation to the evidence consistent with the innocence of the accused or whether or not the evidence may be the result of collusion or concoction'.[171]

Impact in sexual assault trials

18.130 The impact of these rules of evidence depends on the type of trial and the type of evidence the prosecution seeks to adduce. If there are two or more complainants who have allegedly been sexually assaulted by the same defendant, the prosecution is likely to make a pre-trial application to have the counts against the defendant heard in a joint trial, rather than separate trials. As discussed in Chapter 17, the threshold question for holding a joint trial is whether or not each complainant's evidence will be cross-admissible in respect of the charges involving the other complainant or complainants.

18.131 If there is only one complainant, the prosecution may have evidence from other witnesses about the defendant's criminal sexual behaviour with them, or it may wish to adduce relationship evidence to explain the nature of the relationship between the complainant and the defendant, as well as the context in which the sexual assault occurred.[172]

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167 *Pfennig v The Queen* (1995) 182 CLR 461.
168 Ibid, 485; see also *HML v The Queen* (2008) 235 CLR 334.
169 *Evidence Act 1977* (Qld) s 132A.
170 *Evidence Act 1906* (WA) s 31A(2).
171 *Criminal Law Consolidation Act 1935* (SA) s 278(2a).
172 Relationship evidence is discussed later in this chapter.

18.132 Three aspects of the law of evidence concerning the admissibility of tendency and coincidence evidence are problematic in sexual assault cases. These are:

- the 'striking similarities' test;
- the 'no rational view of the evidence' test; and
- excluding 'a reasonable possibility of concoction'.

The 'striking similarities' test

18.133 At common law, the cross-admissibility of the evidence of two or more complainants is, at the outset, dependent on the evidence revealing 'striking similarities'.[173] The cross-admissibility of evidence frequently arises in the child sexual assault context where it has been argued that the 'striking similarities' test 'has been used to create artificial distinctions in relation to sex offender behaviour'.[174]

18.134 This artificiality is said to arise because 'when it comes to assessing the probative value of the evidence of child complainants, there will be higher or lower degrees of similarity depending on what a judge knows about sex offending behaviour'.[175] For example, a trial judge who is unaware of the range of grooming and sexual practices of child sex offenders 'may look for greater degrees of similarity in the evidence compared to a judge who is aware of the variety of ways in which … offenders gain a child's trust and affection and the different sexual practices a serial offender will engage in'.[176]

18.135 A lower threshold for determining probative value may be 'appropriate in child sexual assault cases where the identity of the offender is not in issue, in order to capture the range of sexual and grooming behaviours of serial offenders'.[177] Since most cases of sexual assault involve defendants known to the complainant, rather than strangers, the identity of the accused will not usually be a fact in issue. It is also argued that, when applying the 'striking similarities' test, many cases have failed to recognise that any sexual practices with children 'ought to be the sufficient similarity requirement since sex offenders will engage in different sexual conduct with different children depending upon the age and sex of the child, the passivity or resistance of the child, the degree of grooming of, and the degree of access to, the child, the defendant's relationship with the child and so on'.[178]

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173 *Phillips v The Queen* (2006) 225 CLR 303.
174 National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 214.
175 Ibid.
176 Ibid.
177 Ibid.
178 Ibid, 205. See, eg, the facts in *AE v The Queen* [2008] NSWCCA 52; *R v KP; Ex parte Attorney-General (Qld)* [2006] QCA 301; *R v Fletcher* (2005) 156 A Crim R 308.

18.136 Cases such as *R v KP; Ex parte Attorney-General (Qld)* illustrate how rules on the admissibility of propensity and similar fact evidence can frustrate legislative attempts to increase the number of joint trials.[179] This is because a decision to hold a joint trial is dependent on the cross-admissibility of each complainant's evidence which, in turn, is dependent on finding sufficient similarities in the evidence. Recently, the culmination of the tension between cross-admissibility and joint or separate trials occurred in the High Court case of *Phillips v The Queen*. Since this decision, the applicability of the 'striking similarities' test has been reinforced as the standard for determining the admissibility of similar fact evidence at common law.[180]

18.137 Although the uniform Evidence Acts create a different regime for admitting tendency and coincidence evidence, it can be argued that the striking similarities test is still used in assessing the probative value of the evidence of two or more complainants about a defendant's sexual conduct.[181]

18.138 For example, the NSW Court of Criminal Appeal has noted the similarity between the approach under the *Evidence Act 1995* (NSW) and the common law.[182] Common law formulations, including 'striking similarities' have been held to 'guide' the reasoning process when determining whether tendency or coincidence evidence has significant probative value under ss 97 and 98 of the uniform Evidence Acts.[183]

The 'no rational view of the evidence' test

18.139 At common law, even if the evidence of two or more witnesses has 'striking similarities', it can still be excluded because of its prejudicial effect. In order to prevent the admission of prejudicial propensity and similar fact evidence, the common law developed the 'no rational view of the evidence test',[184] adopted by a majority of the High Court in *Hoch v The Queen*:

> to determine the admissibility of similar fact evidence, the trial judge must apply the same test as a jury must apply in dealing with circumstantial evidence, and ask whether there is a rational view of the evidence that is inconsistent with the guilt of the accused.[185]

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179 *R v KP; Ex parte Attorney-General (Qld)* [2006] QCA 301. The Queensland Court of Appeal held, in the context of a case involving four different children, that the evidence of the older brother about being sexually abused by the defendant was not cross-admissible in relation to the counts involving the younger brother because of lack of similarities in the defendant's alleged sexual behaviour. The Court held that charges relating to all complainants should not have been joined.

180 *Phillips v The Queen* (2006) 225 CLR 303.

181 A Cossins, *Striking Similarities between the Common Law and the Uniform Evidence Acts: Protecting Serial Offenders and Putting Children at Risk*, unpublished (2010), 14.

182 *R v F* [2002] NSWCCA 125, [28].

183 *R v Fletcher* (2005) 156 A Crim R 308, [60]. See also *AE v The Queen* [2008] NSWCCA 52; *R v Milton* [2004] NSWCCA 195; *R v Harker* (2004) NSWCCA 427; *R v F* (2002) 129 A Crim R 126; *R v WRC* (2002) 130 A Crim R 89.

184 *Sutton v The Queen* (1984) 152 CLR 528, 564.

185 *Hoch v The Queen* (1988) 165 CLR 292, 296.

18.140 The test was confirmed by a majority of the High Court in *Pfennig v The Queen*[186] who held that the probative force of similar fact evidence will outweigh its prejudicial effect only if there is no rational view of the evidence that is consistent with the innocence of the accused.[187]

18.141 This test is now referred to as the *Pfennig* test and is the means for determining how the probative force of the evidence and prejudicial effect should be balanced against one another.[188] Where there is a rational view of the evidence consistent with the accused's innocence, the probative force of the evidence is automatically outweighed by its prejudicial effect, thus removing any discretion on the part of the trial judge to admit the evidence.

18.142 Probative force and prejudicial effect must also be considered under s 101(2) of the uniform Evidence Acts. In *R v Ellis*, the NSW Court of Criminal Appeal considered whether the *Pfennig* test should continue to be applied.[189] The fact that s 101(2) introduced a legislative formulation for balancing probative value against prejudicial effect led Spigelman CJ to conclude that:

> the continued application of a 'no rational view' test is not … consistent with a statutory test which expressly requires a balancing process. … The reasoning in *Pfennig* … is, in my opinion, inapplicable to a statutory test that probative value substantially outweighs prejudicial effect.[190]

A reasonable possibility of concoction

18.143 It has been argued that, since the decision in *R v Ellis*, 'the necessity to exclude the possibility of collusion or other influence is questionable' when applying the balancing test under s101(2) of the uniform Evidence Acts.[191] Recent case law indicates, however, that *R v Ellis* has not removed the issue of concoction from the admissibility equation under the uniform Evidence Acts.

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186 *Pfennig v The Queen* (1995) 182 CLR 461, 482–483.

187 McHugh J considered that the test enunciated by Mason CJ, Deane and Dawson JJ in *Pfennig* was too stringent although His Honour recognised that 'where the prosecution case depends entirely on propensity reasoning, the evidence will need to be so cogent that, when related to the other evidence, there is no rational explanation of the prosecution case that is consistent with the innocence of the accused': Ibid, 530.

188 *R v Ellis* (2003) 58 NSWLR 700, [85]; *HML v The Queen* (2008) 235 CLR 334.

189 *R v Ellis* (2003) 58 NSWLR 700.

190 Ibid, [89]. The High Court granted Ellis leave to appeal but later revoked that leave, stating that it agreed with Spigelman CJ's construction of the *Evidence Act 1995* (NSW): *Ellis v The Queen* [2004] HCA Trans 488.

191 Tasmania Law Reform Institute, *Evidence Act 2001 Sections 97, 98 & 101 and Hoch's Case: Admissibility of Tendency and Coincidence Evidence in Sexual Assault Cases with Multiple Complainants*, Issues Paper 15 (2009), 2.

18.144 Despite expectations that the courts would continue to develop the law away from *Hoch v The Queen,*[192] obviating the need for legislative intervention, these expectations may have been 'an overly optimistic view'.[193] It has been argued that, in sexual assault cases, s 101(2) of the uniform Evidence Acts is only likely to be satisfied 'if a reasonable possibility of concoction can be eliminated *and* if there are sufficient similarities (striking or otherwise) between the evidence of two or more witnesses to be able to conclude that the probative value of the evidence outweighs its prejudicial effect'.[194]

18.145 In *R v Ellis*, Spigelman CJ accepted that there 'may well be cases where, on the facts, it would not be open to conclude that the probative value of particular evidence substantially outweighs its prejudicial effect, unless the "no rational explanation" test were satisfied',[195] and that these cases may include those where a trial judge considers that there is a reasonable possibility of concoction.[196]

18.146 The Tasmania Law Reform Institute (TLRI) has observed that, in practice, where a reasonable possibility of concoction is taken into account under s101(2), this is no different from an application of the 'no rational view of the evidence' test because concoction

> weighs so heavily in the balance that the reality is that its existence means that there is no balancing to be undertaken. The position effectively remains the same as that rejected … in *Ellis*.[197]

18.147 When a judge takes concoction or contamination into account, he or she can be seen as performing the task of the jury, by assessing the strength of the evidence—

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192 As implied, eg, by Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102, NSWLRC Report 112, VLRC FR (2005), [11.65]–[11.68].

193 Tasmania Law Reform Institute, *Evidence Act 2001 Sections 97, 98 & 101 and Hoch's Case: Admissibility of Tendency and Coincidence Evidence in Sexual Assault Cases with Multiple Complainants*, Issues Paper 15 (2009), 38.

194 A Cossins, *Striking Similarities between the Common Law and the Uniform Evidence Acts: Protecting Serial Offenders and Putting Children at Risk*, unpublished (2010), 19–20.

195 *R v Ellis* (2003) 58 NSWLR 700, [96]. In *R v Gibbs* (2004) 146 A Crim R 503, Gray J followed Spigelman CJ's reasoning by applying the 'no rational view of the evidence' test to coincidence evidence. *R v Ellis* has also been followed in *R v Ceissman* [2009] ACTSC 50; *Clarkson v The Queen* (2007) 171 A Crim R 1; *Tasmania v Y* (2007) 178 A Crim R 481; *R v Forbes* [2006] ACTSC 47; *L v Tasmania* (2006) 15 Tas R 381; *R v Folbigg* (2005) 152 A Crim R 35; *R v RN* (2005) NSWCCA 413; *Tasmania v S* [2004] TASSC 84; *R v Mason* (2003) 140 A Crim R 274.

196 A Cossins, *Striking Similarities between the Common Law and the Uniform Evidence Acts: Protecting Serial Offenders and Putting Children at Risk*, unpublished (2010), 19. See, eg, *Tasmania v S* [2004] TASSC 84, [11]; *L v Tasmania* (2006) 15 Tas R 381, [40]; *Tasmania v Y* (2007) 178 A Crim R 481, [40].

197 Tasmania Law Reform Institute, *Evidence Act 2001 Sections 97, 98 & 101 and Hoch's Case: Admissibility of Tendency and Coincidence Evidence in Sexual Assault Cases with Multiple Complainants*, Issues Paper 15 (2009), 11.

in particular, whether or not it is true.[198] Yet 'no other exclusionary rule requires the court to determine the veracity of evidence as a basis for admission'.[199]

18.148 The application of the 'no rational view of the evidence' test in sexual assault trials is seen to have 'particular consequences, since where there are two or more complainants, the probative force of the similar fact evidence is destroyed if there is a reasonable possibility of concoction between the complainants'.[200] Yet courts do not apply a universal standard for measuring what amounts to a reasonable possibility of concoction.

18.149 Where two or more children give evidence about a defendant's sexual behaviour with them, the reliability of their evidence is based on whether they had the opportunity to concoct their allegations. While the targeting and grooming strategies of serial sex offenders are well documented in the literature,[201] the rules governing the admissibility of tendency and propensity evidence are based on the belief that if two or more complainants know each other then the possibility of concoction must be ruled out for one complainant's evidence to be admissible in the case of another.

18.150 This assumption is based on the common law's traditional belief that children are unreliable witnesses, prone to fantasy and highly suggestible.[202] This view still prevails despite the fact that it is not supported by the psychological literature.[203] Review of recent literature shows that 'children are highly resistant to abuse suggestions and do not readily make up stories of sexual abuse even when given the opportunity to do so'.[204]

18.151 In addition, the test for concoction does not take into account the practical effects on complainants since in assessing the possibility of concoction the court will

198 Ibid, 39. See also, K Arenson, 'The Propensity Evidence Conundrum: A Search for Doctrinal Consistency' (2006) 8 *University of Notre Dame Law Journal* 31, 37.

199 Tasmania Law Reform Institute, *Evidence Act 2001 Sections 97, 98 & 101 and Hoch's Case: Admissibility of Tendency and Coincidence Evidence in Sexual Assault Cases with Multiple Complainants*, Issues Paper 15 (2009), 39: This point was noted by McHugh J in *Pfennig v The Queen* (1995) 182 CLR 461, 517.

200 National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 191. See *Hoch v The Queen* (1988) 165 CLR 292, 397.

201 National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 187–188.

202 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), 304; *Hoch v The Queen* (1988) 165 CLR 292.

203 As recognised by the ALRC and the Human Rights and Equal Opportunity Commission more than 10 years ago: Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997), 306–307.

204 National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 192–193.

usually conduct a pre-trial hearing, at which the complainants may be required to give evidence.[205]

Reform options

18.152 Several jurisdictions have enacted legislation to overcome problems caused in sexual assault cases by the 'no rational view of the evidence' test and with evidence being excluded on the basis of possible concoction.

18.153 In Queensland, s 132A of the *Evidence Act* 1977 (Qld) governs the admissibility of similar fact evidence and leaves the question of concoction to the jury. The provision states:

> In a criminal proceeding, similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, must not be ruled inadmissible on the ground that it may be the result of collusion or suggestion, and the weight of that evidence is a question for the jury, if any.

18.154 In addition, s 597A(1AA) of the *Criminal Code* (Qld) provides that, in determining whether there should be joint or separate trials 'the court must not have regard to the possibility that similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, may be the result of collusion or suggestion'.

18.155 In South Australia, reforms concerning the prosecution of sexual assault charges were enacted in 2008,[206] following a review of rape laws.[207] Under s 278(2a) of the *Criminal Law Consolidation Act 1935* (SA), issues of joinder, the 'no rational view of the evidence' test and concoction are dealt with together. The provision creates a presumption that where there are two or more counts involving complainants, the counts are to be tried together. A judge may only order separate trials if the evidence of two or more complainants is not cross-admissible.[208]

18.156 The 'no rational view of the evidence' test has been specifically abrogated in relation to determining whether or not evidence will be cross-admissible. Section 278(2a)(c) states that in determining admissibility for these purposes:

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205 This is said to conflict with 'public policy objectives behind preventing child complainants from giving evidence on more than one occasion which has seen some jurisdictions enact provisions to prevent children being required to give evidence at committal proceedings': Ibid, 193. Complainants are also likely to be cross-examined 'more aggressively' at a pre-trial hearing because of the absence of a jury: Tasmania Law Reform Institute, *Evidence Act 2001 Sections 97, 98 & 101 and Hoch's Case: Admissibility of Tendency and Coincidence Evidence in Sexual Assault Cases with Multiple Complainants*, Issues Paper 15 (2009), 14.

206 *Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act 2008* (SA).

207 L Chapman (for Government of South Australia), *Review of South Australian Rape and Sexual Assault Law—Discussion Paper* (2006).

208 In contrast, the Victorian provision (discussed above in relation to a presumption of joint trials) attempts to encourage joint trials even where evidence is not cross-admissible: *Criminal Procedure Act 2009* (Vic) s 194.

(i) evidence relating to the count may be admissible in relation to another count concerning a different alleged victim if it has a relevance other than mere propensity; and

(ii) the judge is not to have regard to—

(A) whether or not there is a reasonable explanation in relation to the evidence consistent with the innocence of the defendant; or

(B) whether or not the evidence may be the result of collusion or concoction.

18.157 In Western Australia, under s 133(3) of the *Criminal Procedure Act 2004* (WA), a court can only order separate trials if satisfied that there would be a likelihood of prejudice to the accused by the joinder of two or more charges.[209] However, the court need not automatically order separate trials of particular offences simply because they are of a particular nature or because evidence in relation to some of the charges is not admissible in relation to others. Under s 133(5), it is open to the court

(a) to decide that any likelihood of the accused being prejudiced can be guarded against by a direction to the jury;

(b) to so decide irrespective of the nature of the offence or offences charged; and

(c) to so decide even if—

(i) the evidence on one of the charges is inadmissible on another; or

(ii) the evidence against one of the accused is not admissible against another,

as the case requires.[210]

18.158 When considering the likelihood of prejudice to the accused from joinder of charges, the court cannot take into account that the evidence of two or more complainants or witnesses may be the result of collusion or suggestion. Section 133(6) states:

> In considering, for the purposes of this section, the likelihood of an accused being prejudiced in the trial by a jury of an indictment that contains 2 or more charges of a sexual nature, the court must not have regard to the possibility that similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, may be the result of collusion or suggestion.

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209 *Donaldson v Western Australia* (2005) 31 WAR 122, [146].

210 *Criminal Procedure Act 2004* (WA) s 133(5) is similar to *Criminal Procedure Act 2009* (Vic) s 194 because it envisages that a joint trial may be held even where the evidence of two or more complainants is not cross-admissible. It differs because it envisages that the risk of impermissible propensity reasoning by juries and prejudice to the accused can be corrected by an appropriate judicial direction: *Donaldson v Western Australia* (2005) 31 WAR 122, [146].

18.159 This provision means that the likelihood of prejudice to which s 133(3) refers cannot include prejudice associated with the possibility of concoction by two or more complainants or witnesses. The Western Australian Court of Appeal has held that once the court concludes that the evidence of two or more complainants is cross-admissible, there is no other basis on which to find that there would be any likelihood of prejudice and no basis for ordering separate trials. In other words, a finding of cross-admissibility 'cures' the prejudice that would otherwise result from impermissible reasoning by the jury.[211]

18.160 In addition, at the same time as the above reforms were enacted, s 31A was inserted into the *Evidence Act 1906* (WA) to deal specifically with the problems associated with admitting propensity evidence in a joint trial.[212] Section 31A(2) provides:

> (2) Propensity evidence or relationship evidence is admissible in proceedings for an offence if the court considers:
>
> (a) that the evidence would, either by itself or having regard to other evidence adduced or to be adduced, have significant probative value; and
>
> (b) that the probative value of the evidence compared to the degree of risk of an unfair trial, is such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial.
>
> (3) In considering the probative value of evidence for the purposes of subsection (2) it is not open to the court to have regard to the possibility that the evidence may be the result of collusion, concoction or suggestion.

18.161 Like the Queensland reforms, s 31A(3) removes the issue of concoction from the admissibility equation and leaves it to the jury when deciding the weight to be given to the evidence.[213] The possibility of concoction cannot be taken into account when determining whether the propensity evidence has significant probative value.[214] This means that the court has to take the evidence at 'its highest'.[215] Nor can the possibility of concoction be taken into account when the court is applying the balancing test under s 31A(2)(b), in particular the risk of an unfair trial, because of the 'quite clearly articulated legislative purpose' of the provision.[216]

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211 *Donaldson v Western Australia* (2005) 31 WAR 122, [141].

212 The definition of propensity evidence under s 31A is also more extensive than at common law and includes tendency, relationship and character evidence.

213 *Di Lena v State of Western Australia; Washer v Western Australia* (2006) 165 A Crim R 482, [51]; *Wood v State of Western Australia* [2005] WASCA 179, [41]; *Donaldson v Western Australia* (2005) 31 WAR 122, [108].

214 *Donaldson v Western Australia* (2005) 31 WAR 122, [154].

215 Ibid, [153] (Roberts-Smith JA).

216 Ibid, [157] (Roberts-Smith JA).

18.162 Section 31A abrogates the common law 'no rational view of the evidence' test. The test introduced by s 31A(2)(b) is taken directly from the balancing test suggested by McHugh J, dissenting in *Pfennig v The Queen*.[217] This test is much less stringent than the *Pfennig* test.[218] In enacting s 31A, the legislature has accepted that, because of its nature, the admission of propensity evidence will always create the risk an unfair trial.[219] However, that risk must be balanced against the competing public interests in holding a joint trial in which all relevant evidence is admitted.[220]

18.163 The balancing test, when referring to fair-minded people, clearly envisages the public interest in the prosecution of sexual offences ought to be taken into consideration when weighing up the risk of prejudice to the accused. These considerations may be especially important in relation to child sexual assault since a particular complainant's evidence will often make more sense when evidence is given of the alleged serial nature of an accused's sexual behaviour.[221]

18.164 None of the reforms enacted in Australia have addressed explicitly the striking similarities test, which may still constitute a major barrier to the admissibility of tendency and propensity evidence and the ability to hold joint trials. The Western Australian reforms represent the most complete break from the common law. By articulating a particular threshold test of admissibility—that the evidence must have significant probative value—the common law striking similarities test may no longer be 'a necessary criterion for admissibility'.[222]

Commissions' views

18.165 In ALRC 102, the ALRC, NSWLRC and VLRC highlighted the difficult task of formulating appropriate rules to deal with probative but prejudicial evidence. In relation to tendency and coincidence evidence, the Commissions recognised 'a stark

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217 *Pfennig v The Queen* (1995) 182 CLR 461, 528.

218 *Di Lena v State of Western Australia; Washer v Western Australia* (2006) 165 A Crim R 482, [94].

219 Ibid, [58].

220 The decision made under s 31A is a question of law, not an exercise of a judicial discretion and, once admitted, there is no room to exclude the evidence under the discretion at common law: Ibid, [60], referring to *R v Christie* [1914] AC 545.

221 For example, in *VIM v Western Australia* (2005) 158 A Crim R 243, separate allegations of sexual assault over many years had been made by the two step-daughters of the accused, who was indicted on 44 counts. The Western Australian Court of Appeal considered that this was 'an example of the very type of case in which the legislature intended the jury to have the benefit of a full evidentiary familial picture': [168].

222 National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 213. The Western Australian Court of Appeal has accepted that, in a child sexual assault trial, propensity evidence need not show 'striking similarities' or sexual interference by the defendant in a particular way: *Donaldson v Western Australia* (2005) 31 WAR 122, [149]. If the evidence in question reveals an underlying unity, system or pattern, that will be sufficient to establish that the evidence has significant probative value under s31A(2) 'irrespective of what physical acts [were] individually involved'. In *Donaldson*, the evidence of the four complainants showed that the defendant, a swimming coach, had a particular pattern of conduct 'or a tendency … by essentially similar means, to inveigle young girls under his charge into situations in which he then commits sexual offences upon them': [149]. This was sufficient for the evidence of the four complainants to be cross-admissible.

contrast between the policy objectives of receiving all probative evidence, and minimising the risk of wrongful conviction'.[223]

18.166 In child sexual assault cases, however, it is likely to seem unfair to victims and their families that:

> in so many cases the isolation of one child pitted against an adult alleged to be the perpetrator leads to acquittal of the adult, when at the same time there are other allegations of similar behaviour against the adult from other family members not before the Court, or when a history of such offending is known but excluded, or when the conduct is part of an alleged wider course of conduct, but evidence of which for one reason or another is excluded.[224]

18.167 As discussed above, a range of jurisdictions have implemented reforms to address these concerns. The National Child Sexual Assault Reform Committee has reviewed the effectiveness of these reforms and concluded that the most successful appear to be those enacted in Western Australia[225]—although in the absence of empirical research it is not possible to determine the extent to which, for example, the number of joint trials has increased in Western Australia as a result of those reforms.

18.168 The National Child Sexual Assault Reform Committee recommended a number of reforms to deal with problems associated with holding joint trials in relation to child sex offences. These include a recommendation to overcome the effect of the 'no rational view of the evidence' test in jurisdictions which have not already introduced reforms to do so.[226] This would expressly eliminate the issue of concoction when the court is required to decide whether to order joint or separate trials.

18.169 The Commissions' preliminary view is that a simpler mechanism to achieve a similar result is to establish a presumption of joint trial of two or more counts joined in the same indictment (see Chapter 17).

18.170 The National Child Sexual Assault Reform Committee also made recommendations to address the problem of admitting tendency, coincidence (propensity or similar fact) evidence in a trial involving only one complainant.[227]

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223 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102, NSWLRC Report 112, VLRC FR (2005), [11.82].

224 Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report No 55 (Part 2) (2000), 367—quoting a Western Australian judge.

225 National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 194–215.

226 Based on *Criminal Procedure Act 2004* (WA) s 133(5)–(6). See National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), Rec 3.7.

227 The Committee proposed amendments to ss 97, 98 and 101 of the uniform Evidence Acts, of general application to tendency and coincidence evidence and that other jurisdictions make similar amendments with respect to the admissibility of propensity and similar fact evidence: National Child Sexual Assault

Usually this will occur when the prosecution seeks to call a witness who, while not a complainant, can give evidence about the defendant's sexual behaviour with him or her.

18.171 The Commissions agree that, because the mere possibility of concoction can affect the admissibility of propensity and similar fact evidence in common law evidence jurisdictions, and because the uniform Evidence Acts do not expressly deal with concoction and the admissibility of tendency and coincidence evidence, there is a need for reform in relation to this issue.

18.172 The Commissions propose that Commonwealth, state and territory legislation should provide that, in sexual assault proceedings, the court have regard to the possibility that the evidence of a witness or witnesses is the result of concoction, collusion or suggestion when determining the admissibility of tendency or coincidence evidence. In uniform Evidence Acts jurisdictions, the appropriate mechanism may be amendment of ss 97, 98 and 101 of the Acts.[228] Such amendments might provide that, in sexual assault proceedings:

- for the purposes of ss 97 and 98, in considering whether the evidence has significant probative value, the court must not have regard to the possibility that the evidence may be the result of collusion, concoction or suggestion; and

- for the purposes of s 101, in considering whether the probative value of the evidence substantially outweighs its prejudicial effect, the court must not have regard to the possibility that the evidence may be the result of collusion, concoction or suggestion.

18.173 As discussed earlier, the Commissions' preference would be for all Australian jurisdictions to join the uniform Evidence Acts scheme. Failing this, however, common law evidence jurisdictions that have not already done so should enact amendments in criminal procedure or evidence legislation providing that:

- in a criminal proceeding, propensity evidence and similar fact evidence must not be ruled inadmissible on the ground that it may be the result of concoction, collusion or suggestion; and

- the weight of the propensity or similar fact evidence is a question for the jury, if any.[229]

Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), Recs 3.8, 3.9.

228 As recommended by the National Child Sexual Assault Reform Committee.

229 As recommended by the National Child Sexual Assault Reform Committee: National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), Rec 3.9.

18.174 Further consideration may also need to be given to the continued reliance on the striking similarities test for the admission of tendency, coincidence, propensity and similar fact evidence (including in uniform Evidence Acts jurisdictions). The National Child Sexual Assault Reform Committee considers that without changes in the application of the test, reforms to increase the number of joint trials may be undermined.[230] The striking similarities test may also impede the prosecution's ability to adduce evidence about the defendant's sexual conduct from witnesses in trials which involve one complainant. Although there have been a number of reforms in different jurisdictions to increase the frequency of joint trials in relation to sex offences, only one common law jurisdiction (Western Australia) has abandoned striking similarities as the test for admissibility of propensity evidence.

Proposal 18–10 Commonwealth, State and territory legislation should provide that, in sexual assault proceedings, a court should not have regard to the possibility that the evidence of a witness or witnesses is the result of concoction, collusion or suggestion when determining the admissibility of tendency or coincidence evidence.

Question 18–7 To what extent does the 'striking similarities' test impede the ordering of joint trials in relation to sex offences?

Question 18–8 Should the Western Australian reforms in relation to the cross-admissibility of evidence be adopted in other jurisdictions?

Relationship evidence

18.175 If there is only one complainant, the prosecution may want to lead evidence from other witnesses about the defendant's criminal sexual behaviour with them, or it may wish to adduce relationship evidence to explain the nature of the relationship between the complainant and the defendant, as well as the context in which the sexual assault occurred.

18.176 Evidence of uncharged acts of sexual misconduct is commonly referred to as 'relationship', 'context' or 'background' evidence and is a type of circumstantial evidence. While relationship evidence describes all conduct 'of a sexual kind' which is often referred to as 'uncharged acts', it also includes grooming behaviours that do not amount to an offence, such as the purchase of gifts and non-sexual touching.[231]

230 Ibid, 208.
231 *HML v The Queen* (2008) 235 CLR 334, [492].

18.177 Relationship evidence forms part of the background against which the complainant's and the accused's evidence is assessed.[232] In a sexual assault trial, relationship evidence may be relevant for a number of different reasons:

- to provide a context or background in which to understand the charges laid against the defendant;
- because it provides a motive on the part of the defendant;
- to show that the defendant had a sexual interest in the complainant;
- to explain why the complainant complied with the sexual demands of the defendant without surprise;
- to explain why the complainant failed to promptly complain; and
- to explain the defendant's confidence in committing the sexual acts or his control over the complainant.[233]

18.178 Where such evidence is admissible, it 'cannot be used by the jury to reason that, if the accused committed the uncharged acts, he or she is more likely to have committed the charged acts'.[234] However, the distinction between relationship evidence and tendency evidence has been described as 'somewhat artificial'[235] since evidence which shows the 'existence of a sexual relationship must surely tend to show that the accused [has a tendency] to do the sort of things the subject of the charge'.[236]

18.179 Nonetheless, many cases have held that evidence of uncharged sexual behaviour between a complainant and an accused is admissible as relationship evidence.[237] Relationship evidence has a long history of being admitted in all types of criminal trials.[238]

18.180 In the last decade, however, the admissibility of relationship evidence has had a conflicted history with 'sharp divisions' in the High Court about when and for

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232 *B v The Queen* (1992) 175 CLR 599, 610.

233 National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 252. See, eg, *R v Vonarx* [1999] 3 VR 618.

234 Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report No 55 (Part 2) (2000), 371.

235 National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 252.

236 *R v Knuth* (Unreported, QCA, J Lee, 23 June 1998), [22].

237 See *Cook v The Queen* (2000) 22 WAR 67; *R v Nieterink* (1999) 76 SASR 56; *R v Vonarx* [1999] 3 VR 618; *R v Alexander* (Unreported, SASC, 24 April 1996); *R v Beserick* (1993) 30 NSWLR 510; *B v The Queen* (1992) 175 CLR 599; *Harriman v The Queen* (1989) 167 CLR 590, 630–631.

238 The reception of 'this type of evidence has come to be routine and unsurprising': *HML v The Queen* (2008) 235 CLR 334, [271]–[272].

what purposes such evidence should be admissible.[239] This division saw a majority attempt to restrict the admission of such evidence at common law in *Gipp v The Queen*.[240] This case resulted in considerable uncertainty about the test that should be applied to admit relationship evidence.[241]

Case law

18.181 It is possible that this uncertainty has been resolved by the High Court decision in *HML v The Queen* (*HML*).[242] *HML* only applies to cases of child sexual assault, where lack of consent is not one of the issues to be decided[243] and in jurisdictions that have not overturned the 'no rational view of the evidence' (*Pfennig*) test.[244]

18.182 The issues in *HML* can broadly be summarised as follows:

(i) when and in what circumstances is evidence of uncharged acts of sexual misconduct admissible in a child sexual assault trial;

(ii) what test applies to its admission; and

(iii) what directions or warnings should be given by a trial judge about how the jury can use the evidence, in particular the standard of proof to be applied.[245]

18.183 All seven judges accepted that there are important reasons why evidence of uncharged acts of sexual misconduct by the defendant ought to be admissible in child sexual assault trials. The public policy reasons recognised for permitting the child to give evidence of uncharged acts included:[246]

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239 Ibid, [328].

240 Gaudron J considered that the admissibility of propensity evidence in the form of past criminal conduct (including relationship evidence) was only warranted in a few specified situations, eg, where the defence raised specific issues such as evidence of good character or lack of surprise or failure to complain on the part of the complainant: *Gipp v The Queen* (1998) 194 CLR 106, 112. Callinan J stated that if such evidence is to be admitted 'it must owe its admissibility to some, quite specific, other purpose, including eg, in an appropriate case, proof of a guilty passion, intention, or propensity, or opportunity, or motive': *Gipp v The Queen* (1998) 194 CLR 106, [182]. See also *Tully v The Queen* (2006) 230 CLR 234, [144]–[145]. Kirby J stated that relationship evidence should only be 'admissible if its probative value outweighs its prejudicial effect': *Gipp v The Queen* (1998) 194 CLR 106, [141].

241 *HML v The Queen* (2008) 235 CLR 334, [163]. This uncertainty has been evident, eg, in the different approaches taken by the Full Court of the Supreme Court of South Australia in *R v Nieterink* (1999) 76 SASR 56 and the Court of Appeal of Victoria decision in *R v Vonarx* [1999] 3 VR 618.

242 Although 'the six different judgments in the case may continue to confound rather than enlighten the law on relationship evidence': National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 253.

243 *HML v The Queen* (2008) 235 CLR 334, [102].

244 Ibid, [54]. The case does not apply to the admission of relationship evidence under the Uniform Evidence Acts, nor under *Evidence Act* 1906 (WA) s 31A. The *Pfennig* test still applies in South Australia, Queensland and the Northern Territory.

245 National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 254.

246 *HML v The Queen* (2008) 235 CLR 334, [56].

- 'multiple and repeated incidents over a period of time' are typical of the sexual abuse of children;

- the impracticality or impossibility of being able to charge every multiple incident of sexual abuse;

- the importance of legal procedure to facilitate the giving of a 'fair and coherent account' by the complainant of what has occurred;

- the exclusion of evidence of uncharged acts would mean that the complainant's evidence of the charged acts of sexual misconduct would be viewed in isolation and sometimes as if the complainant was sexually abused 'out of the blue';

- the artificiality of attempting to 'quarantine the charged acts' from other incidents;

- the seriousness of child sexual assault as a crime and its historical under-enforcement which ought not to be frustrated by 'unjustifiably restrictive court procedures';[247] and

- because today's juries are 'better educated and more literate', there is less need for restrictive rules for excluding relevant but prejudicial evidence.

18.184 In *HML*, all seven judges agreed that uncharged acts of sexual misconduct are likely to be relevant to the facts in issue in a child sexual assault trial, that is, whether the defendant committed the sexual acts that constitute the charges.[248] However, the relevance test was not considered to be a sufficient control on the admissibility of relationship evidence by Gummow, Kirby and Hayne JJ all of whom agreed that, in addition to relevance, evidence of uncharged acts should not be admissible unless the *Pfennig* test is satisfied.[249]

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247 This includes 'the social interest in convicting those guilty of crimes against small children which are both grave and difficult to prove': Ibid, [331].

248 For example, Hayne J stated that '[p]roving that the accused not only had that sexual interest but had given expression to that interest by those acts, made it more probable that he had committed the charged acts': Ibid, [103]. As discussed above, the evidence may also be relevant on other grounds, such as to explain the complainant's delay in complaint, although some of those reasons may only be directly relevant to the credibility of the complainant: *HML v The Queen* (2008) 235 CLR 334, [426].

249 *HML v The Queen* (2008) 235 CLR 334, [59] (Kirby J); [106] (Hayne J with whom Gummow J agreed). The purpose for adopting the *Pfennig* test is to place an extra control over 'the discreditable facts' that are admitted against an accused. Without such a control any relevant discreditable facts would be able to be tendered against an accused simply because they throw some light on the 'context' of the offences: *HML v The Queen* (2008) 235 CLR 334, [80]. Nonetheless, Hayne J considered that evidence of uncharged acts would usually satisfy the *Pfennig* test because 'there will usually be no reasonable view of the evidence … other than as supporting an inference that the accused is guilty of the offence charged': *HML v The Queen* (2008) 235 CLR 334, [107]. Although Hayne J recognised the disadvantage to the defendant by admitting such evidence, His Honour considered that 'its admission would work no prejudice to the accused over and above what the evidence establishes': *HML v The Queen* (2008) 235 CLR 334, [110].

18.185 The National Child Sexual Assault Reform Committee has noted that 'lower courts may not find it all that easy to decide whether to apply the approach of Gummow, Kirby and Hayne JJ, or the approach of the other four judges'[250] who either did not agree that the *Pfennig* test applied to relationship evidence at all,[251] or did not think the *Pfennig* test applied to the relationship evidence in the cases at hand even though there may be other situations in which it would apply.[252]

18.186 It is questionable whether, if relationship evidence which reveals sexual misconduct by the defendant will usually always be admissible under the 'no rational view of the evidence' test, the test serves any useful purpose.[253] In *HML*, Kiefel J considered that only where relationship evidence is being tendered for its tendency purpose should the *Pfennig* test be applied. This is the same approach that is taken in uniform Evidence Acts jurisdictions where the test under s 101(2) does not apply to relationship evidence which is tendered for a non-tendency purpose.[254]

Reform options

18.187 The National Child Sexual Assault Reform Committee proposed that, because of the different and inconsistent approaches taken by the judges in *HML* to the admissibility of relationship evidence, the *Pfennig* test at common law should be abolished in relation to the admissibility of relationship evidence.[255] This would bring common law jurisdictions in line with those that do not use the test (or the balancing test under s 101 of the uniform Evidence Acts) to admit relationship evidence—that is, the uniform Evidence Acts jurisdictions and Western Australia.

Commissions' views

18.188 The Commissions are unconvinced about the need for such reforms, especially given uncertainty over the meaning and the practical effect of the decision in *HML*. Complex legislative drafting would be required to remove doubt about the

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250 National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 257.

251 *HML v The Queen* (2008) 235 CLR 334, [455] (Crennan); [511]–[512] (Kiefel J).

252 See Ibid, [27] (Gleeson CJ); [264] (Heydon J).

253 In *Gipp v The Queen,* McHugh and Hayne JJ observed that relationship evidence in a child sexual assault case is 'far removed from the kinds of propensity evidence that have attracted the stringent requirements of admissibility and direction imposed by common law doctrine … [T]he evidence of general behaviour in this case hardly offends the policy reasons which courts and commentators have relied on to exclude propensity evidence': *Gipp v The Queen* (1998) 194 CLR 106, [81].

254 *HML v The Queen* (2008) 235 CLR 334, [503], [505]. In ALRC 102 the ALRC, NSWLRC and VLRC considered whether the balancing test under s 101(2) of the uniform Evidence Acts should be extended to apply to any evidence tendered against a defendant which discloses disreputable conduct although tendered for a non-tendency or non-coincidence purpose—such as relationship evidence: see Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102, NSWLRC Report 112, VLRC FR (2005), [11.76]–[11.93]. The Commissions concluded that the case had not been made out for change, which would be unlikely to result in different outcomes where questions arise as to the admissibility of evidence relevant for tendency or coincidence purposes and for other purposes.

255 National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), Rec 3.14.

possible application of the test to relationship evidence in Queensland, South Australia and the Northern Territory. The reform would require the development of a statutory definition of relationship evidence and deal with the purposes for which the evidence may be used, directions to the jury and so on.[256]

18.189 In any case, the Commissions' preference would be for all Australian jurisdictions to join the uniform Evidence Acts scheme, adopting the balancing test under s 101(2) and removing the concern about the application of a 'no rational view of the evidence' test to relationship evidence.

Question 18–9 Should the 'no rational view of the evidence' (*Pfennig*) test be applied to determine the admissibility of relationship evidence at common law?

Evidence of recent and delayed complaint

18.190 Complaint evidence is a type of prior consistent statement which is given by a witness or the complainant about when the complainant made their first report of sexual assault. The common law recent complaint rule only allows this type of evidence to be admissible if the complaint was made at the first reasonable opportunity after the alleged sexual assault. However, it is only admissible for credibility purposes, that is, to bolster the credit of the complainant.[257] At common law, evidence of recent complaint cannot be used to prove the facts in issue—that is, whether or not the complainant consented or the defendant committed the alleged sexual conduct.

18.191 By the beginning of the eighteenth century, a failure to complain immediately had evolved into a presumption of fabrication on the part of the rape complainant.[258] Since the rule was based on 'the belief that a rape complainant could only be believed if she could demonstrate she had publicly denounced the perpetrator, rape complainants became a special category of witness whose credibility could be boosted by evidence of recent complaint'.[259]

18.192 The common law's approach to recent complaint evidence meant that evidence of delayed complaint was also considered to be relevant to credibility but for a different purpose—to undermine the complainant's credibility. Evidence of delayed

256 See, eg, Ibid.

257 History of the law of recent complaint is found in D McDonald, 'Gender Bias and the Law of Evidence: The Link between Sexuality and Credibility' (1994) 24 *Victoria University of Wellington Law Review* 175; S Bronitt, 'The Rules of Recent Complaint: Rape Myths and the Legal Construction of the "Reasonable" Rape Victim' in P Easteal (ed) *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998) .

258 J Gobbo, *Cross on Evidence* (1970), 245.

259 National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 143.

complaint is commonly used by defence counsel to argue that a complainant has falsely accused the defendant of sexual assault.

Uniform Evidence Acts jurisdictions

Recent complaint

18.193 The recent complaint rule is no longer applicable in uniform Evidence Acts jurisdictions. In *Papakosmas v The Queen,* the High Court held that recent complaint evidence is relevant to the facts in issue in a sexual assault trial, for example, whether or not the complainant consented to have intercourse with the appellant.[260] In a child sexual assault trial, evidence of recent complaint is relevant to whether or not the defendant committed the act, since consent is not a fact in issue.

18.194 Evidence of a complainant's recent complaint is caught by the exclusionary hearsay rule under s 59 of the uniform Evidence Acts. Evidence of the complaint may nevertheless be admissible under the first-hand hearsay exception, where the complainant is available to give evidence,[261] and the 'fresh in the memory' test is satisfied. Section 66(2) of the uniform Evidence Acts states:

> (2) If a person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:
>
> (a) that person; or
>
> (b) a person who saw, heard or otherwise perceived the representation being made;
>
> if, when the representation was made, the occurrence of the asserted fact was *fresh in the memory* of the person who made the representation (emphasis added).

18.195 In *Papakosmas v The Queen*, because evidence of recent complaint was held to be relevant to the issue of consent and to satisfy s 66(2), it was admissible evidence that went before the jury. Crucially, for the prosecution, three of the complainants' work colleagues were able to give evidence not only of the complainant's crying and distressed state after emerging from the ladies' toilets but also of her statements to them that 'Papakosmas raped me'. This particular statement was held to fall within s66(2) because the complainant had informed her work colleagues about being sexually assaulted by the accused almost immediately after the events in question so that the 'fresh in the memory' requirement was satisfied.

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260 *Papakosmas v The Queen* (1999) 196 CLR 297, 309.

261 The complainant is the person who made the previous representation and is available to give evidence about the asserted fact, the asserted fact being a fact that a person (who made a previous representation) intended to assert by the representation: s 59. In a sexual assault trial, the complainant is the Crown's chief witness who, if competent, is available to give evidence.

18.196 The outcome in *Papakosmas v The Queen* was 'a significant development in the prosecution of sexual assault cases in uniform Evidence Acts jurisdictions since recent complaint evidence is now relevant to the issue of consent'.[262] This means that juries can use such evidence as proof of the events alleged by the complainant. It also means that juries will not receive a judicial direction about how to use the evidence, 'thus preventing the type of confusion that is likely to exist in jurors' minds about using recent complaint evidence for credibility and non-credibility purposes'.[263]

Delayed complaint

18.197 In *Graham v The Queen*, the High Court was required to consider the scope of the 'fresh in the memory' test under s 66(2). Instead of evidence of recent complaint, a witness had given evidence about the complainant's disclosures made six years after the alleged sexual assault. The High Court held that the witness' evidence was *not* admissible under s 66(2) because the complainant had not told her friend she was sexually abused by her father when the events were fresh in her memory. The High Court interpreted the word, 'fresh' to mean 'recent' or 'immediate' so that the lapse of time 'will very likely be measured in hours or days, not, as was the case here, in years'.[264]

18.198 In ALRC 102, the ALRC, NSWLRC and VLRC recommended retention of the concept of 'fresh in the memory' under s 66(2) with an extension of the matters to be taken into account in determining what is 'fresh in the memory' to address the restrictive interpretation in *Graham v The Queen*. The Commissions concluded that 'understanding of memory processes has progressed significantly' since the uniform Evidence Acts were first introduced and 'the law should reflect that knowledge'.[265] ALRC 102 noted research showing that

> while focusing primarily on the lapse of time between an event and the making of a representation about it might be justifiable in relation to memory of unremarkable events, the distinct and complex nature of memory of violent crime indicates that the nature of the event concerned should be considered in deciding whether a memory is 'fresh' at the relevant time. The assessment of 'freshness' should not be confined to time.[266]

18.199 ALRC 102 recommended that a new sub-section should be inserted into s 66.[267] This recommendation was subsequently enacted, with some re-wording, as s 66(2A):

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262 National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 149.
263 Ibid.
264 *Graham v The Queen* (1998) 195 CLR 606, 608.
265 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102, NSWLRC Report 112, VLRC FR (2005), 253.
266 Ibid, [8.120].
267 Ibid, Rec 8–4.

(2A) In determining whether the occurrence of the asserted fact was fresh in the memory of a person, the court may take into account all matters that it considers are relevant to the question, including:

(a) the nature of the event concerned, and

(b) the age and health of the person, and

(c) the period of time between the occurrence of the asserted fact and the making of the representation.[268]

Other modifications to the common law

18.200 Queensland, Western Australia and South Australia have enacted provisions that address some of the problems with the recent complaint rule at common law.[269]

18.201 Queensland has enacted a specific provision that applies to the admission of out-of-court statements in sexual assault trials. Section 4A of the *Criminal Law (Sexual Offences) Act 1978* (Qld) states:

(2) Evidence of how and when any preliminary complaint was made by the complainant about the alleged commission of the offence by the defendant is admissible in evidence, regardless of when the preliminary complaint was made.

(3) Nothing in subsection (2) derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied it would be unfair to the defendant to admit the evidence.

(4) If a defendant is tried by a jury, the judge must not warn or suggest in any way to the jury that the law regards the complainant's evidence to be more reliable or less reliable only because of the length of time before the complainant made a preliminary or other complaint.

(5) Subject to subsection (4), the judge may make any comment to a jury on the complainant's evidence that it is appropriate to make in the interests of justice.

18.202 This provision does not allow evidence of the content of the statement to be admissible, only evidence of how and when the statement was made—although it does allow this evidence to be admitted regardless of when the complaint was made. Admissibility is not dependent on the person being available for cross-examination.

18.203 However, evidence of a preliminary complaint admitted under s 4A(2) is still only relevant to the complainant's credibility so that juries in Queensland will be instructed that they cannot use the evidence as proof of the facts in issue, such as lack

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268 The amending legislation in Tasmania (*Evidence Amendment Bill 2008* (Tas)) had not been passed at the time of writing.

269 For a more comprehensive review of modification to the common law relating to recent and delayed complaint evidence, see: National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 143–148.

of consent.[270] This means that Queensland has not abolished the common law recent complaint rule.

18.204 In Western Australia, a child-specific modification to the law on hearsay evidence was enacted in 1992.[271] Under s 106H of the *Evidence Act 1906* (WA), the admissibility of out-of-court statements is left to the discretion of the judge, and is dependent on the child being available for cross-examination.

18.205 The aim of the provision was to allow any statement made by a child to another person to be admissible in certain criminal trials, including child sexual assault trials. Arguably, s106H abolishes the common law recent complaint rule because the 'relevant statement' is admissible if it 'relates to any matter in issue in the proceeding'. Evidence of a child's delayed complaint may be relevant to whether or not the defendant committed the alleged acts since it may explain why the child delayed making a complaint and the circumstances that prompted the disclosure.

18.206 In South Australia, a child-specific hearsay exception was enacted, after the Chapman review of sexual assault laws.[272] A substituted s 34CA of the *Criminal Law Consolidation Act 1935* (SA) was intended 'to facilitate the proof of sexual offences against children'.[273] The provision abolishes the recent complaint rule because out-of-court statements admitted under this provision can be used to prove the truth of the facts asserted.[274]

18.207 Under s 34CA, to be admissible, the statement must have sufficient probative value, the child must be called or be available to be called to give evidence, and cross-examination of the child must be granted by the court. Importantly, s 34CA does not contain the words such as 'regardless when the preliminary complaint was made' (as is the case in Queensland). This may mean that any delay in complaint will be enough to make the probative value of a child's out-of-court statement less than sufficient.[275]

Evidence of delayed complaint

18.208 Hearsay evidence has been considered unreliable because the maker of the statement could not be cross-examined about its veracity. The position at common law is that hearsay evidence of delayed complaint will not be admissible, unless this has been amended by specific legislation.

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270 *R v RH* [2005] 1 Qd R 180; *R v GS* [2005] QCA 376.

271 This provision was enacted to implement the recommendations of the Western Australian Law Reform Commission, *Report on Evidence of Children and Other Vulnerable Witnesses* (1991). See also *RPM v The Queen* [2004] WASCA 174, [46].

272 L Chapman, *Review of South Australia Rape and Sexual Assault Law: Discussion Paper* (2006).

273 South Australia, *Parliamentary Debates*, House of Assembly, 25 October 2007, 1449 (M Atkinson—Attorney-General, Minister for Justice, Minister for Multicultural Affairs).

274 *Criminal Law Consolidation Act 1935* (SA) s 34CA(3).

275 National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 146.

18.209 The hearsay exception under s 66(2) of the uniform Evidence Acts overcomes this problem because the maker of the statement (the complainant) is available to give evidence and to be cross-examined about her complaint as long as she is competent to give evidence. The relevance of evidence of delayed complaint 'is not to compete with the quality of the complainant's evidence but to illustrate the context in which she made her disclosure and the reasons for any delay'.[276]

18.210 The psychological literature shows that delay is the most common characteristic of both child and adult sexual assault.[277] Since complainants are routinely cross-examined by defence counsel about delays in complaint in ways that suggest fabrication, 'it is likely that evidence about a complainant's first complaint would answer the type of questions that jurors can be expected to ask themselves'.[278]

18.211 In uniform Evidence Acts jurisdictions, s 66(2) will, in some cases, permit the admission of evidence of delayed complaint where the occurrence of the events was 'fresh in the memory' of the complainant. In other cases, the 'fresh in the memory' requirements will be a barrier to admissibility.

18.212 Evidence of delayed complaint may also be admissible under s 108 of the uniform Evidence Acts. The relevant part of this exception to the credibility rule[279] provides that:

> (3) The credibility rule does not apply to evidence of a prior consistent statement of a witness if:
>
> (a) evidence of a prior inconsistent statement of the witness has been admitted; or
>
> (b) it is or will be suggested (either expressly or by implication) that evidence given by the witness has been fabricated or re-constructed (whether deliberately or otherwise) or is the result of a suggestion;
>
> and the court gives leave to adduce the evidence of the prior consistent statement.[280]

18.213 Where delay in complaint is used to impugn the credibility of the complainant, s 108 can be used to admit evidence about the complaint including, for example, the reasons for the delay in complaint and the surrounding circumstances.

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276 Ibid, 151.

277 For a review of this literature see Ibid, 79–91; D Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Review—Report prepared for the Commonwealth Office of the Status of Women* (2003) Australian Institute of Criminology.

278 National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 152.

279 The rule that credibility evidence about a witness is not admissible: Uniform Evidence Acts, s 102.

280 Ibid s 108.

Problems with the operation of s 66

18.214 Some commentators have identified the operation of s 66 of the uniform Evidence Acts as a problem in relation to evidence of delayed complaint. This view has been summarised by the National Child Sexual Assault Reform Committee as follows:

> Trial and appellate judges may consider that a complainant's representation is unreliable because of their young age at the time it was made, or because too much time has elapsed between the events in question and the preliminary complaint. Because s 66(2A) does not actually change the 'recent' or 'immediate' requirement imposed by *Graham's* case it is unlikely that the amendment will have the effect of admitting evidence of delayed complaint, as a matter of course.[281]

18.215 One option to avoid the 'fresh in the memory' requirement would be to adopt the Queensland approach to evidence of delayed complaint. This would ensure that evidence of the content of, and the circumstances surrounding, a sexual assault complaint was admissible, regardless of the length of time between the complaint and the alleged sexual abuse.

18.216 The Queensland approach recognises that the law has considered the time lapse between the assault and the making of a complaint as 'evidence of truthfulness and fabrication, despite the fact that delay in complaint has been consistently found to be the most typical feature' of sexual assault.[282]

18.217 Questions have been raised about whether 'courts and judges are the appropriate forum and personnel to be making … assessments' about the quality of a witness' memory.[283] If there are issues of reliability, options for reform could be to ensure that a complainant is available to be cross-examined about their out-of-court statements and that courts are able to give appropriate warnings to the jury.

Commissions' views

18.218 The Commissions consider that this is an area of evidence law in which consistency should be pursued, based on provisions that recognise that delay in complaint is a common characteristic of sexual assault.

18.219 Knowledge that children typically delay disclosure of sexual abuse is one reason that evidence of a child's delay in complaint and its circumstances have been held to satisfy the relevance test under the uniform Evidence Acts.[284] Such evidence rationally affects the assessment of the probability of the existence of a fact in issue, namely whether the accused committed the alleged sexual abuse.

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281 National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 154.
282 Ibid.
283 Ibid, 155.
284 Ibid, 152.

18.220 The 'fresh in the memory' requirement under the uniform Evidence Acts can mean that, for example, when a jury warning is given regarding the forensic disadvantage suffered by the defendant as a result of a delay in complaint, evidence of when the complaint was made, what was said and the reasons for delay may be 'technically inadmissible in examination-in-chief'.[285] Consequently,

> evidence about the delay is left to the defence to raise during cross-examination, leaving the jury with an inaccurate impression about the reasons for the complainant's delayed disclosure and, unless addressed during re-examination, an incomplete account of why, when and how the [complainant] made her or his first complaint.[286]

18.221 One option to address these concerns would be for legislation to provide that, where complainants in sexual assault trials are called to give evidence, the hearsay rule does not apply to evidence of a preliminary complaint, regardless of when the preliminary complaint was made. Consistently with the Queensland provisions, a 'preliminary complaint' could be defined as any complaint other than

> (a) the complainant's first formal witness statement to a police officer given in, or in anticipation of, a criminal proceeding in relation to the alleged offence; or
>
> (b) a complaint made after the complaint mentioned in paragraph (a).

18.222 The mechanism for reform would be amendment of s 66 of the uniform Evidence Acts in those jurisdictions. While the Commissions' preference is for all Australian jurisdictions to join the uniform Evidence Acts scheme, in other jurisdictions, reforms could be enacted in criminal procedure legislation relating to sexual offences.

18.223 Such a reform may be criticised, however, for attempting to amend an exception to the hearsay rule to address concerns primarily about attacks on the credibility of complainants in sexual assault cases. Evidence of a long delayed complaint is not inherently more reliable than in-court evidence (the usual justification for exceptions to hearsay rule). It can be seen as wrong in principle to retain s 66 generally, while creating a special exception for complainants in sexual assault proceedings.

18.224 Another factor dictating against reform is that there has not been enough time to establish whether new s 66(2A) of the uniform Evidence Acts has had any impact on the admission of evidence of delayed complaint. This amendment to the

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285 L Chapman, *Review of South Australia Rape and Sexual Assault Law: Discussion Paper* (2006), 114.

286 National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 153.

uniform Evidence Acts was intended, in part, to address 'special difficulties' with the 'fresh in the memory' criterion in sexual offence cases.[287]

Question 18–10 Should Commonwealth, state and territory legislation provide that, where complainants in sexual assault proceedings are called to give evidence, the hearsay rule does not apply to evidence of a preliminary complaint, regardless of when the preliminary complaint was made?

Jury warnings

18.225 In jury trials, the judge directs the jury as to the legal rules that it must apply to the evidence. The latter task encompasses a responsibility to direct the jury about any legal limits on the use it may make of the evidence and to give an appropriate warning or caution where there are potential 'dangers' involved in acting upon particular evidence. The judge may also make comments about the evidence and, to some extent, express opinions as to what conclusions appear appropriate.

18.226 The matters about which a warning will be required are usually those with which the court is said to have 'special experience' not possessed by members of the jury. Warnings must therefore be given in terms which convey that they are binding directions of law. The duty of a trial judge to give appropriate and adequate warnings stems from the overriding duty to ensure a fair trial. Hence the failure to give an appropriate jury warning may lead to a miscarriage of justice.[288]

18.227 In the sexual assault context the purpose of jury warnings has changed over time. Historically, they served to protect the accused against an unfair conviction. More recently, 'legislation has been enacted to counter myths about sexual assault and to ensure that complainants, as well as people charged with sexual offences, are treated fairly'.[289]

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287 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102, NSWLRC Report 112, VLRC FR (2005), [8.75].

288 Ibid, [18.1]–[18.2].

289 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [7.7] (footnotes omitted). For a discussion of the popular myths surrounding sexual assault, see D Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Review—Report prepared for the Commonwealth Office of the Status of Women* (2003) Australian Institute of Criminology; D Boniface, 'Ruining a Good Boy for the Sake of a Bad Girl: False Accusation Theory in Sexual Offences, and New South Wales Limitations Periods—Gone But Not Forgotten' (1994) 6 *Current Issues in Criminal Justice* 54; A Cossins, 'Complaints of Child Sexual Abuse: Too Easy to Make or Too Difficult to Prove?' (2001) 34 *Australian and New Zealand Journal of Criminology* 149.

18.228 In a sexual assault trial, 'a jury may receive a number of different warnings and directions which focus on the unique characteristics of sexual assault such as delay, one witness to the offence and a lack of corroborating evidence'. [290] As a result of the numerous complex directions and warnings that may be required in sexual assault cases, the trial judge's task of sufficiently directing a jury—in a manner which is clear, intelligible, relevant, brief and insulated from appeal—and the jurors' task of comprehending and applying each direction are formidable.[291]

Warnings about unreliable evidence and corroboration

18.229 Historically, sexual assault complainants[292] and children[293] were among classes of witness considered by the common law to be inherently unreliable.[294] The unreliability of children and sexual assault complainants was considered a matter—capable of affecting the evaluation of the evidence—about which judges had special knowledge or experience beyond the jury's appreciation. [295]

18.230 For this reason, the common law required corroboration warnings to be given by trial judges to juries in respect of the evidence of both sexual assault complainants and child witnesses. The common law corroboration warning has two components:

- the corroboration component—the caution that, as it is dangerous to convict on a child or sexual assault complainant's 'uncorroborated' evidence, it was necessary to have corroborating evidence; and

- the reliability component—the caution that, as children and sexual assault complainants as classes of witness are unreliable, the evidence of a particular child or complainant had to be treated with care.[296]

18.231 Corroboration warnings about the potential unreliability of categories of witnesses are now recognised as discriminatory and based on prejudice rather than empirical evidence.[297]

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290 National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 58.

291 For a summary of both the common law and uniform Evidence Act directions which highlights the complexity of a trial judge's task see, *R v BWT* (2002) 54 NSWLR 241, 250–251.

292 *Kelleher v The Queen* (1974) 131 CLR 534.

293 *Hargan v The King* (1919) 27 CLR 13.

294 For example, Brennan J in *Bromley v The Queen* (1989) 168 CLR 79 noted: 'The courts have had experience of the reasons why… [children and sexual assault complainants] may give untruthful evidence wider than the experience of the general public, and the courts have a sharpened awareness of the danger of acting on the uncorroborated evidence of such witnesses': 324. See also *JJB v The Queen* (2006) 161 A Crim R 187; *R v TN* (2005) 153 A Crim R 129, [69].

295 Queensland Law Reform Commission, *A Review of Jury Directions*, WP67 (2009), [7.80].

296 This analysis was put forward in Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report No 55 (Part 2) (2000), 32.

297 For a review of the literature on suggestibility studies and the reliability of children's evidence see National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex*

Statutory response to the corroboration component

18.232 All Australian jurisdictions have enacted legislation abolishing the mandatory requirement to warn the jury that it is dangerous to act on uncorroborated evidence. In South Australia and the Northern Territory the provisions abolish the mandatory requirement only with respect to the uncorroborated evidence of child witnesses,[298] whereas in the other jurisdictions the provisions have general application to uncorroborated evidence.[299]

18.233 This statutory response to the common law requirement to give a corroboration warning recognises that the typical sexual assault offence takes place in private, without other witnesses.[300] While corroboration for an assault may exist by way of 'an admission, DNA evidence, medical evidence, recent complaint, or tendency evidence … for the most part, particularly in child sexual assault matters, such evidence may be rare'.[301]

18.234 These provisions do not prohibit a warning that it would be dangerous to convict on uncorroborated evidence—only the requirement to give such a warning.[302] In addition, trial judges retain their general powers and obligations to give appropriate warnings 'necessary to avoid the perceptible risk of miscarriage of justice arising from the circumstances of the case'.[303]

Statutory response to the reliability component

18.235 Judges in the uniform Evidence Acts jurisdictions are obliged to give a warning in respect of evidence that may be unreliable, including several broadly described categories of evidence, unless there is good reason for not doing so.[304] As s 165 of the uniform Evidence Acts concerns warnings in respect of *categories of evidence*, rather than *categories of witnesses*, it is not of immediate relevance to the present discussion.[305]

Offences in Australia, unpublished (2009), 111–124 and the Australasian Institute of Judicial Administration, *Bench Book for Children Giving Evidence in Australian Courts* (2009), 28–40.

298 *Evidence Act 1929* (SA) s 12A; *Evidence Act 1939* (NT) s 9C.

299 *Evidence Act 1995* (Cth) s 164(3); *Evidence Act 1995* (NSW) s 164(3); *Evidence Act 2008* (Vic) s 164(3); *Criminal Code* (Qld) s 632(2); *Evidence Act 1906* (WA) s 50; *Criminal Code* (Tas) s 136; *Evidence Act 2001* (Tas) s 164; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 69, 70.

300 See, eg, New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 October 2006, 2958 (G McBride—Minister for Gaming and Racing and Minister for the Central Coast).

301 Criminal Justice Sexual Offences Taskforce (NSW Attorney General's Department), *Responding to Sexual Assault: The Way Forward* (2005), 103.

302 *Conway v The Queen* (2002) 202 CLR 203, [53].

303 *Longman v The Queen* (1989) 168 CLR 79, 86. See also *Tully v The Queen* (2006) 230 CLR 234; *Robinson v The Queen* (1999) 197 CLR 162; *Bromley v The Queen* (1989) 168 CLR 79.

304 Uniform Evidence Acts, s 165.

305 Uniform Evidence Acts s 165 does not interfere with a trial judge's general powers and obligations under the common law to give appropriate warnings and directions to the jury—subject to s 165A of the uniform Evidence Acts which controls what a judge may say about the evidence of children.

18.236 In all Australian jurisdictions, except for Queensland, a judge is prohibited from warning or suggesting to the jury that children as a class are unreliable witnesses.[306] This statutory response addresses the misconception that the evidence of children is inherently less reliable than that of adults.

18.237 New South Wales, Victoria, the ACT and the Northern Territory[307] have enacted legislation pursuant to which a judge must not warn, or suggest in any way to, the jury that it is unsafe to convict on the uncorroborated evidence of a complainant because the law regards complainants as an unreliable class of witness. These provisions were enacted to mirror the prohibition on the warning that children as a class are unreliable witnesses, and prevent judges from stating or suggesting to the jury that complainants in sexual assault proceedings are unreliable witnesses as a class.[308]

18.238 These provisions do not prevent a judge from making any comment on evidence given in a trial that it is appropriate to make in the interests of justice—for example, warning that a particular child's or complainant's evidence, or the particular circumstances of the witness, may affect the reliability of that evidence.

Murray warning

18.239 One warning that may be given by a trial judge pursuant to their common law powers is the *Murray* warning.[309] A *Murray* warning cautions about the danger of convicting on the uncorroborated evidence of a sexual assault complainant—including a child complainant—and is frequently given in sexual assault trials, if requested by the defence.[310] A *Murray* warning is generally to the effect that:

> where there is only one witness asserting the commission of the crime, the evidence of that witness must be scrutinised with great care before a conclusion is arrived at that a verdict of guilty should be brought in.[311]

18.240 The legislation that now prohibits a judge from stating or suggesting to a jury that complainants in sexual offence proceedings are unreliable witnesses as a class may have been enacted with the parliamentary intention of relieving a trial judge from

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306 *Evidence Act 1995* (Cth) s 165A; *Evidence Act 1995* (NSW) s 165A; *Evidence Act 2008* (Vic) s 165A; *Evidence Act 1906* (WA) s 106D; *Evidence Act 1929* (SA) s 12A; *Evidence Act 2001* (Tas) s 164(4); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 70; *Evidence Act 1939* (NT) s 9C. *Criminal Code* (Qld) s 632(2) provides only that 'a judge is not required by any rule of law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated testimony of 1 witness'.

307 *Criminal Procedure Act 1986* (NSW) s 294AA; *Crimes Act 1958* (Vic) s 61; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 69; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(5).

308 See, eg, New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 October 2006, 2958 (G McBride—Minister for Gaming and Racing and Minister for the Central Coast).

309 *R v Murray* (1987) 11 NSWLR 12.

310 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), 373–374; J Bargen, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault, Gender Bias and the Law Project* (1996); J Cashmore, 'The Prosecution of Child Sexual Assault: A Survey of NSW DPP Solicitors' (1995) 28 *Australian and New Zealand Journal of Criminology* 32, 43.

311 *R v Murray* (1987) 11 NSWLR 12, 19.

giving a *Murray* warning.[312] However, because those provisions are directed at warnings that refer to complainants of sexual offences as an unreliable class of witness and not whether the evidence of one witness must be scrutinised with great care, it is unlikely that such provisions prevent the trial judge from giving the *Murray* warning.[313]

18.241 Criticisms of the *Murray* warning include that it:

- is 'superfluous where the complainant's unreliability [is] obvious or useless where the complainant [is] a skilled and convincing liar';[314]
- is 'patently obvious';[315]
- is supported by a rationale that is inconsistent with the psychological literature;[316]
- potentially undermines a complainant's evidence and perpetuates myths about women;[317] and
- may be interpreted by jurors as an invitation to acquit.[318]

18.242 It is open to question whether the standard directions regarding the burden and standard of proof adequately address the situation where the only evidence comes from the complainant. Some commentators argue the warning is unnecessary given the judge will direct the jury not to convict unless they are satisfied of the guilt of the accused beyond reasonable doubt.[319] Other sources suggest the *Murray* warning is a useful reinforcement of the direction on the standard of proof.[320] Another view questions what the *Murray* warning actually means and suggests that it is likely to

312 See, eg, *Criminal Procedure Act 1986* (NSW) s 294AA; New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 October 2006, 2958 (G McBride—Minister for Gaming and Racing and Minister for the Central Coast).

313 New South Wales Law Reform Commission, *Jury Directions*, CP 4 (2008), [7.39]; Judicial Commission of New South Wales, *Sexual Assault Handbook* (2009) <www.judcom.nsw.gov.au/publications/benchbks/sexual_assault/index.html> at 14 April 2010 24 March 2010.

314 D Boniface, 'The Common Sense of Jurors vs The Wisdom of the Law: Judicial Directions and Warning in Sexual Assault Trials' (2005) 11(1) *University of New South Wales Law Journal* 5, 265.

315 Ibid, 267.

316 National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 103–105.

317 NSW Adult Sexual Assault Interagency Committee, *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW* (2004).

318 Queensland Law Reform Commission, *A Review of Jury Directions*, WP67 (2009), [7.82]

319 New South Wales Law Reform Commission, *Jury Directions*, CP 4 (2008), [7.35].

320 Judicial Commission of New South Wales, *Sexual Assault Handbook* (2009) <www.judcom.nsw.gov.au/publications/benchbks/sexual_assault/index.html> at 14 April 2010 24 March 2010.

confuse jurors as to whether there is a difference between being 'satisfied beyond reasonable doubt' and 'scrutinising the evidence with great care'.[321]

Commissions' view

18.243 There is general support for the legislative provisions which prohibit a judge from warning or suggesting to the jury that children as a class are unreliable witnesses.[322] The Commissions' view is that similar prohibitions should also be extended to complainants in sexual assault cases. As the NSW Criminal Justice Sexual Offences Taskforce commented:

> this would prevent a general warning being given about scrutinising the evidence of the complainant with great care, simply because he or she is alleging sexual assault. However, where there is specific evidence, which suggests that aspects of a complainant's evidence may be unreliable, a comment may still be made about needing to treat such evidence with care.[323]

Proposal 18–11 Commonwealth, state and territory legislation should prohibit a judge in any sexual assault proceeding from:

(a) warning a jury, or making any suggestion to a jury, that complainants as a class are unreliable witnesses; and

(b) warning a jury of the danger of convicting on the uncorroborated evidence of any complainant.

Warnings about delay in complaint

18.244 Common law assumptions in relation to sexual assault complainants included that 'sexual assault complainants are among the classes of witness considered by the common law to be inherently unreliable' and that 'a genuine sexual assault victim would make a complaint at the first opportunity and the failure to do so was considered relevant to the complainant's credibility'.[324]

18.245 These assumptions have since been discredited by research.[325] Delay in complaint is now known to be a typical feature of reporting sexual assault. In response

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321 J Wood, 'Sexual Assault and the Admission of Evidence' (Paper presented at Practice and Prevention: Contemporary Issues in Adult Sexual Assault in New South Wales, Sydney, 12 February 2003), [17]–[20].

322 Criminal Justice Sexual Offences Taskforce (NSW Attorney General's Department), *Responding to Sexual Assault: The Way Forward* (2005), 104.

323 Ibid.

324 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102, NSWLRC Report 112, VLRC FR (2005), [18.72]

325 For details of this research see, Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [2.43]. See also, Australian Law Reform Commission, New South Wales Law Reform

to such research, legislative provisions were enacted in a number of jurisdictions to 'remove the common law requirement that trial judges warn juries that it would be unwise or dangerous to convict an accused of a sexual offence on the basis of the uncorroborated evidence of the complainant'.[326] Legislation was also enacted to 'require the trial judge to warn the jury that delay in complaint does not necessarily indicate that the allegation is false and that a person may have a good reason for delaying in making a complaint'.[327]

18.246 Arguably, these legislative reforms have subsequently been undermined by the High Court in *R v Longman*[328] and *Crofts v The Queen*.[329]

Longman warning

18.247 The *Longman* warning has been described as the warning required to be given to a jury in cases where there has been a substantial delay between the time of the alleged offence and the complaint. In *Longman*, a complaint was made more than 20 years after the alleged offence. In general terms, *Longman* requires that the jury be warned that, because of the passage of a number of years, it would be 'dangerous to convict' on the complainant's evidence alone unless the jury is satisfied of its truth and accuracy, having scrutinised the complainant's evidence with great care.[330] The rationale for the warning is that a significant delay puts the accused at a forensic disadvantage because he has lost the 'means of testing the complainant's allegations which would have been open to him had there been no delay'.[331]

Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102, NSWLRC Report 112, VLRC FR (2005), [18.72]–[18.73]; A Cossins, 'Time Out for Longman: Myths, Science and the Common Law' (2010, under review) *Melbourne University Law Review* 34.

326 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102, NSWLRC Report 112, VLRC FR (2005), [18.73]. Note also that some jurisdictions have abolished corroboration warning requires in respect of all witnesses: see, eg, uniform Evidence Acts s 164.

327 Ibid, [18.73]. See, eg, *Crimes Act 1958* (Vic) s 61(1)(b).

328 *Longman v The Queen* (1989) 168 CLR 79.

329 *Crofts v The Queen* (1996) 186 CLR 427.

330 *Longman v The Queen* (1989) 168 CLR 79, 91. See also 108–109.

331 Ibid, 91.

18.248 The *Longman* warning has attracted a great deal of comment and criticism,[332] including that:

- the combined effect of *Longman* and subsequent High Court cases[333] has been to 'give rise to an irrebuttable presumption that the delay *has* prevented the accused from adequately testing and meeting the complainant's evidence'[334] and, as a result, trial judges are required to give the warning irrespective of whether the accused has in fact been prejudiced or suffered a forensic disadvantage;

- warning the jury in the terms that it would or may be 'dangerous or unsafe' to convict 'risks being perceived as a not too subtle encouragement by the trial judge to acquit',[335] thereby encroaching improperly on the fact-finding task of the jury;

- the actual length of delay which necessitates the giving of a *Longman* warning is unclear;[336]

- a practice has developed of giving the *Longman* warning to 'appeal-proof' trial judges' directions even if it is unnecessary in the particular case;[337] and

- the warning is given even where there is corroboration of the complainant's evidence.[338]

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332 See, eg, Victorian Law Reform Commission, *Jury Directions*, Final Report No 17 (2009); Queensland Law Reform Commission, *A Review of Jury Directions*, WP67 (2009); New South Wales Law Reform Commission, *Jury Directions*, CP 4 (2008); L Chapman, *Review of South Australia Rape and Sexual Assault Law: Discussion Paper* (2006); Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report No 8 (2006); Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102, NSWLRC Report 112, VLRC FR (2005); Criminal Justice Sexual Offences Taskforce (NSW Attorney General's Department), *Responding to Sexual Assault: The Way Forward* (2005); Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004); Legislative Council Standing Committee on Law and Justice—Parliament of New South Wales, *Report on Child Sexual Assault Prosecutions*, Report No 22 (2002). See also A Cossins, 'Time Out for Longman: Myths, Science and the Common Law' (2010, under review) *Melbourne University Law Review* 34.

333 *Dyers v The Queen* (2002) 210 CLR 285; *Doggett v The Queen* (2001) 208 CLR 343; *Robinson v The Queen* (1999) 197 CLR 162; *Crampton v The Queen* (2000) 206 CLR 161.

334 *R v BWT* (2002) 54 NSWLR 241, [14]–[15].

335 Ibid, [34].

336 Ibid,[95]. See, eg, *R v Heuston* [2003] NSWCCA 172.

337 Criminal Justice Sexual Offences Taskforce (NSW Attorney General's Department), *Responding to Sexual Assault: The Way Forward* (2005), 89–90. See also, New South Wales Law Reform Commission, *Jury Directions*, CP 4 (2008), [7.49]–[7.54]; Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report No 8 (2006), [2.1.1]–[2.2.1], [2.3.1]–[2.3.2].

338 A Cossins, 'Time Out for Longman: Myths, Science and the Common Law' (2010, under review) *Melbourne University Law Review* 34.

18.249 The *Longman* warning also raises a range of other issues in relation to perpetuating myths and misconceptions about sexual assault and discriminatory attitudes to women and children. For example, at common law the warning focuses on the evidence of the complainant, rather than the forensic disadvantage suffered by the defendant.[339] The warning continues to link delay in complaint with the complainant's credibility and reflects discredited assumptions as to the reliability of memory, particularly that of children.[340]

Uniform Evidence Acts approach

18.250 In ALRC 102, the ALRC, NSWLRC and VLRC identified two options for reform to address the concerns raised in relation to the *Longman* warning: to legislate to abolish the warning in its entirety; or to legislate to clarify, modify or limit its operation.[341]

18.251 Ultimately the ALRC and the VLRC, but not the NSWLRC, recommended that:

> the uniform Evidence Acts be amended to provide that where a request is made by a party, and the court is satisfied that the party has suffered significant forensic disadvantage as a result of delay, an appropriate warning may be given.
>
> The provision should make it clear that the mere passage of time does not necessarily establish forensic disadvantage and that a judge may refuse to give a warning if there are good reasons for doing so.
>
> No particular form of words need to be used in giving the warning. However, in warning the jury, the judge should not suggest that it is 'dangerous to convict' because of any demonstrated forensic disadvantage.[342]

18.252 The recommendation was subsequently enacted as s 165B of the *Evidence Act 1995* (Cth), *Evidence Act 1995* (NSW) and *Evidence Act 2008* (Vic).[343]

18.253 In its 2008 consultation paper on jury directions, the VLRC considered whether s 165B of the uniform Evidence Acts provides a satisfactory approach to warning the jury in relation to the forensic disadvantage because of delay and whether such a warning continues to be necessary, or the matter ought to be left to counsel to

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339 Ibid.

340 See Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report No 8 (2006), [2.1.22].

341 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102, NSWLRC Report 112, VLRC FR (2005), [18.100]. See [18.101]–[18.102] for the principal arguments in support of each of these options.

342 Ibid, 628, Rec 18–3. See also [18.130]–[18.146] for the NSWLRC's views in relation to this recommendation.

343 Differences between these provisions include that in s 165B(2) of the Commonwealth and Victorian Acts, application must be made by 'the defendant', while in s 165B(2) of the NSW Act application must be made by 'a party'. Also, the NSW Act is alone in providing a non-exhaustive list of factors that may be regarded as establishing a significant forensic disadvantage, see *Evidence Act 1995* (NSW) s 165B(7).

address.[344] The VLRC concluded that s 165B of the *Evidence Act 2008* (Vic) appropriately deals with *Longman* warnings because:

> Section 165B provides that the judge must be satisfied that the accused has suffered forensic disadvantage because of the delay before giving the jury a warning. The judge is probably better placed than the jury to make this threshold assessment. If the judge makes this determination he or she must inform the jury of the nature of the disadvantage and instruct them to take it into account when considering their verdict.
>
> Section 165B of the *Evidence Act* is activated by a request from counsel for a warning. The trial judge has a discretionary power to refuse to give a warning which has been requested when satisfied that 'there are good reasons for not doing so'. This approach is consistent with our recommendations concerning all directions other than those which are mandatory.[345]

18.254 Dr Anne Cossins[346] has identified a number of weaknesses and limitations in the operation of s 165B of the uniform Evidence Acts. The limitations arise because:

- s 165B 'does not affect any other power of the judge to give any warning to, or to inform, the jury'[347]—which means, trial judges are still able to give a *Longman* warning; and

- the *Longman* warning is mandatory in nature whereas a s 165B warning is dependent on an application by 'a party'[348] in NSW or 'the defendant'[349] in the Commonwealth, Victorian and the ACT jurisdictions.

18.255 A number of issues may arise in practice as a result. For example, in NSW, a circumstance may arise where the prosecution makes application for a s 165B warning to be given and the defence reminds the judge of the mandatory nature of the *Longman* warning. In this instance the trial judge may give both a *Longman* warning and a s 165B warning, although it is more likely that the judge will refuse to give the s 165B warning on the basis that a *Longman* warning will instead be given.[350] Where there is a conviction, it is unlikely that the defence would appeal against the failure by a trial judge to give the less advantageous s 165B warning. In the Commonwealth and Victorian jurisdictions, where a warning under s 165B is dependent on a request by the defendant, it is doubtful whether the defence would make such a request as an alternative to the more advantageous *Longman* warning.

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344 As discussed in the final report: Victorian Law Reform Commission, *Jury Directions*, Final Report No 17 (2009), 105.

345 Ibid. The relevant recommendation is Rec 37 at 106: 'The issue of delay in complaint in criminal trials should be governed by a provision in the legislation, substantially adopting s 165B of the *Evidence Act 2008*, in lieu of s 61 of the *Crimes Act 1958*'.

346 A Cossins, 'Time Out for Longman: Myths, Science and the Common Law' (2010, under review) *Melbourne University Law Review* 34.

347 Uniform Evidence Acts, s 165B(5).

348 *Evidence Act 1995* (NSW) s 165B.

349 *Evidence Act 1995* (Cth) s 165B; *Evidence Act 2008* (Vic) s 165B.

350 Pursuant to *Evidence Act 1995* (NSW) s 165B(3).

Options for reform

18.256 The Queensland Law Reform Commission (QLRC) has proposed and the TLRI has recommended the enactment of legislative provisions to override the *Longman* warning in terms which are broadly consistent with the uniform Evidence Acts approach.[351] The TLRI recommendation has not yet been implemented.

18.257 South Australia has pursued an alternative reform option by enacting s 34CB of the *Evidence Act 1929* (SA). Section 34CB of the *Evidence Act 1929* (SA) was enacted with the clear intention of abolishing the *Longman* warning.[352] Arguably, however, the drafting abolishes the trial judge's obligation to give the *Longman* warning, without limiting the power to give the warning by providing:

> (1) A rule of law or practice obliging a judge in a trial of a charge of an offence to give a warning of a kind known as a Longman warning is abolished.[353]

18.258 As a result, s 34CB of the *Evidence Act 1929* (SA) differs from s 165B of the uniform Evidence Acts to the extent that it abolishes the trial judge's obligation to give the *Longman* warning. In practice, however, the provisions may differ little in the extent to which they regulate the trial judge's general power to give a *Longman* warning.[354] The key distinction which emerges between s 165B of the uniform Evidence Acts and s 34CB of the *Evidence Act 1929* (SA) is that under the uniform Evidence Acts, a judge may be obliged to give a *Longman* warning—irrespective of whether a s 165B warning is requested—whereas a judge under s 34CB of the *Evidence Act 1929* (SA) is not obliged to give a *Longman* warning.

18.259 Other points of difference between s 165B of the uniform Evidence Acts and s 34CB of the *Evidence Act 1929* (SA) include that:

- a judge under the uniform Evidence Acts is not obliged to give a s 165B direction to the jury if it is not requested,[355] whereas a judge under s 34CB of the *Evidence Act 1929* (SA) must do so if the court is of the opinion 'that the period of time that has elapsed between the alleged offending and the trial has resulted in a significant forensic disadvantage to the defendant';[356]

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351 Queensland Law Reform Commission, *A Review of Jury Directions*, WP67 (2009), Rec 7-1; Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report No 8 (2006), Rec 2.

352 South Australia, *Parliamentary Debates*, House of Assembly, 25 October 2007, 1449 (M Atkinson—Attorney-General, Minister for Justice, Minister for Multicultural Affairs).

353 A Cossins, 'Time Out for Longman: Myths, Science and the Common Law' (2010, under review) *Melbourne University Law Review* 34, 35.

354 Cf Uniform Evidence Acts, s 165B(5).

355 Ibid s 165B(2).

356 *Evidence Act 1929* (SA) s 34CB(2).

- a judge under the uniform Evidence Acts provision has a discretion to refuse to give a warning relating to delay where the defendant is forensically disadvantaged if there are good reasons for doing so,[357] whereas no such 'let out' clause is available to a judge under s 34CB of the *Evidence Act 1929* (SA); and

- the uniform Evidence Acts do not explicitly require that the direction given must be specific to the circumstances of the particular case, whereas the South Australian provision makes explicit this requirement.[358]

18.260 The National Child Sexual Assault Reform Committee has proposed an alternative provision to address the inadequacies of s 165B of the uniform Evidence Acts.[359] The Committee proposes that the defendant show—on the balance of probabilities—that he has suffered 'actual forensic disadvantage' before the court is required to give a s 165B warning or instruction to the jury.[360] The Committee also proposes that s 165B should prescribe the exact wording of the warning and prohibit any other form of words being used.[361] The Committee also stated that s 165B should require the trial judge to give reasons for not giving a warning and should explicitly abrogate the court's power to give a *Longman* warning.

Commissions' views

18.261 The Commissions agree with the view expressed by the VLRC, that s 165B of the uniform Evidence Acts provides a satisfactory approach to the problems raised by *Longman* warnings. The Commission proposes that all states and territories that have not already done so should adopt provisions consistent with s 165B.

18.262 The Commissions are interested, however, in further comments on the operation in practice of s 165B of the uniform Evidence Acts in sexual assault proceedings—particularly those involving offences perpetrated in a family violence context.

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357 Uniform Evidence Acts, s 165B(3).

358 *Evidence Act 1929* (SA) s 34CB(3)(a).

359 National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 71–75.

360 Ibid, Rec 2.1.

361 The proposed wording would require the judge to inform the jury that they 'may' take the forensic disadvantage into account in determining whether the prosecution has proved its case beyond reasonable doubt. Uniform Evidence Acts 165B(2) provides the court must 'inform the jury of the nature of that disadvantage and the *need* to take the disadvantage into account when considering the evidence' (emphasis added).

Proposal 18–12 Commonwealth, state and territory legislation should provide that:

(a) if the court, on application by the defendant, is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must inform the jury of the nature of the disadvantage and the need to take that disadvantage into account when considering the evidence;

(b) the judge need not comply with (a) if there are good reasons for not doing so; and

(c) no particular form of words needs to be used in giving the warning pursuant to (a), but in warning the jury, the judge should not suggest that it is 'dangerous to convict' because of any demonstrated forensic disadvantage.

Question 18–11 What issues arise in practice pursuant to s 165B of the uniform Evidence Acts? Is the s 165B(5) abrogation of the trial judge's obligation and power to give a *Longman* warning sufficiently explicit?

Crofts warning

18.263 The *Crofts* warning originates from a jury direction mandated by the High Court in *Kilby v The Queen*.[362] In *Kilby v The Queen*, the High Court observed that evidence of recent complaint is not evidence of the facts alleged, but goes to the credibility of the complainant as it demonstrates consistency of conduct. However, the court also held as a corollary that where there has been a failure to make a complaint at the earliest available opportunity, this fact may be used to impugn the credibility of the complainant.[363] *Kilby v The Queen* therefore endorsed a court direction to juries that delay or absence of complaint could be used as a factor in determining a complainant's credibility—known as the *Kilby* direction.

18.264 Legislation, including s 61(1)(b) of the *Crimes Act 1958* (Vic), was subsequently passed in a number of Australian jurisdictions to require the judge to warn the jury that a delay in making a complaint of sexual assault does not necessarily mean that the allegation is false.[364] Although such provisions were designed to remove stereotypes as to the unreliability of evidence given by sexual assault complainants,

362 *Kilby v The Queen* (1973) 129 CLR 460.

363 Ibid, 472.

364 See also, *Criminal Procedure Act 1986* (NSW) s 294; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4A(4); *Evidence Act 1906* (WA) s 36BD; *Criminal Code* (Tas) s 371A; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 71.

their protective effects have arguably been negated by the High Court decision in *Crofts v The Queen*.[365]

18.265 In *Crofts v The Queen*, the complainant reported that she had been sexually assaulted by a family friend over a period of six years, and made a complaint six months after the last assault. The trial judge directed the jury, as required by s 61(1)(b) of the *Crimes Act 1958* (Vic), that delay in complaint did not necessarily indicate that the allegation of sexual assault was false and that there were good reasons why a complainant might delay making a complaint.

18.266 The High Court held that s 61(1)(b) does not preclude the court from giving a *Kilby* direction or from commenting that delay in complaint of sexual assault may affect the credibility of the complainant. It considered that the purpose of s 61(1) and like provisions is to 'restore the balance' and rid the law of stereotypical notions as to the unreliability of sexual assault complainants, but not to immunise complainants from critical comment where necessary in order to secure a fair trial for the accused.

18.267 The Court held that a *Kilby* direction must be given where the delay is 'substantial'. Two qualifications were placed on this requirement: first, the direction need not be given where the facts of the case and the conduct of the trial do not suggest the need for a direction to restore the balance of fairness (for example, where there is an explanation for the delay); and secondly, the warning must not be expressed in terms that suggest a stereotyped view that sexual assault complainants are unreliable.[366]

18.268 As a result, subject to the two qualifications, where a trial judge gives the jury the statutory direction that delay in complaint does not necessarily indicate that the allegation is false and that there may be good reasons why a victim of sexual assault hesitates in complaining about it, [367] the judge should also consider giving the direction that 'delay in complaint may be taken into account in evaluating the evidence of the complainant and in determining whether or not to believe the complainant'.[368]

18.269 As with the *Longman* warning, the *Crofts* warning has attracted a great deal of comment and criticism.[369] Major criticisms of the *Crofts* warning include that:[370]

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365 *Crofts v The Queen* (1996) 186 CLR 427.

366 This history is taken from Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102, NSWLRC Report 112, VLRC FR (2005), [18.147]–[18.151].

367 *Criminal Procedure Act 1986* (NSW) s 294; *Evidence Act 1906* (WA) s 35BD; *Criminal Code* (Tas) s 371A; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 71; *Sexual Offences (Evidence and Procedure) Act 1983* (NT). Note that the judge is not required to warn the jury that delay in complaint does not necessarily indicate that the allegation is false pursuant to s 61(1)(b) of the *Crimes Act 1958* (Vic). Note that s 4A(4) of the *Criminal Law (Sexual Offences) Act 1978* (Qld) differs from all other provisions.

368 New South Wales Law Reform Commission, *Jury Directions*, CP 4 (2008), [7.66].

369 See, the list of reports cited in relation to *Longman* above.

- It has produced uncertainty about when a judge is to direct the jury that it is entitled to take into account delay in assessing the complainant's credibility.[371] As a result, to limit the risk of a successful appeal on the basis of a potential miscarriage of justice, trial judges 'as a general rule' direct in this way irrespective of whether the complainant is the sole witness and even where reasons have been advanced for the delay in complaint.[372]

- It requires trial judges to give competing and apparently contradictory statutory and common law warnings. That is, 'to balance the explanation that evidence of a failure to complain of an assault, at the earliest reasonable opportunity, does not necessarily mean that the complaint was untrue, (s 107 *Criminal Procedure Act 1986*), with a direction that the jury can take that delay into account as reducing the complainant's credibility'.[373] The unnecessary complexity may confuse jurors and render the warnings meaningless.[374]

- The near mandatory nature of the requirement to direct the jury that it is entitled to take delay into account in assessing the complainant's credibility risks 'undermining the purpose of the legislative provisions which was to avoid misconceptions about the behaviour of victims of sexual abuse'.[375]

- The premise on which the *Crofts* warning is given reflects discredited assumptions as to the nature of sexual assault and the behaviour of sexual assault complainants. It may be misleading and unfairly disadvantageous to a complainant to give a *Crofts* warning 'if there is no evidentiary basis for suggesting a nexus between delay and fabrication of the complaint'.[376]

Options for reform

18.270 The VLRC's 2004 report *Sexual Offences*[377] recommended an amendment to s 61 of the *Crimes Act 1958* (Vic) which was subsequently enacted as s 61(1)(b)(ii):

> [the judge] must not warn, or suggest in any way to, the jury that the credibility of the complainant is affected by the delay unless, on the application of the accused, the

370 See also, Victorian Law Reform Commission, *Jury Directions*, Final Report No 17 (2009), [3.123]; Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102, NSWLRC Report 112, VLRC FR (2005), [18.152]–[28.258].

371 See, eg, Victorian Law Reform Commission, *Jury Directions*, Final Report No 17 (2009), [3.122]; Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report No 8 (2006), [2.1.6]; Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [7.88].

372 See, eg, *R v Markuleski* (2001) 52 NSWLR 82, [175], [187].

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

374 Criminal Justice Sexual Offences Taskforce (NSW Attorney General's Department), *Responding to Sexual Assault: The Way Forward* (2005), 97.

375 Victorian Law Reform Commission, *Jury Directions*, Final Report No 17 (2009), [3.123].

376 Ibid.

377 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004) .

> judge is satisfied that there is *sufficient evidence* tending to suggest that the credibility of the complainant is so affected to justify the giving of such a warning.[378]

18.271 The National Child Sexual Assault Reform Committee criticised the amendment because it did 'not abolish the *Crofts* warning, nor specify what amounts to 'sufficient evidence'.[379] Other commentators consider that the words 'sufficient evidence' do 'not make clear the standard of persuasion or standard of proof required'.[380] The TLRI have also criticised the Victorian amendments on the basis that they could be interpreted as simply enacting *Crofts*:

> they make provision for the trial judge to warn where he or she is 'satisfied that there exists sufficient evidence in the particular case to justify such a warning'. The facts of *Crofts* itself, as viewed by the High Court, arguably satisfy this condition.[381]

18.272 Despite the shortcomings of the Victorian amendment, the NSW Criminal Justice and Sexual Offences Taskforce recommended an amendment in similar terms.[382] That recommendation was subsequently enacted as s 294(2)(c) of the *Criminal Procedure Act 1986* (NSW). Section 294(2) additionally requires the judge to warn the jury that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false.

18.273 In ALRC 102, the ALRC, NSWLRC and VLRC noted that the *Crofts* warning 'is highly problematic as it reflects assumptions about sexual assault complainants which are outdated and empirically unsustainable'.[383] The ALRC, NSWLRC and VLRC concluded that the problems created by the *Crofts* warning should be dealt with in offence-specific legislation and judicial and practitioner education on the 'nature of sexual assault, including the context in which sexual offences typically occur, and the emotional, psychological and social impact of sexual assault'.[384]

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378 *Crimes Act 1958* (Vic) s 61(1)(b)(ii) (emphasis added) .

379 National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 97. See also, *Crimes Act 1958* (Vic) s 61(2) 'nothing in subsection (1) prevents a judge from making any comment on evidence given in the proceeding that it is appropriate to make in the interests of justice'.

380 H Donnelly, 'Delay and the Credibility of Complainants in Sexual Assault Proceedings' (2007) 19(3) *Judicial Officers' Bulletin* 17, 19.

381 Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report No 8 (2006), 24. See also, New South Wales Law Reform Commission, *Jury Directions*, CP 4 (2008), 151.

382 Criminal Justice Sexual Offences Taskforce (NSW), *Responding to Sexual Assault: The Way Forward* (2005), Rec 37.

383 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102, NSWLRC Report 112, VLRC FR (2005), [18.169]. See also [18.170]–[18.171].

384 Ibid, [18.172]–[18.173].

18.274 Following the Chapman inquiry into sexual assault laws in South Australia,[385] s 34M of the *Evidence Act 1929* (SA) was enacted. Section 34M(1) abolishes the *Kilby* and *Crofts* directions. Section 34M(2) states that

> no suggestion or statement may be made to the jury that a failure to make, or a delay in making, a complaint of a sexual offence is of itself of probative value in relation to the alleged victim's credibility or consistency of conduct.

18.275 Evidence relating to how and why the complainant made his or her complaint, and to whom, is inadmissible.[386] If such evidence is admitted, the judge must direct the jury that:

> (a) it is admitted—
>
> (i) to inform the jury as to how the allegation first came to light; and
>
> (ii) as evidence of the consistency of conduct of the alleged victim; and
>
> (b) it is not admitted as evidence of the truth of what was alleged; and
>
> (c) there may be varied reasons why the alleged victim of a sexual offence has made a complaint of the offence at a particular time or to a particular person,
>
> but that, otherwise, it is a matter for the jury to determine the significance (if any) of the evidence in the circumstances of the particular case.[387]

18.276 Concerns arising in respect of s 34M of the *Evidence Act 1929* (SA) include:

- whether the words 'of itself' under s 34M(2) mean 'that a delay in complaint together with *other* evidence … might be used to make such a suggestion to the jury about delay in complaint';[388]
- that the instructions in relation to the manner in which the judge must direct the jury are 'much less informative compared to similar directions in other jurisdictions, such as s 294(2) of the *Criminal Procedure Act 1986* (NSW)';[389] and
- where the defence, during its closing address, uses any delay in complaint as evidence of fabrication and the trial judge does not adequately explain the delay—that is, that there may be good reasons why a victim delays their complaint and what the reasons are in a particular case—it is likely that

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385 L Chapman (for Government of South Australia), *Review of South Australian Rape and Sexual Assault Law—Discussion Paper* (2006).

386 *Evidence Act 1929* (SA) s 34M(3).

387 Ibid s 34M(4). See also s 34M(5): 'It is not necessary that a particular from of words be used in giving the direction under subsection (4).'

388 National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 100–101.

389 Ibid.

> directing the jury that it is a matter for them to determine what significance, if any, should be given to the evidence of the complainant's complaint invites the jury to engage in *Crofts* type of reasoning.[390]

18.277 The VLRC has again recently reviewed, and the NSWLRC and QLRC are currently reviewing, their jurisdictions' statutory responses to the *Crofts* warning.[391]

18.278 In its 2009 report on jury directions, the VLRC noted that s 61 of the *Crimes Act 1958* (Vic) 'acknowledges that there may be cases where the credibility of the complainant is affected by delay in making a complaint'. In order to avoid that acknowledgment being used to justify a mandatory warning 'the legislation describes the circumstances in which a warning may be given and its content':

> First, the Act requires a direction that there may be good reasons why a victim might delay or hesitate to complain. Secondly, the Act prohibits judges from telling the jury that the complainant's credibility may be affected by delay in complaint unless first satisfied there is 'sufficient evidence' to justify such a warning. The common law powers of a trial judge to give the jury a warning and to comment on the evidence 'in the interests of justice' have not been disturbed, except that the judge must not comment on the reliability of a complainant's evidence 'if there is no reason to do so in a particular proceeding'.[392]

18.279 The VLRC commented that it was questionable whether s 61 limits the circumstances in which the judge is to direct the jury that it is entitled to take into account delay in assessing the complainant's credibility.[393]

18.280 The main issue the VLRC identified was in relation to the 'extent to which the judge should be involved in giving the jury directions about the credibility of the complainant'.[394] The VLRC questioned whether a threshold assessment about 'sufficient evidence' by the judge on the question of credibility 'can be justified when it is the task of the jury to assess the credibility of witnesses and decide whether they accept or reject their evidence'.[395] The VLRC's final view was that:

> the trial judge should not be obliged to give the jury directions about delayed complaint but should have a discretionary power to give appropriate directions to correct statements by counsel that conflict with the evidence or are based upon stereotypical assumptions about reporting of sexual offences.[396]

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390 Ibid.

391 Victorian Law Reform Commission, *Jury Directions*, Final Report No 17 (2009), 54–57, 102–105; Queensland Law Reform Commission, *A Review of Jury Directions*, WP67 (2009), 238–249; New South Wales Law Reform Commission, *Jury Directions*, CP 4 (2008).

392 Victorian Law Reform Commission, *Jury Directions*, Final Report No 17 (2009), [3.125]–[3.126].

393 Ibid, [3.127].

394 Ibid, [3.135].

395 Ibid, [5.88].

396 Ibid, [5.94].

18.281 The advantages of this approach are said to include that it: better acknowledges the adversarial nature of the criminal trial process and is more consistent with the roles of judge and jury; is consistent with the simplification of the law; and overcomes the problem of juries having to understand and apply directions about delay which appear contradictory and which may suggest to the jury that the evidence of the complainant has no probative value.[397]

18.282 In its 2008 consultation paper on jury directions, the NSWLRC asked whether s 294(2) of the *Criminal Procedure Act 1986* (NSW) is sufficient to address 'the issue of what (if any) warning judges should give the jury on the impact of delay on the complainant's credibility'.[398] The NSWLRC considered the competing arguments in respect of s 294(2). On the one hand, it is considered that to prevent a judge from warning a jury that 'delay in complaining is relevant to the victim's credibility unless there is sufficient evidence to justify such a warning'[399] is 'simply a reiteration of the High Court's ruling in *Crofts*'.[400] On the other hand, reinforcing the 'sufficient evidence' requirement may serve to prevent judges from 'indiscriminately giving the *Crofts* direction for the main purpose of "appeal-proofing" the case, particularly in cases where there was in fact no delay, or where there are indisputably good reasons for a delay'.[401]

18.283 In Queensland, s 4A of the *Criminal Law (Sexual Offences) Act 1978* (Qld) provides that the *Crofts* warning cannot be given.[402] The main criticism of this response is that 'it does not allow the judge to make any comment that might be warranted in the light of comments by the parties, especially defence counsel'.[403] This means, for example, where defence counsel have raised the issue of delay in relation to a complainant's credibility in cross-examination or during their address to the jury, the judge may be prevented from commenting that there may be good reasons for delay in complaint. As such s 4A may produce less fair outcomes for complainants—particularly where little evidence is adduced by the prosecution about the reason for the complainant's delay in complaint—than the current s 61 of the *Crimes Act 1958* (Vic) approach to jury warnings.[404]

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397 Ibid, [3.137].

398 New South Wales Law Reform Commission, *Jury Directions*, CP 4 (2008), Issue 7.8.

399 *Criminal Procedure Act 1986* (NSW) s 294(2).

400 New South Wales Law Reform Commission, *Jury Directions*, CP 4 (2008), [7.75].

401 Ibid, [7.76].

402 'The judge must not warn or suggest in any way to the jury that the law regards the complainant's evidence to be more reliable or less reliable only because of the length of time before the complainant made a preliminary or other complaint': *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4A(4).

403 Queensland Law Reform Commission, *A Review of Jury Directions*, WP67 (2009), [7.45]; Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report No 8 (2006), [3.4.5].

404 Note that *Crimes Act 1958* (Vic) s 61(1)(b)(i) provides that the judge 'must inform the jury that there may be good reasons why a victim of sexual assault may delay or hesitate in complaining about it'. See also National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 98; L Chapman, *Review of South Australia Rape and Sexual Assault Law: Discussion Paper* (2006), 114.

18.284 To address this concern, the QLRC's discussion paper proposes an amendment to s 4A to give judges the power to 'give appropriate directions to correct statements by counsel that conflict with the evidence or are based upon stereotypical assumptions about reporting of sexual offences'.[405]

Commissions' views

18.285 The Commissions propose two options for reform. The first option would be for the Commonwealth, states and territories to develop legislation modelled on the VLRC's recommendation.

18.286 Legislation would provide that, in any trial for a sexual offence, the issue of the effect of any delay in complaint, or absence of complaint, on the credibility of the complainant should be a matter for argument by counsel and for determination by the jury and that 'the trial judge must not give a direction regarding the effect of delay in complaint, or absence of complaint, on the credibility of the complainant, unless satisfied it is necessary to do so in order to ensure a fair trial'. If evidence is given, or comments made, that tend 'to suggest that the person against whom the offence is alleged to have been committed either delayed making, or failed to make, a complaint in respect of the offence, the judge must tell the jury that there may be good reasons why a victim of a sexual offence of that kind may delay making or fail to make a complaint in respect of the offence'.[406]

18.287 The second option would be for legislation modelled on elements of s 4A(4) of the *Criminal Law (Sexual Offences) Act 1978* (Qld), including the amendment proposed by the QLRC, and s 61(1) of the *Crimes Act 1958* (Vic). Such legislation would provide that, in any trial for a sexual offence, the judge:

- must inform the jury that there may be good reasons why a victim of a sexual assault may delay or hesitate in complaining about it;[407]
- must not warn or suggest in any way to the jury that the law regards the complainant's evidence to be more reliable or less reliable only because of the length of time before the complainant made a preliminary or other complaint;[408]
- maintains a discretion to give appropriate directions to correct statements by counsel that conflict with the evidence or are based upon stereotypical assumptions about reporting of sexual offences;[409] and

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405 Queensland Law Reform Commission, *A Review of Jury Directions*, WP67 (2009), Proposal 7–2.
406 See Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), Rec 38.
407 See *Crimes Act 1958* (Vic) s 61(1)(b)(i).
408 See *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4A(4).
409 See, amendment to s 4A(4) proposed by the QLRC: Queensland Law Reform Commission, *A Review of Jury Directions*, WP67 (2009), Proposal 7–2.

- maintains a discretion to comment on the reliability of the complainant's evidence in the particular case if they consider it is appropriate to do so in the 'interests of justice'.[410]

18.288 If warnings about the effect of delay on the credibility of complainants are still necessary in sexual offence cases, the Commissions consider that this second option creates a model which overcomes the shortcomings of the provisions from which it is derived.

18.289 Paragraph (a) of the second proposed option (set out below)—that is, the direction in relation to 'good reason for delay'—has been criticised because it may encourage the jury to speculate on the delay.[411] Such directions were originally introduced to eliminate unwarranted misconceptions about the unreliability of the evidence of sexual assault complainants and to assist the jury to gain an understanding of the complainant's position.[412] As long periods of delay are not uncommon in cases of child sexual assault in a family context (for a range of reasons), the retention of the 'good reason for delay' direction may be particularly justified in those cases.

18.290 Paragraph (b) of the second option clearly prevents the *Crofts* warning from being given. Paragraphs (c) and (d) of the second option proposal act as 'let out' clauses in response to the strict prohibition on the giving of a *Crofts* warning by paragraph (b). These provisions permit trial judges to redress statements by defence counsel where the fact of delay is used to undermine the credibility of the complainant's account in cross-examination or in addressing the jury; and preserve the common law powers of a trial judge to give the jury a warning and to comment on the evidence 'in the interests of justice'.

Question 18–12 Are warnings about the effect of delay on the credibility of complainants necessary in sexual assault proceedings?

Proposal 18–13 Commonwealth, state and territory legislation should provide that, in sexual assault proceedings:

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410 *Crimes Act 1958* (Vic) s 61(2); *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4A(5).

411 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [5.83]. Associate Professor John Willis considered the direction risked distracting the jury—who will want to know why there is a delay in complaint—and doubted whether many people would still hold stereotypical views that delay in complaint is relevant to the complainant's credibility: Victorian Law Reform Commission, *Jury Directions*, Final Report No 17 (2009), [5.83]. Other commentators suggest that preventing such a direction from being given may produce less fair outcomes for complainants: National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 98.

412 See, eg, Law Reform Commission of Victoria, *Rape and Allied Offences: Procedure and Evidence*, Discussion Paper 5 (1987), 46–48; Law Reform Commission of Tasmania, *Report and Recommendations on Rape and Sexual Offences*, Report 31 (1982), 26.

(a) (i) the issue of any delay in complaint, or absence of complaint, on the credibility of the complainant should be a matter for argument by counsel and for determination by the jury;

(ii) subject to paragraph (iii), save for identifying the issue for the jury and the competing contentions of counsel, the trial judge must not give a direction regarding the effect of delay in complaint, or absence of complaint, on the credibility of the complainant, unless satisfied it is necessary to do so in order to ensure a fair trial; and

(iii) if evidence is given, or a question is asked, or a comment is made that tends to suggest that the person against whom the offence is alleged to have been committed either delayed making or failed to make a complaint in respect of the offence, the judge must tell the jury that there may be good reasons why a victim of a sexual offence may delay making or fail to make a complaint in respect of the offence.

OR

(b) the judge:

(i) must inform the jury that there may be good reasons why a victim of a sexual assault may delay or hesitate in complaining about it;

(ii) must not warn or suggest in any way to the jury that the law regards the complainant's evidence to be more reliable or less reliable only because of the length of time before the complainant made a preliminary or other complaint;

(iii) maintains a discretion to give appropriate directions to correct statements by counsel that conflict with the evidence or are based upon stereotypical assumptions about reporting of sexual offences; and

(iv) maintains a discretion to comment on the reliability of the complainant's evidence in the particular case if the judge considers it is appropriate to do so in the interests of justice.

Cross-examination

18.291 Cross-examination is a feature of the adversarial process and is designed, among other things, to allow the defence to confront and undermine the prosecution's case by exposing deficiencies in a witness' testimony, including the complainant's

testimony. Under the common law, the uniform Evidence Acts and other legislation, limitations have been placed on inappropriate and offensive questioning under cross-examination. It has been argued, however, that the effect of these provisions in practice has not provided a sufficient degree of protection for complainants in sexual assault proceedings. The following section:

- briefly discusses the cross-examination of children and other vulnerable witnesses in sexual assault cases; and

- examines issues concerning cross-examination where the defendant is not represented by a lawyer.

Cross-examination of children and vulnerable witnesses

18.292 Cossins has documented inquiries relating to the prosecution of child sex offences, and children as witnesses within the criminal justice system over the last 14 years.[413] This found that cross-examination is one of the most difficult parts of testifying for children; children are subject to complex, developmentally inappropriate and repetitive questioning and questioning deliberately designed to confuse and create inconsistencies; and the powers of judicial officers to intervene to prevent improper questioning are either 'exercised sparingly' or sometimes have no effect on defence counsel questioning.[414]

18.293 Unless they have a cognitive impairment, adults are much less vulnerable than children during cross-examination. Nonetheless, they can be subject to the same types of leading, repetitive, aggressive, intimidating and humiliating questions as children. There is, however, much less information available about the impact of cross-examination on adult sexual assault complainants, particularly recent information. Because of the extent of juror misconceptions about how women and children respond to sexual assault, cross-examination is likely to play a central role in confirming the pre-existing attitudes and beliefs of jurors.[415]

Current law

18.294 In NSW, reforms for controlling cross-examination were enacted in 2005, under s 275A of the *Criminal Procedure Act 1986* (NSW). This reform imposed a

413 A Cossins, 'Cross-Examination in Child Sexual Assault Trials: Evidentiary Safeguard or an Opportunity to Confuse?' (2009) 33 *Melbourne University Law Review* 68, 73.

414 Ibid, 73–74; quoting Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), 314. See also C Eastwood and W Patton, *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System* (2002).

415 The *Heroines of Fortitude* report highlighted the experience of Indigenous women under cross-examination in sexual offence proceedings: J Bargen, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault, Gender Bias and the Law Project* (1996), 99–103.

positive duty on the court 'to intervene in relation to a range of improper questions, irrespective of whether or not the other party raised an objection'.[416]

18.295 Similar provisions were subsequently adopted under s 41 of the uniform Evidence Acts (except in Victoria). When recommending, in ALRC 102, that such a duty should be enacted, the ALRC, the NSWLRC and the VLRC considered the duty was necessary to: protect vulnerable witnesses from improper questioning, ensure 'the best evidence is received by the court', and overcome judges' long-standing reluctance to intervene in cross-examination.[417]

18.296 The provisions applying at Commonwealth level, and in NSW and the ACT, apply to all witnesses, not just vulnerable ones. A disallowable question is a question that:

> (a) is misleading or confusing, or
>
> (b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or
>
> (c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or
>
> (d) has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).[418]

18.297 The VLRC did not agree that s 41 should apply to all witnesses. Rather, it concluded that 'a specific duty in relation to vulnerable witnesses offers the best prospect of changing the culture of judicial non-intervention'.[419] Subsequently, the *Evidence Act 2008* (Vic) enacted provisions, in similar terms, but specific to vulnerable witnesses, defined to include persons: under the age of 18 years; who have a cognitive impairment or an intellectual disability; or whom the court considers to be vulnerable, having regard to the characteristics of the witness and the context in which the questions are put.[420]

18.298 Apart from South Australia,[421] no other Australian jurisdiction places a positive duty on the court to disallow improper questions.[422]

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416 A Cossins, 'Cross-Examination in Child Sexual Assault Trials: Evidentiary Safeguard or an Opportunity to Confuse?' (2009) 33 *Melbourne University Law Review* 68, 93.

417 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102, NSWLRC Report 112, VLRC FR (2005), 153.

418 *Evidence Act 1995* (Cth) s 41(1); *Evidence Act 1995* (NSW) s 41(1).

419 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102, NSWLRC Report 112, VLRC FR (2005), [5.123].

420 *Evidence Act 2008* (Vic) s 41(4).

421 *Evidence Act 1929* (SA) s 25(4).

422 See *Evidence Act 1977* (Qld) s 21(2); *Evidence Act 1906* (WA) s 26(3); *Evidence Act 2001* (Tas) s 41(2); *Evidence Act 1939* (NT) s 16(2).

Further reform

18.299 Perceived problems with the reluctance of judicial officers to intervene to protect witnesses in criminal trials and to control cross-examination have led to proposals for further reform of vulnerable witness protections. For example, Cossins and the National Child Sexual Assault Reform Committee have set out a range of recommendations aimed at enabling children to give their best evidence in sexual assault trials. These include recommendations to:

- prohibit suggestive questions or statements that are designed to persuade the child to agree with the proposition or suggestion put to them;
- prohibit asking the same question or making the same statement more than once;
- prohibit questions or statements made by the defence that directly accuse the child of lying or being a liar;
- place restrictions on the use of prior inconsistent statements by the defence; and
- introduce court-appointed intermediaries (social workers, psychologists or other relevant professionals) trained in child cognition, language and development to assess defence questions during the cross-examination of a child complainant.[423]

18.300 SCAG is developing, through the Evidence Working Group and Parliamentary Counsels' Committee, proposed amendments to the uniform Evidence Acts dealing with vulnerable witness provisions. Model provisions are expected to be drafted later in 2010.

18.301 The Terms of Reference instruct the ALRC, in undertaking this inquiry, to be 'careful not to duplicate … the work being undertaken through SCAG on the harmonisation of uniform evidence laws, in particular the development of model … vulnerable witness protections'. For this reason, the Commissions do not make any proposals for reform of vulnerable witness provisions at this stage.

Unrepresented defendants

18.302 Every Australian jurisdiction, with the exception of Tasmania, has enacted legislation to place restrictions on the cross-examination of complainants in sexual offence proceedings by unrepresented defendants.[424]

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423 A Cossins, 'Cross-Examination in Child Sexual Assault Trials: Evidentiary Safeguard or an Opportunity to Confuse?' (2009) 33 *Melbourne University Law Review* 68, 99–101.

424 *Crimes Act 1914* (Cth) ss 15YF–15YG; *Criminal Procedure Act 1986* (NSW) s 294A; *Criminal Procedure Act 2009* (Vic) s 356; *Evidence Act 1977* (Qld) ss 21N–21S; *Evidence Act 1906* (WA) s 25A; *Evidence Act 1929* (SA) s 13B; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 38D; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 5.

18.303 In some jurisdictions this protection is only afforded to child complainants and child witnesses.[425] In other jurisdictions it has application beyond sexual offences, and applies to a broader range of legal proceedings and/or wider class of witnesses.[426] In Western Australia the court's power to prohibit personal cross-examination by the defendant is discretionary (albeit for a wider class of witness across a range of criminal proceedings).[427]

18.304 The NSWLRC explored the issue of cross-examination by an unrepresented accused in detail.[428] That report outlined the key reasons why a defendant might be unrepresented: because they are ineligible for legal aid and are unable to afford to instruct a private lawyer, or through choice.[429] It canvassed the competing interests of the rights of the accused to a fair trial—the critical consideration being the ability to test the evidence against them—and the rights of the complainant (that is, the need to reduce the potential distress and humiliation to complainants caused by personal cross-examination).

18.305 In regard to this last area, the NSWLRC drew attention to the particular nature of sexual offences, the nature of the evidence that needs to be elicited from the complainant, the length of cross-examination, and its focus on issues of credibility and consent. To be personally cross-examined by the defendant was seen as having a negative impact on the complainant's ability to answer questions, thus affecting the quality and nature of the evidence received. This is likely to be amplified in those cases where the complainant and the defendant have, or have had, an intimate or family relationship.[430]

18.306 The VLRC and QLRC, who dealt with this issue as part of broader inquiries, also emphasised the negative effect of personal cross-examination on child complainants and child witnesses.[431]

18.307 In order to 'strike a balance' between the rights of the accused to test the evidence against them, and the importance of limiting the traumatic experience of complainants in sexual offence proceedings, most jurisdictions prohibit personal cross-examination. However, jurisdictions differ as to:

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425 See *Crimes Act 1914* (Cth) ss 15YF–15YG.

426 This is discussed below.

427 *Evidence Act 1906* (WA) s 25A(1).

428 New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report No 101 (2003).

429 Ibid, [1.13]–[1.17].

430 Raised in submissions to Ibid, [2.11].

431 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [4.122]. See also Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report No 55 (Part 2) (2000), 272–273.

- whether this protection applies to witnesses other than sexual assault complainants or alleged victims and whether it applies in other legal proceedings; and

- who asks the questions on behalf of the unrepresented defendant and whether that person has any role or responsibility in providing advice to the defendant.

Which witnesses are protected?

18.308 In some jurisdictions protection from cross-examination by an unrepresented defendant is limited to the cross-examination of a complainant in sexual offence proceedings,[432] or to child complainants and child witnesses in sexual offence proceedings,[433] while in others it applies to a wider range of proceedings and witnesses:

- In Victoria, the protection applies to 'protected witnesses' in sexual offence proceedings and offences that would amount to family violence within the meaning of the *Family Violence Protection Act 2008* (Vic).[434]

- In Queensland, the protection applies to witnesses under 16 years of age, witnesses with an 'impairment of the mind' and alleged victims in a 'prescribed special offence' (this covers rape and sexual assault along with a range of other offences) or, subject to conditions, victims of a 'prescribed offence'.[435]

- In the ACT, the protection applies to the complainant or a 'similar act witness' in a sexual offence proceeding, a serious violent offence proceeding, and to a less serious violent offence proceeding where the witness and the accused have been in an intimate relationship[436] or the court considers that the witness has some particular vulnerability.[437]

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432 *Criminal Procedure Act 1986* (NSW) s 294A prohibits personal cross-examination by an unrepresented accused in 'prescribed sexual offence proceedings' which is defined in s 3; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 5.

433 *Crimes Act 1914* (Cth) s 15YF prohibits the cross-examination of a child complainant (that is the child who is alleged to be the victim of the offence) and s 15YG prohibits the cross-examination of a child witness (other than the child complainant) unless the court grants leave to do so. Both of these sections apply to sexual offence proceedings as specified in s 15Y. It is made clear that these protections apply to committal proceedings and other proceedings related to the prosecution of the prescribed offences: s 15Y(2).

434 *Criminal Procedure Act 2009* (Vic) s 354. 'Protected witness' is defined broadly and includes the complainant, a family member of the complainant, a family member of the accused person, and any other witness that the court declares protected.

435 'Prescribed special offence' and 'prescribed offence' are defined in *Evidence Act 1977* (Qld) s 21M(3).

436 'Intimate relationship' is defined in *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 38B(2)–(4).

437 Ibid s 38D(1). The protection also applies to a child or person with a disability who is giving evidence in a sexual or violent offence proceeding (ie, where they are not the complainant who is already protected): *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 38D(2).

- In South Australia, the protection applies to children or witnesses who are the alleged victims of a 'serious offence', or an offence of contravening or failing to comply with a domestic violence restraining order or a restraining order.[438]

- The provision in Western Australia is discretionary, but it is open to the court to 'forbid' such personal cross-examination for any witness in a criminal proceeding.

Who asks the questions?

18.309 In the Commonwealth, NSW and ACT jurisdictions, the defendant's cross-examination questions are to be asked on their behalf by 'a person appointed by the court'. The role of the appointed person is simply to ask the questions. In NSW and the ACT it is made clear that this appointed person 'must not independently give the accused person legal or other advice'.[439]

18.310 In Western Australia, South Australia and the Northern Territory, the defendant's cross-examination questions are either put by the court or a person appointed by the court.[440] In Western Australia and the Northern Territory the questions must be 'repeated accurately' by the judge or other appointed person.[441] In South Australia, however, the legislation makes it clear that only those questions 'determined by the judge to be allowable' will be asked of the witness.[442]

18.311 In Victoria[443] and Queensland,[444] the person who asks the questions must be a legal practitioner and has a more active legal role in asking the questions. In Victoria the court 'must order Victoria Legal Aid to provide legal representation' to the accused for the purpose of cross examining the protected witness.[445] The legal practitioner provided by Victoria Legal Aid 'must act in the best interests of the accused person if the accused person does not give any instructions to that legal practitioner'.[446] In

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438 *Evidence Act 1929* (SA) s 13B(5).

439 *Criminal Procedure Act 1986* (NSW) s 294A(4); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 38D(5). The NSW legislation does not accord with the conclusion of the NSWLRC which had recommended that the person appointed to conduct the cross-examination should be the legal representative for the accused for the purposes of that cross-examination: see New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report No 101 (2003), [5.38], Rec 7.

440 *Evidence Act 1906* (WA) s 25A(1)(c); *Evidence Act 1929* (SA) s 13B(2)(b); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 5(1)(b).

441 *Evidence Act 1906* (WA) s 25A(1)(c); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 5(1)(b).

442 *Evidence Act 1929* (SA) s 13B(2)(b).

443 *Criminal Procedure Act 2009* (Vic) s 357.

444 *Evidence Act 1977* (Qld) s 21O(2)(b).

445 *Criminal Procedure Act 2009* (Vic) s 357(2).

446 Ibid s 357(4). Where an accused refuses this representation, the court must warn them that they will not be allowed to adduce evidence from another witness that contradicts the evidence of the protected witness where the protected witness has not been given the opportunity to respond to that contradictory evidence: *Criminal Procedure Act 2009* (Vic) s 357(5). The ACT also makes this explicit in its legislation:

Queensland, the lawyer appointed to ask the questions on behalf of the accused is 'the person's legal representative for the purposes only of the cross-examination'.[447]

18.312 In all the jurisdictions where this alternative mode of cross-examination is conducted the judge is required to explain to the jury that this is a 'standard' or 'routine' procedure, that they are not to draw any adverse inferences from this practice, nor are they to give the witness' evidence any greater or lesser weight.[448]

18.313 A key difference of approach in the jurisdictions, and in the literature on this issue, is whether the person appointed to ask the cross-examination questions on behalf of the accused should be legally trained and in a position to provide the accused with legal advice in the context of the cross-examination only.

18.314 The NSWLRC's report on this issue canvassed whether it was necessary for the person to be a legal practitioner. Reasons for not having a legal practitioner included the fact that the person has 'already decided against legal representation' and that it is not a necessary requirement.[449] Ultimately, the NSWLRC concluded that a legal practitioner should cross-examine the complainant as 'this is not only in the interests of the accused, but also of the administration of justice, particularly since sexual offences are such serious charges'.[450]

18.315 The approach in NSW, which involves the appointment of a person who is not necessarily legally trained and is specifically not to provide legal advice, has been held to be valid.[451] It has, however, been criticised, including by judicial officers.[452] The NSWLRC and the VLRC both recommended that the appointed representative should be legally trained and in a position to provide legal advice for the purposes of cross examination. This is the approach that has been enacted in Victoria.[453]

Commissions' views

18.316 The Commissions propose that Commonwealth, states and territories legislate to prohibit an unrepresented defendant from personally cross-examining any complainant or other witness in any sexual offence proceeding.

Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 38D(4)(b). This is known as the rule in *Browne v Dunn*: *Browne v Dunn* (1893) 6 R 67.

447 *Evidence Act 1977* (Qld) s 21P.

448 *Criminal Procedure Act 1986* (NSW) s 294A(7); *Criminal Procedure Act 2009* (Vic) s 358; *Evidence Act 1977* (Qld) s 21R; *Evidence Act 1929* (SA) s 13B(4); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 38D(7); *Evidence Act 1939* (NT) s 21A(3).

449 New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report No 101 (2003), [5.6].

450 See Ibid [5.19]–[5.20].

451 See *Clark v The Queen* (2008) 185 A Crim R 1; *R v MSK and MAK* (2004) 61 NSWLR 204.

452 For example, by the trial judge (Sully J) in *R v MSK and MAK* (2004) 61 NSWLR 204.

453 *Criminal Procedure Act 2009* (Vic) s 357.

18.317 In the Commissions' view it is inappropriate to have the judicial officer ask questions on behalf of the accused. Such approaches (which exist in the Northern Territory and Western Australia) place the judicial officer in a difficult position in determining the admissibility of the questions and may raise perceptions of bias. This was also the view of the VLRC, NSWLRC and QLRC.[454]

18.318 The position in Victoria and Queensland, where the person who asks the questions must be a legal practitioner, and has a more active legal role, is preferred. The Commissions note that the critical advantages of legal practitioner involvement include benefits associated with the professional duty the lawyer owes to the court and the client; the skills that lawyers bring to this work in terms of understanding the rules of evidence; the public interest in testing the evidence presented by the witness; and in addressing the imbalance between the prosecution and the unrepresented defendant.[455]

Proposal 18–14 Commonwealth, state and territory legislation should:

(a) prohibit an unrepresented defendant from personally cross-examining any complainant or other witness in sexual assault proceedings; and

(b) provide that any person conducting such cross-examination is a legal practitioner representing the interests of the defendant.

Other aspects of giving evidence

18.319 Leaving aside the specific issue of cross-examination, some jurisdictions provide 'alternative' or 'special' arrangements for the giving of evidence by complainants or other witnesses in sexual offence proceedings. Aspects of these arrangements were discussed in Chapter 17, in relation to the use of pre-recorded evidence.

18.320 These regimes provide a range of measures dealing with the giving of contemporaneous evidence by closed circuit television (CCTV) or video-link, the use of screening to restrict contact between the witness and the defendant, and the exclusion of persons from the court.[456] All jurisdictions also permit a complainant in

454 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [4.141]; New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report No 101 (2003), [5.11]–[5.12], [5.21]; Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report No 55 (Part 2) (2000), 291–292.

455 See New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report No 101 (2003), [5.7]–[5.10].

456 For example, *Criminal Procedure Act 1986* (NSW) s 294B; *Criminal Procedure Act 2009* (Vic) s 13.

sexual offence proceedings to have a support person present with them while they give evidence.[457]

18.321 There are some variations among jurisdictions. In most jurisdictions, the giving of evidence by way of alternative or special arrangements 'may' be ordered by the court.[458] In other cases, the arrangements are something to which, subject to exceptions, the complainant is entitled,[459] or are mandatory (especially in the case of evidence given by children).[460]

18.322 Some methods for giving evidence by complainants, such as the use of CCTV, are broadly used. However, not all jurisdictions expressly permit, for example, the use of screens or planned seating arrangements;[461] or require evidence of the complainant in sexual offence proceedings to be given in closed court.[462]

Question 18–13 Are there significant gaps or inconsistencies among Australian jurisdictions in relation to 'alternative' or 'special' arrangements for the giving of evidence by complainants or other witnesses in sexual offence proceedings?

Evidence on re-trial or appeal

18.323 Chapter 17 noted that some jurisdictions provide that pre-recorded audio-visual evidence of complainants in sexual offence proceedings may be admissible in evidence in a re-trial or appeal.[463]

18.324 Such provisions may also apply to a recording of a complainant's evidence at trial. For example, the *Criminal Procedure Act 2009* (Vic) provides that such a recording:

> is admissible in evidence as if its contents were the direct testimony of the complainant—
>
> (a) in the proceeding; and
>
> (b) unless the relevant court otherwise orders, in—

457 For example, *Criminal Procedure Act 1986* (NSW) s 294C; *Criminal Procedure Act 2009* (Vic) s 360(c).
458 For example, *Evidence Act 1906* (WA) s 106R; *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 8.
459 For example, *Criminal Procedure Act 1986* (NSW) s 294B; *Evidence Act 1929* (SA) s 13.
460 For example, *Crimes Act 1914* (Cth) s 15YI.
461 For example, Tasmania.
462 For example, while a court in Victoria may direct that only persons specified by the court be permitted to be present while the witness is giving evidence, in NSW, proceedings must be held in closed court when the complainant gives evidence: *Criminal Procedure Act 1986* (NSW) s 291; *Criminal Procedure Act 2009* (Vic) s 360(d).
463 For example, *Criminal Procedure Act 2009* (Vic) s 374.

(i) any new trial of, or appeal from, the proceeding; or

(ii) another proceeding in the same court for the charge for a sexual offence or a charge for a related offence; or

(iii) a civil proceeding arising from the same facts as those on which the charge for a sexual offence is founded.[464]

18.325 NSW has introduced broader provisions relating to evidence in re-trials of sexual offence proceedings.[465] The *Criminal Procedure Act 1986* (NSW) provides that if a person is convicted of a prescribed sexual offence and, on an appeal against the conviction, a new trial is ordered, the prosecutor may tender as evidence in the new trial 'a record of the original evidence of the complainant', despite the rule against hearsay evidence.[466]

18.326 While the original evidence might include any pre-recorded evidence used in the trial,[467] it covers 'all evidence given by the complainant in the proceedings from which the conviction arose', including court transcripts of evidence.[468]

18.327 If a record of the original evidence of the complainant is admitted in proceedings, the complainant is not compellable to give any further evidence in the proceedings, including for the purpose of any examination in chief, cross-examination or re-examination.[469]

18.328 The problem addressed by the provision was described as being that:

> Not surprisingly, some complainants who have given evidence that resulted in a conviction decide they simply cannot return to give evidence again if a new trial is ordered on appeal. Significant time will have passed and the complainant will have tried as best as possible to put the matter out of their mind.[470]

18.329 Similar, but more limited, provisions have been enacted in other jurisdictions. For example, in South Australia, an 'official record' of the evidence of a vulnerable witness may be admitted as evidence in later proceedings, at the discretion of the court. Where such evidence is admitted it 'may relieve the witness, wholly or in part, from an obligation to give evidence in the later proceedings'.[471]

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464 Ibid s 379.

465 *Criminal Procedure Act 1986* (NSW) pt 5 div 3 inserted by the *Criminal Procedure Amendment (Evidence) Act 2005* (NSW).

466 *Criminal Procedure Act 1986* (NSW) s 306B.

467 Such as a recording of a police interview: Ibid s 306U.

468 Ibid s 306B.

469 Ibid s 306C.

470 New South Wales, *Parliamentary Debates*, L Assembly, 3 March 2005, 14649 (B Debus—Attorney General and Minister for the Environment).

471 *Evidence Act 1929* (SA) s 13D.

18.330 The Commissions are interested in comment on whether the Commonwealth, states and territories should develop legislation, modelled on that in NSW, to permit prosecutors to tender a record of the original evidence of the complainant in any re-trial ordered on appeal.

Question 18–14 Should Commonwealth, state and territory legislation permit prosecutors to tender a record of the original evidence of the complainant in any re-trial ordered on appeal?

Part E

Existing and Potential Responses

19. Integrated Responses and Best Practice

Contents

Introduction

19.1 This Part examines ways of improving interaction between legal frameworks in the context of family violence, and improving consistency in interpretation and application of laws governing sexual assault in the family violence context. Consistent with the Terms of Reference of this Inquiry, the focus is upon the practical impact of legal frameworks and improving the safety of women and children. The interaction in

practice of legal frameworks requires consideration not only of the legal frameworks, but also of institutional frameworks, practice and culture.

19.2 This chapter looks at integrated responses and their elements, including governing policies; victim support; inter-agency collaboration; information sharing; education and training; and data collection. The next chapter addresses specialisation, with a particular focus on specialised courts. Specialisation, of course, may be a feature of integrated responses in the same way as the other elements discussed in this chapter, but is dealt with in a separate chapter for the sake of convenience.

19.3 This chapter first discusses 'integrated responses' (also known as 'community coordinated responses' or 'multi-agency responses') generally, followed by an overview of integrated responses in relation to family violence in Australia and the corresponding issues that arise in this Inquiry. While child protection is discussed incidentally in this chapter, strategies of integration particular to child protection are discussed mainly in Chapters 13 and 14. Following this discussion, elements of these integrated responses—such as governing policies and victim support—are considered in detail.

Integrated responses

19.4 'Integrated responses' to family violence have flourished since a pioneering model, the Domestic Abuse Intervention Project, was established in Duluth, Minnesota in 1981 (the Duluth Model). This model is based on four key principles: the need for coordination and co-operation between agencies; the need for collaboration between partners; a focus on victim safety; and the need for offenders to be held accountable for their actions.[1] The Duluth model features offender programs, community awareness-raising and training, and case management. It works in tandem with, and monitors, criminal justice services. A similar model was adopted in Hamilton, New Zealand in 1991.[2]

Terminology

Integration

19.5 'Integration' is sometimes considered synonymous with the terms 'coordination', 'cooperation' and 'collaboration'. These latter terms tend to indicate degrees of integration. Agencies that coordinate service delivery 'might share information and dovetail their processes but they do so essentially in order to each pursue their own goals more efficiently'.[3] Integration, on the other hand, requires:

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1 Domestic Abuse Intervention Programs, *Duluth Model on Public Intervention* <www.theduluthmodel.org/duluthmodelonpublic.php> at 11 January 2010.

2 J Mulroney, *Trends in Interagency Work* (2003) Australian Domestic and Family Violence Clearinghouse, 3.

3 Domestic Violence Incest Resource Centre, *Developing an Integrated Response to Family Violence in Victoria—Issues and Directions* (2004), 11.

> agencies to decide on and articulate common goals and agree on ways to pursue those goals. Integration of services is more than coordinated service delivery—it is a whole new service. Co-location of agencies, agreed protocols and codes of practice, joint service delivery, agencies reconstituting or realigning their core business to confront the challenges posed by a broadened conception of the problem: these are the key indicators of an integrated response.[4]

19.6 Cooperation, coordination and integration may be conceptualised as part of a scale of integration, as set out below:

Autonomy	**Cooperative links**	**Coordination**	**Integration**
Parties/agencies act without reference to each other, although the actions of one may affect the other(s).	Parties establish ongoing ties, but formal surrender of independence not required. A willingness to work together for some common goals. Communication emphasised. Requires good will and some mutual understanding.	Planned harmonisation of activities between the separate parties. Duplication of activities and resources is minimised. Requires agreed plans and protocols or appointment of an external coordinator or (case) manager.	Links between the separate parties draw them into a single system. Boundaries between parties begin to dissolve as they become effectively work units of sub groups within a single larger organisation.

Source: M Fine, P Kuru and C Thomson, *Coordinated and Integrated Human Service Delivery Models: Final Report* (2005) Social Policy Research Centre, University of NSW, 4.

19.7 According to this scale, most of the 'integrated' responses described in this chapter are described more accurately as forming cooperative links or coordination, rather than integration.

19.8 Integration may occur at different levels, such as at the level of the national or state government, at the local level, and between individual consumers and staff. The degree of integration may be loose—where there are independent decentralised organisations 'interacting as the occasion arises'—or tight—where there are centralised independent organisational units acting in a coordinated or collaborative way.[5]

19.9 There are also different models of integration. A report produced for the NSW Cabinet Office and Premier's Department in 2005 identified 10 different models of service delivery including, 'one stop shops' (involving co-location of services), 'case management' (integrated delivery of services focusing on client outcomes) and 'inter-agency collaboration' (which corresponds loosely to integrated responses as used

4 Ibid.
5 Ibid, 5.

above).[6] The report noted that most projects tend to combine elements of these different conceptual models.

Integrated responses

19.10 The term 'integrated responses' is typically used in the literature to refer specifically to inter-agency models of collaboration, often based on the Duluth model. They may be distinguished from 'whole of government' responses to family violence, which are government policy frameworks that span a range of departments and agencies. Whole of government responses may form an element of an integrated response (as discussed below), but they do not necessarily exhibit other features of an integrated response such as mechanisms for inter-agency collaboration and (ideally) seamless service delivery.

19.11 Other mechanisms of integration—such as information sharing, combined jurisdictions, and cooperative responses in relation to child protection—are considered elsewhere in this Consultation Paper.[7] These mechanisms may form part of an integrated response, but are not typically considered an 'integrated response' in the sense described below.

19.12 An integrated response typically will have a common set of aims—the key ones being victim safety and offender accountability—and guiding principles that embed a shared understanding of family violence. Features of an integrated response may include:

- common policies and objectives, including possibly pro-arrest and prosecution policies;[8]
- inter-agency collaboration and information sharing, including possibly: coordinated leadership across services and resources; sharing of resources and protocols; and inter-agency tracking and management of family violence incidents;
- involvement of, and recognition of the need for, victim support;
- commitment to ongoing training and education;
- ongoing data collection and evaluation, with a view to system review and process improvements; and

6 Ibid.
7 See Chs 8, 10, 12–14.
8 Pro-arrest and pro-prosecution policies are discussed further below.

- specialised family violence courts, lists and case management (discussed in Chapter 20), and offender programs for those who engage in family violence (discussed in Chapters 6 and 20).[9]

19.13 While a comprehensive integrated response has all of these features, not all features are required for a project to be considered an integrated response. Both comprehensive, and more limited, integrated responses in the family violence context in Australia are discussed below.

19.14 In less comprehensive models, mechanisms of integration differ widely. In some cases, integration occurs at the level of policy, usually in the form of steering or coordinating committees. In other cases, integration may focus on the delivery of services by a number of agencies. A number of projects focus on improving liaison between police and family violence services, particularly where police refer victims to victim support services, with the victim's consent. These are often known as 'fax-back protocols', as police typically fax the details of the victim to the service.

19.15 In some jurisdictions, such as the ACT and Tasmania, the 'integrated response' covers the entire jurisdiction at both a policy and operational level, while in other jurisdictions, such as New South Wales, the projects are more localised.

19.16 Integrated responses offer a number of potential advantages. Ideally, agencies involved in service delivery for family violence victims should share similar understandings of the phenomenon of family violence and have similar goals; share information and good practice; connect services seamlessly for victims; improve service delivery for victims; and reflect critically on ways of improving the safety of victims and the accountability of those who engage in family violence.

Integrated responses in Australia

19.17 Integrated responses to family violence in Australia have flourished in the past decade and are generally fostered in relatively small-scale communities. The most comprehensive responses are in the small jurisdictions of the ACT and Tasmania, combining both policy and operational levels within a broad strategic vision. In Victoria, a broader policy response has been initiated, with funding for smaller-scale local partnerships as part of an Integrated Family Violence Service program. In other Australian jurisdictions, the focus so far has been on small-scale projects. The following is a brief overview of the large-scale projects, and notable smaller-scale projects, in each Australian jurisdiction (discussed in alphabetical order).[10]

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9 Statewide Steering Committee to Reduce Family Violence, *Reforming the Family Violence System in Victoria* (2007), 19.

10 Descriptions of these projects are usefully compiled by the Australian Domestic Violence Clearinghouse in its Good Practice Database: see Australian Domestic and Family Violence Clearinghouse, *Good Practice Database* <www.austdvclearinghouse.unsw.edu.au/good_practice.html> at 11 January 2010.

Australian Capital Territory

19.18 The Family Violence Intervention Program (FVIP) is a coordinated criminal justice response established in 1998, following the recommendation of the ACT Community Law Reform Committee in 1995.[11] It includes most of the key elements of the Duluth model. Its focus is the criminal justice system in the context of family violence. The FVIP operates within the context of an overarching ACT Government policy framework oriented towards the safety of women and their children.[12]

19.19 The FVIP has no legislative basis and operates under protocols established in 1998 and under a 2006 Memorandum of Agreement. The key agencies involved are the Australian Federal Police (ACT Policing); Office of the Director of Public Prosecutions (ODPP); ACT Magistrates' Court; ACT Corrective Services; Domestic Violence Crisis Service (DVCS); Office for Children, Youth and Family Support; Policy and Regulatory Division, Department of Justice and Community Safety; and the Office of the Victims of Crime Coordinator.

19.20 At the policy level, the FVIP is steered by a coordinating committee chaired by the Victims of Crime Coordinator (acting as the Domestic Violence Project Coordinator).[13] The role of the committee is to act as the forum for discussion about strategic planning and coordination, as well as policy and procedural frameworks.

19.21 The core components of the FVIP are:

- pro-charge, pro-arrest policies with a presumption against bail;
- early provision of victim support (by DVCS);
- pro-prosecution policies;
- coordination and case management; and
- an offender program as a sentencing option.[14]

19.22 Under the FVIP, police are encouraged to lay charges and arrest offenders when they are called to an incident. They are trained in evidence collection methods particular to family violence and equipped with Family Violence Investigation Kits.

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11 ACT Community Law Reform Committee, *Domestic Violence*, Report No 9 (1995).

12 ACT Government, *Justice, Options and Prevention—Working to Make the Lives of ACT Women Safe* (2003).

13 The Domestic Violence Project Coordinator is a statutory appointment under the *Domestic Violence Agencies Act 1986* (ACT), and the Victims of Crime Coordinator is a statutory appointment under the *Victims of Crime Act 1994* (ACT).

14 See Australian Domestic and Family Violence Clearinghouse, *Good Practice Database* <www.austdvclearinghouse.unsw.edu.au/good_practice.html> at 11 January 2010, 'Family Violence Intervention Program', Record 102.

DVCS workers are contacted to attend all family-violence related incidents and offer victim support services at the time of the incident, as well as ongoing victim support. The police identify all family violence incidents and these are transferred to a specialist list for family violence matters in the Magistrates' Court. The ODPP is responsible for prosecuting and their policy is to continue prosecutions even where victims are reluctant or give unfavourable evidence. Evidence is disclosed earlier, in line with a practice direction, and all pre-trial matters are managed by a single magistrate, although trials are heard by other magistrates in the court. If a person is found guilty, the usual result is the imposition of a good behaviour bond with a number of conditions, and may include a mandated referral to a behaviour change program for offenders run by ACT Corrective Services.

19.23 The FVIP has been implemented in phases, and a key feature of the FVIP is the periodic evaluation of the program.[15] The evaluations indicate that the FVIP has helped to establish better relations between agencies; has contributed to victim safety and protection; has contributed to offender accountability by ensuring incidents are charged and processed in court; and has implemented practices to improve and develop the program.[16]

New South Wales

19.24 In New South Wales, integrated responses to family violence have tended to be localised, smaller-scale and focused on service delivery. These projects include (but are not limited to):

- Mt Druitt Family Violence Response and Support Strategy;
- Canterbury Bankstown Inter-agency Domestic Violence Response Team;
- Green Valley Domestic Violence Service;
- Domestic Assault Response Team (Tuggerah Lakes);
- Domestic Violence Intervention Response Team (Brisbane Water);
- Staying Home Leaving Violence (Bega and East Sydney);
- Operation Choice (Shoalhaven and Lake Illawarra);
- Manning/Great Lakes Police and Women's Refuge Partnership Against Domestic Violence Project; and

15 An evaluation was prepared in 2009 and is being prepared for publication.
16 See Urbis Keys Young, *Evaluation of the ACT Family Violence Intervention Program Phase II* (2001).

- Domestic Violence Intervention Court Model (Wagga Wagga and Campbelltown) (discussed in Chapter 20).[17]

19.25 Some of these, such as the Domestic Violence Intervention Response Team, involve police referring victims to victim support workers. The Green Valley project refers victims of family violence to a specialist team of family violence, drug and alcohol and child protection workers located within NSW Health, and also facilitates applications for housing.

19.26 The Wyong and Tuggerah Lakes Domestic Assault Response Team (DART) combines police and Department of Community Services (DoCS) caseworkers. When police apply for a protection order in relation to family violence, the DART is alerted and performs an extensive background check on the parties, including any child protection interventions and outcomes and current or pending Family Court orders. The police conduct home visits or contact victims and, if children are involved, a DART caseworker also comes to explain child protection issues and make appropriate referrals. In joint meetings between DoCS and police, high-risk families are identified for support through 'intensive case management'.[18] In 2007, an independent review emphasised the need for coordination in the delivery of services in relation to family violence in NSW.[19] This has led to the establishment of both a centralised Violence Prevention Coordination Unit (VPCU) within the NSW Department of Premier and Cabinet, and an expert advisory committee, the Premier's Council on Preventing Violence against Women. The VPCU and the Premier's Council are currently developing a Strategic Framework for addressing family violence in NSW, which is likely to strengthen inter-agency responses.[20]

Northern Territory

19.27 In the Northern Territory, the Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council have established the Cross Borders Domestic Violence Service, which covers a remote area crossing the borders of the Northern Territory, South Australia and Western Australia. It provides access to medical and legal services, and also focuses on the development of inter-agency protocols.[21] This service does not appear to have been evaluated.

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17 These are listed in NSW Ombudsman, *Domestic Violence: Improving Police Practice* (2006), 47. The Commissions are aware that other arrangements may apply informally, such as a protocol for expediting information exchange in family violence matters on the Katoomba and Lithgow circuit of the Local Court, which developed from a court users' meeting.

18 Ibid, 50–51. Child protection is discussed in Chs 12–14.

19 ARTD Consultants, *Report on Coordinating NSW Government Action Against Domestic and Family Violence* (2007) NSW Department of Premier and Cabinet.

20 Office for Women's Policy (NSW), *Discussion Paper on NSW Domestic and Family Violence Strategic Framework* (2008).

21 Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council, *NPYWC Domestic Violence Service* (2010) <www.waru.org/organisations/npywc/npy_domestic.php> at 30 January 2010.

Queensland

19.28 In 2009, Queensland released a whole of government strategy for addressing family violence.[22] This focused on five areas of reform: prevention; early identification and intervention; connected victim support services; perpetrator accountability; and system planning and coordination.[23] It also includes a focus on improving integrated responses.[24] As part of its 2009–10 program of action, one key measure is to test an enhanced integrated response in Rockhampton, comprising: case management services for those with multiple support needs; a specialised court program; enhanced legal services; offender programs; community awareness raising and capacity building of the service sector.[25]

19.29 A long-running integrated response in Queensland is the Gold Coast Domestic Violence Integrated Response (GCDVIR), a community-based response which has been operating since 1996. It has a coordinating committee with representatives from family violence centres and shelters; police; the Gold Coast Hospital; the Southport Magistrates Court; Legal Aid; the offenders' program service provider; and government departments for corrective services, justice, child safety, community services, and housing.

19.30 The GCDVIR has developed a number of programs, including:

- the Police Fax Back Project (a fax-back protocol);
- Domestic Violence Court Assistance Program: a secure and specially designed family violence office at the Southport Magistrates Court, staffed by the Domestic Violence Prevention Centre Gold Coast Inc (DVPC), which provides victim support, information and advocacy;
- Mandated Men's Program: a 24-week court-ordered family violence program for offenders, run collaboratively by Community Correction Southport and DVPC;
- the Safety First Project: a service where basic information and a comprehensive risk assessment about women leaving refuges is faxed to the DVPC for quicker access to its services;
- inter-agency protocols on communication and inter-agency training; and

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22 Queensland Government, *For Our Sons and Daughters: A Queensland Government Strategy to Reduce Domestic and Family Violence 2009–2014* (2009).

23 Ibid, 8–9.

24 Ibid, 11.

25 Queensland Government, *For Our Sons and Daughters: A Queensland Government Strategy to Reduce Domestic and Family Violence Program of Action 2009–2010* (2009), 5. The specialised court in Rockhampton is described in Ch 20.

- development of family violence resources.[26]

19.31 Townsville and Thuringowa in northern Queensland have developed an integrated response to family violence, known as Dovetail. Government partners include Centrelink, Corrective Services, Department of Child Safety, Department of Communities and Department of Housing. Dovetail partners also include the legal sector—Family Court, Legal Aid, Legal Services, Townsville Magistrates Court—as well as the police; city councils; and non-government services, including the North Queensland Domestic Violence Resource Service, Salvation Army, and women's services.[27]

19.32 These agencies commit to key principles and goals, including the development of protocols for all services, and monitoring of the legislation and family violence systems. Agencies meet regularly and monitor relevant programs, which include fax-back protocols with the police; court support; and offender programs.

19.33 The Logan River Valley Integrated Community Response to Domestic Violence Group Fax-Back Project also provides a fax-back process in that region.[28]

South Australia

19.34 The South Australian Government, as part of its Women's Safety Strategy and Keeping them Safe—Child Protection Agenda, piloted the Family Safety Framework (FSF) in Holden Hill, the South Coast Local Service area and the Far North Local Service Area between late 2007 and 2008.

19.35 The FSF involves an inter-agency agreement on key principles and is focused on targeting high risk families for risk assessment by a local Family Safety Meeting, attended by a range of agencies. The sharing of information in that meeting is governed by a specially developed Information Protocol, and an Action Plan is prepared for each referral. The agencies involved in the Protocol include the police, a range of government departments, and non-government family violence services. No additional funding was allocated to agencies.

19.36 The FSF was evaluated in November 2008 and was found to have achieved improved responses to victims and their children and enhanced victim safety and

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26 Domestic Violence Prevention Centre Gold Coast, *Domestic Violence Prevention Centre Gold Coast* <www.domesticviolence.com.au/GoldCoastPartnerships.htm#overview> at 2 February 2010.

27 Northern Queensland Domestic Violence Resource Service, *Dovetail* <www.nqdvrs.org.au/Dovetail.htm> at 11 January 2010.

28 Australian Domestic and Family Violence Clearinghouse, *Good Practice Database* <www.austdvclearinghouse.unsw.edu.au/good_practice.html> at 11 January 2010, 'Logan River Valley Integrated Community Response to Domestic Violence Group Fax-Back Project Record'.

reduced re-victimisation.[29] In October 2009, the FSF was expanded to three other regions.[30]

Tasmania

19.37 Tasmania has implemented 'Safe at Home', an integrated whole of government criminal justice response to family violence. Safe at Home comprises 16 funded initiatives across the Departments of Justice; Police and Public Safety; Health and Human Services; and Premier and Cabinet. Part of the response included the reforms that led to the *Family Violence Act 2004* (Tas). The Department of Justice is responsible for its implementation; a Statewide Steering Committee chaired by the Department of Premier and Cabinet is responsible for high level issues including resource distribution; and an Inter-Departmental Committee chaired by the Department of Justice is responsible for operational planning and development, supported by Regional Coordinating Committees.[31]

19.38 In respect of police, initiatives include a Family Violence Response and Referral Line, which operates 24 hours a day, seven days a week and refers callers either to police, counselling or support services; specialist Victim Safety Response Teams (VSRT) in each policing district; and specialist police prosecutors. Police attending family violence incidents play a key role in identifying the presence of family violence; administering risk assessment tools; and entering a Family Violence Management System report which is quality assured by a VSRT or supervising Sergeant. Operational police also issue police-initiated Family Violence Orders, apply for Family Violence Orders,[32] determine bail, and prepare oppositions to bail. Police are also responsible for notifying Children and Family Services if a child is affected by family violence.[33]

19.39 There are weekly Integrated Case Coordination (ICC) meetings attended by relevant agencies to consider all new and 'active' family violence cases in each policing district, supported by an ICC database linking police and Department of Justice databases.[34]

19.40 Victim support is provided by a Court Support and Liaison Service, a Child Witness Service and a Special Needs Liaison Service, which provide support to victims, children and people with special needs such as drug and alcohol problems (respectively). In addition, there is a specialist Children and Young Person's Program

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29 J Marshall, E Ziersch and N Hudson, *Family Safety Framework—Final Evaluation Report* (2008) Office of Crime Statistics and Research (SA).

30 Office for Women (SA), *Women's Safety Strategy* <www.officeforwomen.sa.gov.au/index.php?section=970> at 2 February 2010.

31 Successworks, *Review of the Integrated Response to Family Violence: Final Report* (2009), 19–20.

32 These are discussed in Ch 5.

33 Successworks, *Review of the Integrated Response to Family Violence: Final Report* (2009), 12.

34 Funding has been provided for an Integrated Case Coordination Management System as the next stage: Ibid, 13.

counselling service. For offenders, there is a Family Violence Offender Intervention Program.

19.41 Specific additional funding has been provided for legal aid, the Tasmanian Magistrates' Court and the Department responsible for child protection. There has also been specific funding for alternative accommodation for offenders removed from their homes,[35] and for the Ya Pulingina Kani Aboriginal Advisory Group, to advise on the most culturally appropriate ways to manage Aboriginal offenders and provide support to Aboriginal adult and child victims.

19.42 The Safe at Home initiative was independently reviewed in June 2009.[36] The review found evidence that the objectives were being achieved, but made 37 recommendations for improvement, including: the adoption of family safety as a unifying paradigm; a strengthened risk assessment program;[37] a Victim Rights Charter; case management for high-risk offenders; establishment of a specialist family violence court and use of specialist prosecutors; and improved support for child witnesses.

Victoria

19.43 In 2002, the Victorian Government established a Statewide Steering Committee to Reduce Family Violence, including representatives from police, government departments, family violence services, the courts, peak bodies for family violence, support organisations for sexual assault victims, the No to Violence Male Family Violence Prevention Association, legal services and the Victorian Health Promotion Foundation.[38] This Committee advised on the need for, and developed a model for, an integrated response in Victoria. The Government also established an Indigenous Family Violence Task Force in 2002, which reported in 2003.[39]

19.44 Since 2005, the Victorian Government has invested $140 million in whole of government policies to address violence against women.[40] These initiatives include:

- reforms to family violence and sexual offences legislation, based on the recommendations in two reports of the Victorian Law Reform Commission;[41]

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35 Ibid, 15 reports, however, that this funding was returned from the contracted non-government service provider as the service was unsuccessful.

36 Ibid.

37 Risk assessment is discussed in the context of family dispute resolution in Ch 11.

38 Department of Human Services (Vic), *Changing Lives—A New Approach to Family Violence in Victoria* (2007).

39 Victorian Indigenous Family Taskforce, *Final Report* (2003).

40 Office of Women's Policy (Vic), *Right to Respect: Victoria's Plan to Prevent Violence Against Women 2010 –2020* (2009), 4. These strategies involve the Minister for Housing and Minister for Local Government; the Minister for Women's Affairs; the Attorney-General; the Minister for Police and Emergency Services; and the Minister for Community Services and Children.

41 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006); Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004).

- a new Code of Practice and five-year strategy plan for the Victorian police in respect of family violence;[42]

- the establishment of specialist family violence courts, as well as sexual assault lists and prosecution teams and multi-disciplinary sexual assault centres;[43]

- the provision of counselling and offender treatment programs in the context of family violence and sexual assault;

- the establishment and funding of a child witness service;

- funding for the Department of Human Services for partnerships with community and local organisations to provide integrated services such as housing, counselling and treatment programs (known as the Integrated Family Violence Service program);

- the development of a comprehensive risk assessment framework and tools;[44] and

- ten-year plans to: address Indigenous family violence;[45] prevent violence against women;[46] and the forthcoming *Strategic Framework for Family Violence Reform 2010–2020* to build on existing reforms for the handling of family violence.

19.45 The Integrated Family Violence Service program includes common risk assessment tools, protocols, and accreditation and funding for specialist family violence services according to a Code of Practice.[47]

19.46 One notable multi-agency local project in Victoria is the Violence Against Women Integrated Services Partnership project in Warrnambool. The key focus of this partnership has been the establishment of protocols responding to family violence with the police, the Magistrates Court, Accident and Emergency Department at South West Healthcare, Emma House Domestic Violence Services and the Salvation Army. These partners refer victims, with their consent, to Emma House, through a fax-back service.

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42 Victoria Police, *Living Free from Violence—Upholding the Right: the Victoria Police Strategy to Reduce Violence Against Women and Children 2009–2014* (2009); Victoria Police, *Code of Practice for the Investigation of Family Violence* (2005).

43 The specialist family violence and sexual assault courts are discussed in Ch 20. Sexual assault centres are discussed in Ch 20 in the context of specialist sexual assault courts.

44 Government of Victoria, *Family Violence Risk Assessment and Risk Management: Supporting an Integrated Family Violence Service System* (undated).

45 Aboriginal Affairs Victoria, *Strong Culture, Strong Peoples, Strong Families-Towards a Safer Future for Indigenous Families and Communities* (2008).

46 Office of Women's Policy (Vic), *Right to Respect: Victoria's Plan to Prevent Violence Against Women 2010 –2020* (2009).

47 Children Youth and Families (Vic), *Integrated Family Violence* (2008).

Services such as counselling, referrals to mental health and sexual assault services, and a children's worker are provided. The Salvation Army provides emergency accommodation for offenders; the Warrnambool Magistrates' Court operates a special family violence list to enable victim support on-site; the RSPCA provides emergency accommodation for pets; and the partnership meets monthly to discuss broader strategic issues.[48]

Western Australia

19.47 In Western Australia, an integrated response is developing through whole of government strategic plans to address family violence, developed and implemented by a Senior Officers' Group, consisting of senior state and Australian Government departmental representatives as well as the community sector. As part of the 2004–08 plan, the Western Australian Government developed specialist Family Violence Courts (discussed in Chapter 20) and protocols between the police and child protection authorities.[49]

19.48 The 2009–13 plan commits to a range of initiatives, including a focus on prevention and early intervention strategies; and a 'statewide integrated response' for victims of family violence, including an accessible, integrated 24-hour response throughout the State.[50]

19.49 There are two notable local multi-agency projects in Western Australia. The first inter-agency model adopted in Western Australia was the Armadale Domestic Violence Intervention Project (ADVIP), established in 1993. It includes representatives from the police, women's refuges, community corrections, the hospital and Curtin University. Fortnightly Core Group meetings are held to discuss problems in specific cases and to coordinate interventions in particular cases, while monthly meetings of the Inter-agency Safety Committee focus on broader systemic issues.[51] An accountability audit has been conducted of the ADVIP.[52]

19.50 Domestic Violence Advocacy Support Central in Perth provides a 'one stop shop' for family violence services, through the co-location of refuge, legal, family support, police and counselling services. The agencies involved include Orana Women's Refuge, Legal Aid, Police and Department for Community Development,

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48 Australian Domestic and Family Violence Clearinghouse, *Good Practice Database* <www.austdvclearinghouse.unsw.edu.au/good_practice.html> at 11 January 2010, Record 126.

49 Department for Child Protection (WA), *WA Strategic Plan for Family and Domestic Violence 2009–2013* (2009).

50 Ibid.

51 E Pence, S Mitchell and A Aoina, *Western Australian Safety and Accountability Audit of the Armadale Domestic Violence Intervention Project* (2007) Department for Communities Government of Western Australia.

52 Ibid.

with visiting sessions from Centrecare and the Domestic Violence Children's Counselling Service.[53]

Commissions' views

19.51 Integrated responses seem to offer clear benefits for service delivery to victims, including—importantly for this Inquiry—benefits in improving experiences for victims involved in multiple proceedings across different legal frameworks. For example, fax-back protocols between police and victim support services, and co-location of services, facilitate victims' access to a range of legal options and referrals. Another benefit is that such responses enable networks to be formed across services and government departments at a local level, fostering collaboration and communication between key players in different legal frameworks, and providing ongoing improvements to practice and understanding. The precise costs and benefits depend, of course, upon the models adopted.

19.52 As discussed above, a number of Australian jurisdictions have either implemented or are in the process of implementing integrated responses. In other Australian jurisdictions, however, the 'integrated responses' that exist are mostly small-scale operations, focused on liaison between police and victim support services. It is clearly desirable for integrated responses to be developed in close consultation with local networks and leaders, in order to reflect the diversity of needs and strengths in different geographical areas. The Commissions consider, however, that Australian states and territory governments should have, or continue to have, responsibility for fostering such integrated responses.

19.53 The Commissions note that there are many ways in which governments may foster the development of integrated responses. These include:

- developing strategic plans;
- creating statewide steering committees;
- creating model information sharing protocols and/or amending information sharing legislation;
- providing training and education; and
- funding locally developed initiatives.

19.54 At this stage, the Commissions also consider that there is strong evidence that integrated responses should, at a minimum, have a number of key features. These are:

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53 Legal Aid Western Australia, *Domestic Violence Advocacy Support Central* (2006) <www.legalaid.wa.gov.au/annualreport/section1/7dvasc.html> at 2 February 2010.

common policies and objectives; mechanisms for inter-agency collaboration, including those to ensure information sharing; provision for victim support, and a key role for victim support organisations; training and education programs; and provision for data collection and evaluation. These features are discussed in more detail in the rest of this chapter. Specialised courts and offender programs, which may also be features of integrated responses, are discussed in the next chapter. Risk assessment frameworks are discussed in Chapter 11.

19.55 There is also a role for the Australian government in promoting integrated responses, as part of a national agenda for action on family violence. The Commissions note that this may take a number of forms. For example, much could be learnt from other Australian jurisdictions in the development of integrated responses, and the Australian Government could facilitate the transfer of this knowledge between Australian jurisdictions. This could be done through existing mechanisms such as the Standing Committee of Attorneys-General and the Ministerial Council for Police and Emergency Management, or through more informal mechanisms. For example, the United Kingdom has developed a resource manual for the development of specialist family violence courts.[54] A similar national resource manual for integrated responses could be one way of promoting integrated responses.

19.56 The Commissions note that the Australian Domestic and Family Violence Clearinghouse has a very useful Good Practice Database (and Coordinator) that provides helpful information about such responses.[55] This may be a logical starting point for training and the transfer of knowledge between jurisdictions. Alternatively, this may be a function for the National Centre of Excellence recommended in the *Time for Action* report or the expert panel and reference group recommended by the Family Law Council.

19.57 Another mechanism might be the use of federal funding to promote initiatives. The FVIP in the ACT, for example, was established using federal funding for family violence.

Proposal 19–1 State and territory governments should establish and further develop integrated responses to family violence in their respective jurisdictions, building on best practice. The Australian Government should also foster the development of integrated responses at a national level. These integrated responses should include the following elements:

(a) common policies and objectives;

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54 Crime Reduction Centre Information Services Team, *Specialist Domestic Violence Court Programme Resource Manual* (Revised ed, 2008).

55 Australian Domestic and Family Violence Clearinghouse, *Good Practice Database* <www.austdvclearinghouse.unsw.edu.au/good_practice.html> at 11 January 2010.

(b) mechanisms for inter-agency collaboration, including those to ensure information sharing;

(c) provision for legal and non-legal victim support, and a key role for victim support organisations;

(d) training and education programs; and

(e) provision for data collection and evaluation.

Maintaining momentum

19.58 One lesson that can be learnt from the ACT experience with integrated responses is that it can be a challenge to sustain the momentum and resourcing of these integrated responses. Integrated responses often depend on the energy, enthusiasm and expertise of the people originally involved, and sustaining integrated responses when those people move on is a key challenge.

19.59 One key aspect for retaining momentum is leadership. The Commissions have heard from stakeholders that committed leadership is necessary to drive integrated (and other) responses forward. One model, used in the ACT, provides for a statutory position of coordinator. The ACT Victims of Crime Coordinator chairs the FVIP in the role of Domestic Violence Project Coordinator under the *Domestic Violence Agencies Act 1986* (ACT).[56] This model has the benefit of ensuring that one person has a statutory responsibility and resources for driving the integrated response forward, and ensuring a degree of continuity and victim-focused leadership.

19.60 A separate issue is whether integrated responses themselves should have a legislative basis. The FVIP itself, like other integrated responses in Australia, does not have a legislative basis. On the one hand, a legislative basis may provide greater security, especially in terms of funding, and may help sustain commitment to the response as key players enter and exit. A legislative basis could also have the benefit of setting out statutory positions for steering committees, special provisions on information sharing, and underlining the importance of the integrated response as part of the core responsibilities of key players.

19.61 On the other hand, legislation may restrict the flexibility of integrated responses, and increase costs. Integrated responses need to be sensitive to the needs, strengths and existing institutions and frameworks in a particular area, and these contextual factors may change over time. Legislation may also restrict the capacity of integrated responses to evolve as part of an ongoing process of feedback.

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56 *Domestic Violence Agencies Act 1986* (ACT) pt 3.

19.62 The Commissions are interested in hearing from stakeholders whether legislative support for integrated responses is desirable and, if so, what such legislation should address.

> **Question 19–1** Should state and territory legislation support integrated responses to family violence within their jurisdictions and, if so, what should this legislation address? For example, should responsibility for coordinating integrated responses within a jurisdiction be placed on a statutory office-holder or agency?

19.63 As noted above, another key mechanism for ensuring critical reflection and improvement of integrated responses is the need for ongoing data collection and periodic independent evaluations of integrated responses. This is discussed further below.

19.64 While the precise model of integrated responses is clearly a matter for relevant governments in consultation with relevant stakeholders, there are common features of an integrated response which should be considered in the development of these models. These are considered in the rest of this chapter.

19.65 To some extent, however, these features also represent best practice, whether inside or outside of an integrated response. The following discussion, therefore, is not confined to integrated responses but also considers how these features may play a role in improving practices generally.

Common policies and objectives

19.66 One of the first steps in developing any integrated response is for key players to agree upon shared principles and objectives. Two common objectives in most integrated responses are victim safety and defendant accountability. Similar objectives are sometimes set out in legislation.[57]

19.67 For example, both the integrated responses in the ACT and in Tasmania are founded on common principles and objectives. The Safe at Home response in Tasmania is based on the following principles:

- family violence is a crime and where evidence exists that it has been committed arrest and prosecution will occur;
- the safety of victims is paramount;

57 See, eg, *Family Violence Protection Act 2008* (Vic) s 1. These purposes are discussed in Ch 3.

- police are responsible for providing immediate intervention to secure victim safety and manage the risk that the offender might repeat or escalate the violence;

- the victim does not determine the response of the justice system;

- wherever possible, victims should be able to choose to remain in or return (as soon as possible) to their own homes; and

- the criminal justice response to family violence should be seamless and the roles and responsibilities of each participating agency and service should be clear.[58]

19.68 Its objectives are to:

- achieve a reduction in the level of family violence in the medium to long term;

- improve safety for adult and child victims of family violence; and

- change the offending behaviour of those responsible for the violence.[59]

19.69 These principles and objectives may also be stated as part of a statewide plan or response. For example, similar principles and objectives have been stated as part of the *NSW Strategy to Reduce Violence against Women*; Queensland's whole of government response to family violence, released in July 2009;[60] South Australia's statement on the Women's Safety Agenda;[61] and Western Australia's strategic plan for family violence.[62] At the time of writing, both Victoria and the Northern Territory were preparing similar strategic plans. It is likely that these will also include shared principles and objectives, as in other state and territory plans or strategies.

19.70 Ensuring a shared understanding of the nature of family violence and the overall objectives of government in this field is a foundational step in ensuring integration.[63] The first step is to ensure that agencies commit to common policies and objectives as part of furthering that shared understanding. The Commissions therefore support the development of common objectives and principles in state and territory strategic plans and in other inter-agency programs. However, as this first step has been, or is being, taken in most Australian jurisdictions, the Commissions consider that no proposals are required in this area.

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58 Successworks, *Review of the Integrated Response to Family Violence: Final Report* (2009), 10.
59 Ibid, 10.
60 Queensland Government, *For Our Sons and Daughters: A Queensland Government Strategy to Reduce Domestic and Family Violence 2009–2014* (2009).
61 South Australian Government, *Our Commitment to Women's Safety in South Australia* (2005).
62 Department for Child Protection (WA), *WA Strategic Plan for Family and Domestic Violence 2009–2013* (2009), 7.
63 This is discussed in Ch 4.

19.71 It is common, although not universal, for these principles and objectives to include within them reference to two types of policies, commonly known as 'pro-arrest' and 'pro-prosecution' (or 'no-drop') policies. Pro-arrest policies are policies which encourage police to arrest those committing family violence, in certain circumstances, while pro-prosecution policies encourage prosecution in a family violence context. In both cases, the victim's wishes do not determine whether a person is arrested or prosecuted.[64]

19.72 The primary objectives of such policies include: removing responsibility (and blame) for the decision to arrest or prosecute from the victim; increasing the number of arrests and prosecutions made in relation to family violence; increasing the reporting of incidents of family violence; promoting more rigorous prosecution of cases; reducing the number of withdrawals or stays of proceedings; promoting victim cooperation in prosecutions; and reducing re-offending.[65] There is evidence that these policies have improved the response of the criminal justice system to family violence in Australia and overseas.[66]

Inter-agency collaboration

19.73 While inter-agency collaboration is a feature of integrated responses, the issue of inter-agency collaboration extends well beyond such responses. The need for collaboration between agencies (and courts) is one of the most important issues raised in this Inquiry, and has been a common and strongly emphasised theme in consultations and research to date.

19.74 Specific forms of inter-agency collaboration are discussed elsewhere in this Consultation Paper, including in relation to cooperation between police and family law courts in Chapter 8, in relation to information sharing in Chapter 10, and cooperative responses in child protection in Chapters 13 and 14.

19.75 It is convenient, however, to draw together here some of the common issues that arise in relation to inter-agency collaboration, building upon the lessons learned from integrated responses. These include: the need and value of collaboration; the challenges of collaboration; forms and levels of collaboration; issues relating to information sharing; and collaboration between the federal and state levels of government. These issues form the more general backdrop of the proposals and suggestions for reform in relation to inter-agency collaboration elsewhere in this Consultation Paper.

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64 See also the discussion in Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), Ch 5.

65 The Ad Hoc Federal-Provincial-Territorial Working Group Reviewing Spousal Abuse Policies and Legislation, *Spousal Abuse Policies and Legislation* (2003).

66 See, in Canada, Ibid; in the US, A Klein, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges* (2009) National Institute of Justice, [2–10], [6–12]. In Australia, see R Holder and N Mayo, 'What Do Women Want - Prosecuting Family Violence in the ACT' (2003) 15 *Current Issues in Criminal Justice* 5.

Need and value of collaboration

19.76 The way government services are delivered tends to follow the structure of government. For example, services for child protection typically are delivered by a different department from that responsible for crime and justice. Similarly, the delivery of legal services reflects both jurisdictional divisions and different governing legal frameworks.

19.77 These divisions are convenient for those administering the services, but are less convenient for those receiving services. For these reasons, there has been an increasing trend towards coordination and integration of services, by either co-locating services or by integrating services delivered to a particular category of 'client'.[67] The advantages of integration have been described as follows:

> In essence there are three main sets of arguments for improved integration: improved access for consumers; increased efficiency, achieving more from the use of limited resources; and enhanced effectiveness, resulting in enhanced outcomes for consumers and funders.[68]

19.78 More specifically in the context of this Inquiry, the advantages of inter-agency collaboration include:

- ensuring that victims of family violence are referred to appropriate government services wherever and whenever they are brought into contact with government agencies or services;
- minimising elements of duplication or inefficiencies arising from the delivery of multiple services by multiple agencies, such as through the sharing of information;
- increasing the capacity of services and legal systems to manage complex cases through networks of information and services, and improving the decisions made by agencies and courts as a result;
- ensuring that victims of family violence do not fall 'through the cracks' of agencies and legal systems working in isolation from each other; and
- avoiding or reducing the prospect of conflict between measures or policies adopted by different agencies.

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67 M Fine, P Kuru and C Thomson, *Coordinated and Integrated Human Service Delivery Models: Final Report* (2005) Social Policy Research Centre, University of NSW, 2.

68 Ibid.

Challenges of collaboration

19.79 Despite these advantages, caution needs to be exercised in the promotion of inter-agency collaboration for its own sake. While inter-agency collaboration has a number of advantages:

> [w]hat is required … is not the promotion of the goal of service integration as an end in itself, but a more differential approach. Clear evidence of the nature and extent of problems in particular spheres of service provision together with evidence of the value of specific initiatives to address these difficulties is necessary before an ongoing commitment is made to new initiatives.[69]

19.80 Not all services need to be integrated for all people, and services may have such different approaches or philosophies that they ought not be integrated. For this reason, proposals and suggestions for inter-agency collaboration are discussed in the specific contexts in which they arise in this Consultation Paper, rather than in the abstract.

19.81 It is also important to recognise a number of challenges of inter-agency collaboration. Some of these, such as the need for leadership and continued commitment by key players, have been discussed earlier in this chapter in the context of maintaining momentum for integrated responses.

19.82 Another important challenge is the need for adequate resourcing, training and support. Inter-agency collaboration 'costs before it pays': it requires resourcing for staff and support systems, services, and start up costs.[70] Further, staff will experience greater pressure and will undertake 'tasks of greater complexity requiring more training and expertise, time and effort, if their resources do not expand'.[71]

19.83 Finally, another key challenge is ensuring that the mechanisms of collaboration are flexible enough to meet the respective needs of the different partners, and yet stable enough to endure.

Methods of collaboration

19.84 As discussed above, there are different mechanisms of collaboration. At the level of policy, agencies may collaborate in agreeing upon common principles and objectives, as noted above, and in formulating strategy plans. Agencies may also collaborate through overarching policy and operational bodies such as statewide steering committees.

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69 Ibid, 3–4.
70 Ibid, 6.
71 Ibid.

19.85 At an operational level, key ways in which agencies may collaborate include:

- sharing information obtained by agencies;
- sharing knowledge by agencies (such as joint training);
- facilitating or making referrals for victims between agencies (referred to in this chapter as victim liaison);
- developing protocols for communication and working together;
- collaborative decision making by agencies (such as joint case management conferences); and
- developing inter-agency networks, including mechanisms for feedback on system improvements.

19.86 Collaboration between agencies and other actors is discussed at various points in this Consultation Paper. For example, cooperation between federal family courts and state and territory courts is discussed in Chapter 8. Collaboration between family dispute resolution practitioners and family lawyers and courts is discussed in Chapter 11. Cooperation in the context of child protection and the criminal law is discussed in Chapter 13, while cooperation in the context of child protection and family law is discussed in Chapter 14.

19.87 In particular, information sharing is a key issue for this Inquiry which has been addressed in other parts in this Consultation Paper. Information sharing in the context of family violence and family law is discussed in Chapter 10. This discussion canvasses issues including access to court records; offences prohibiting the publication of information about specific court proceeding; the sharing of agency information, information sharing protocols, and the development of a national protection order database. Information sharing in the context of child protection is discussed in Chapter 14.

Victim support

19.88 Victim support is a critical element of integrated responses, and beyond. Victim support workers play a pivotal role generally in 'integrating' the legal frameworks for victims, helping victims to navigate between the different legal frameworks. Victims who are supported make better decisions and are more likely to use both the legal system and available government services. In consultations, stakeholders repeatedly emphasised the importance of family violence support services as the key mechanism of integration from the point of view of victims. As noted in the next Chapter, this view is also borne out by evaluations of specialised courts which employ victim support workers.

19.89 Victim support organisations may provide a range of services. These include: information and referral to services; counselling; safety planning; accommodation; and practical services such as child care. Most relevantly, these services may include crisis support; legal advice; advocacy services; court support (where a worker provides general information about court processes and supports the person in court) or advocacy at court (where the worker advocates for the client in court).

19.90 Victim support may be provided at different points of entry into the legal system. It may be provided at, or soon after, an incident to which the police were called; they may be provided as telephone support or as a centre at which victims may attend for advice and information; and it may be provided on the day a person attends court.

19.91 One of the most significant ways of improving the ability of victims to navigate through the system is to enable timely and effective access to victim support organisations. The ACT's model of victim support delivery was widely recognised among stakeholders as a leading model, although not necessarily a feasible model in larger jurisdictions. In the ACT, the DVCS has a memorandum of understanding with the Australian Federal Police (AFP). This provides that police should offer the services of DVCS at the time of a family violence incident to all parties present at the incident (except those taken into custody). Approximately 85% of people accept this suggestion.[72] DVCS crisis workers are informed by the police if the parties wish to use their services, and typically arrive at the scene where police brief the workers. The memorandum of understanding is implemented and administered by a management committee constituted jointly by the AFP and DVCS. As noted above, 'fax-back protocols' also operate in other areas and enable close collaboration between police and victim support services, and early delivery of victim support, at a critical stage.

19.92 The DVCS is also an approved crisis support organisation under the *Domestic Violence Agencies Act 1986* (ACT).[73] As an approved organisation, it benefits from s 18 of that Act, which enables a police officer or staff member of the AFP,[74] on suspicion of the past or future commission of a 'domestic violence offence', to disclose to the organisation 'any information that is likely to aid the organisation in rendering assistance to the person or to any children of the person'. This Act is discussed in the context of information sharing in Chapter 10.

19.93 The DVCS also offers 24-hour telephone support and court support (although not court advocacy) services. It also acts as an advocate with government agencies including child protection agencies.

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72 Domestic Violence Crisis Service (ACT), *Domestic Violence Crisis Service (ACT)* <www.dvcs.org.au/domesticviolencb.html#CrisisIntervention> at 14 April 2010at 15 January 2010.

73 See Domestic Violence (Crisis Support Organisation) Approval 1992, 8 July 1992, authorised under s 17 of the *Domestic Violence Agencies Act 1986* (ACT).

74 A branch of the AFP, ACT Policing, is responsible for policing in the ACT.

19.94 Another aspect of victim support is court assistance schemes. In NSW, for example, the Legal Aid Commission operates 33 Women's Domestic Violence Court Assistance Schemes. Support workers can provide information about protection orders, act as a support person in court, explain the court process, and refer victims to other services. While court support workers cannot themselves provide legal advice, they may be able to organise lawyers to provide legal advice on a particular case.[75] The Women's Family Law Support Service also provides court support and information at the Sydney and Melbourne registry of the Family Law Courts,[76] and a similar service is provided in South Australia (known as the Women's Information Service Family Court Support).

19.95 Victim support is a key aspect of the Victorian specialised family violence courts, discussed in Chapter 20. An on-site victim support worker is available during the court days allocated to family violence hearings. A duty lawyer from Legal Aid is available as well.

19.96 Victim support workers are also provided as part of the Domestic Violence Intervention Court Model (DVICM) in NSW. Notably, an independent evaluation indicated that victim support was by far the most successful element of the DVICM.[77]

19.97 The importance of victim support has been recognised in the United Kingdom's national strategy for reducing family violence, which includes as a core element the funding of Independent Domestic Violence Advisors and Independent Sexual Violence Advisors. The role of these advisors is to 'help victims navigate their way through various systems; for example, the criminal justice system …, the civil court system, and other systems such as housing, health, and education'.[78] They are especially associated with the specialised family violence courts in the United Kingdom and Multi-Agency Risk Assessment Conferences (MARACs), which provide multi-agency responses to very high-risk victims.

19.98 In 2009, an independent evaluation of Independent Domestic Violence Advisors (IDVAs) in the United Kingdom was published. It found:

> The IDVA role offers a unique opportunity to provide independent, objective advice to victims about their options, and one that is not duplicated by any other worker. IDVAs navigate multiple systems and are crucial contributors to multiagency

75 Legal Aid NSW, *Women's Domestic Violence Court Assistance Schemes* <www.legalaid.nsw.gov.au/asp/index.asp?pgid=728> at 2 February 2010.

76 Richard Chisholm noted in his 2009 report that this service had proved particularly invaluable to victims of family violence: R Chisholm, *Family Courts Violence Review* (2009), 151, fn 161.

77 L Rodwell and N Smith, *An Evaluation of the NSW Domestic Violence Intervention Court Model* (2008) NSW Bureau of Crime Statistics and Research.

78 A Robinson, *Evaluation of Independent Sexual Violence Advisors (ISVAs) and Independent Domestic Violence Advisors (IDVAs)* (2009) Home Office (UK), 15.

> initiatives, especially MARACs. Their specialist skills and ability to provide both individual and institutional advocacy are very highly valued.[79]

19.99 The evaluation found strong support for the work of the advisors in court support, citing one victim as follows:

> To have that support, it just gives you the strength to go and give evidence. I could have backed out many times because I was afraid to stand up and go against my ex-husband but having [the Advisor] there, she gave me the strength to go on with it. It is a hard thing to do, but having someone there to talk to you and listen to you, to reassure you everything will be ok, it did really help.[80]

19.100 It also noted that partner agencies

> were quick to comment on the importance of providing support to victims, as they were sympathetic to the stress involved in a court case. In fact, IDVA support was viewed as a necessary precursor to having successful court outcomes; for example, reducing retraction, giving better evidence, and obtaining convictions.[81]

Commissions' views

19.101 There is strong evidence that victim support provided at the time of an incident to which the police are called, at court, and at other key times during the legal process is an important measure that can improve the ability of victims to navigate between legal frameworks. Victim support workers can, and do, routinely navigate through the legal, social and health systems on behalf of victims.

19.102 In the Commissions' view, one of the most practical methods of improving the interaction in practice of legal frameworks is through strengthening and supporting existing victim support services. This would be immediately beneficial and is proven to have significant impact on victims' experiences in navigating systems. Although extra resourcing would be required, it is likely that this would ultimately be one of the most cost-effective measures for improving victim satisfaction and safety.

19.103 There is much to be said for the delivery of victim support at the time the police are called out to an incident. It is notable that a number of 'fax-back protocols' have been initiated in some areas. This may be a practice that should be encouraged by Australian state and territory governments.

19.104 Victim support is also particularly crucial at court. The Commissions note that, while victim support workers are a feature of specialised courts, they need not be tied to such courts. Indeed, this is one element which the Commissions believe can be productively mainstreamed across courts. The NSW Domestic Violence Court Assistance Schemes are useful precedents, and the Family Law court support schemes

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79 Ibid, 4.
80 Ibid, 16.
81 Ibid.

in NSW, Victoria and South Australia should be extended nationally across the family court system.

Proposal 19–2 State and territory governments should, to the extent feasible, make victim support workers and lawyers available at family violence-related court proceedings, and ensure access to victim support workers at the time the police are called out to family violence incidents.

Proposal 19–3 The Australian Government should ensure that court support services for victims of family violence are available nationally in federal family courts.

Legal advice and representation

19.105 One important, practical, aspect of victim support is access to legal advice. The role of legal representation, and in particular the role of legal aid, in ensuring this access was discussed in detail in Richard Chisholm's report, *Family Courts Violence Review* (2009).[82] Chisholm recommended that careful consideration should be given in the funding and administration of legal aid to the serious implication of parties, especially children, being legally unrepresented.[83]

19.106 The National Council to Reduce Violence against Women and their Children (National Council) also included in its report, *Time for Action* (2009), the following strategy:

> Ensure adequate funding for legal aid and advocacy services is provided by the Australian Government, over and above State/Territory funding, to recognise the significant focus given to domestic and family violence in the 2006 amendments to the *Family Law Act 1975*.[84]

19.107 The Commissions have heard that the limited availability of legal aid and scope of practitioner expertise often result in victims needing to obtain separate representation for family law as compared with protection order proceedings. The problem of fragmented legal representation is exacerbated by the fact that victims may also need to be separately represented in property and parenting proceedings in federal family courts.[85]

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82 R Chisholm, *Family Courts Violence Review* (2009), 168–172.

83 Ibid, Rec 4.5.

84 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), 119.

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

19.108 The Commissions' view is that access to legal advice and representation is a crucial element of integrated responses. The Commissions support the recommendations of both the National Council and Chisholm in this regard. In particular, they consider that the adequate resourcing and further development of women's legal services is critically important, because of the need for specialised, timely and free legal advice and representation.

Victims' compensation

19.109 Another, often overlooked, aspect of support for victims is access to financial assistance. Family violence, among other harms, often has a significant impact on the financial security of victims.[86] Victims of family violence may incur medical, counselling, legal and housing expenses, as well as education and child care expenses, and may have been subject to economic abuse as an element of family violence.[87]

19.110 In practice, these costs may constitute a significant barrier for victims in accessing the legal system. Improving access to victims' compensation may be an important way of improving the way victims navigate the legal system as well as the social and health systems, by providing (for example) access to counselling and funds to change locks.[88] The purposes of victims' compensation are discussed in Chapter 3.

19.111 There are three legal avenues for obtaining compensation. First, it is possible for some victims to sue in tort, usually for assault and battery.[89] While this has the advantage that much higher damages are generally available,[90] it is not a route that is used frequently in the context of family violence. This is largely because of the limited financial resources of defendants; the expense, delay, and trauma involved in civil litigation, including the fear of facing the offender; and victims' tendency to delay

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86 The Australian Domestic and Family Violence Clearinghouse are presently conducting a study on women's financial security both before and after abusive relationships. See R Braaf and I Barrett Meyering, *When Does It End? The Continuation of Family Violence Through the Court Process, Financial Outcomes for Women and Good Practice*, Australian Institute of Judicial Administration, 1–3 October 2009.

87 See Access Economics, *The Cost of Domestic Violence to the Australian Economy, Part I* (2004), esp ch 5.

88 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), 98.

89 Other actions, such as breach of fiduciary duty or negligence, may also be available, although these have not tended to be successful. Only a few tort claims in the context of family violence have been made: see, eg, *Varmedja v Varmedja* [2008] NSWCA 177; *Giller v Procopets* [2004] VSC 113; *Ainsworth v Ainsworth* [2002] NSWCA 130; *Jackson v Jackson* [1999] NSWSC 229. For claims of breach of fiduciary duty, see: *Paramasivam v Flynn* (1998) 90 FCR 489; *SB v NSW* [2004] VSC 514; and for claims of negligence, see: *Batchelor v State of Tasmania* [2005] TASSC 11; *SB v NSW* [2004] VSC 514.

90 For example, in *Varmedja v Varmedja* [2008] NSWCA 177, damages of $232,791.55 were awarded in respect of a number of physical and sexual assaults; in *Ainsworth v Ainsworth* [2002] NSWCA 130, $572,815 was awarded in respect of four separate assaults; and in *Re Q* [1995] FLC 92–565, $100,000 was awarded in respect of a sexual assault.

disclosing or reporting family violence.[91] Further, there are legal barriers, including limitation periods;[92] the limitations of the tort of assault;[93] and the difficulty of providing evidence of claims. Victims may also be reluctant to begin proceedings in multiple courts.[94]

19.112 Secondly, in all jurisdictions except Western Australia, one available sentencing option is to order an offender to pay compensation for loss, injury or damage as a consequence of an offence.[95] Although this power is exercised in the criminal context of sentencing, the compensation awarded is civil in nature and assessed in the same way as claims in tort.[96]

19.113 This power has been exercised very infrequently in the context of family violence,[97] both because of the fact that family violence is typically under-enforced in the criminal system, and because offenders rarely have the resources to pay the orders.[98] In some jurisdictions, the financial capacity of the defendant to pay is a relevant factor in deciding to award compensation.[99] Further, the usual policy is that the power is only exercised in clear and simple cases.[100] Other barriers may apply in

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91 These were commonly cited in one empirical study of women's motivations: B Feldthusen, O Hankivsky and L Greaves, 'Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse' (2000) 12 *Canadian Journal of Women and the Law* 77. One Canadian study uncovered only 25 tort actions for family violence cases between 1989–2007: L Buckingham, 'Striking Back: The Tort Action for Spousal Violence' (2007) 23 *Canadian Journal of Family Law* 273.

92 For example, in *Giller v Procopets* [2004] VSC 113, three of the eight claims of assault were barred by the limitation period, and an extension of time was granted only in respect of one of them.

93 This issue was noted in respect of the criminal offence of assault in Ch 7.

94 In the 1990s, it was possible for victims to claim in the Family Court under legislation vesting state jurisdiction on that court. This led to a rise in such claims: see, eg, *In the Marriage of CK and IW Kennon* (1997) 22 Fam LR 1; *In the Marriage of Rosati* (Unreported, Family Court of Australia, Chisholm J, 14 February 1997); *Marsh v Marsh* (1993) 17 Fam LR 289. Following *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, however, this jurisdiction is no longer available: see Ch 2.

95 *Victims Support and Rehabilitation Act 1996* (NSW) pt 4; *Sentencing Act 1991* (Vic) s 85B; *Penalties and Sentences Act 1992* (Qld) s 35; *Criminal Law (Sentencing) Act 1988* (SA) s 53; *Sentencing Act 1997* (Tas) s 58; *Crimes (Sentencing) Act 2005* (ACT) s 18, ch 7; *Sentencing Act 1995* (NT) s 88. The Western Australian legislation only permits restitution orders in respect of property damage: *Sentencing Act 1995* (WA) s 116.

96 R Fox and A Freiberg, *Sentencing: State and Federal Law in Victoria* (2nd ed, 1999), 5.

97 No statistics appear to be available. Research has revealed only two uses of this power in the context of family violence: *Mordaunt v Assessor, Victim Services* [1997] NSWSC 1131 and *Stevens v Baxter* [2009] VSC 257.

98 Some evidence for the inability of offenders to pay is recorded in the Victims Compensation Tribunal (NSW), *Chairperson's Report 2007–2008*, 23. The Tribunal notes the difficulty of recovering debts from offenders, and records that it recovered $3.3 million from offenders against payments of $61 million to victims that year. In Tasmania, compensation orders are mandatory in respect of property offences. However, in the first year of this coming into operation, only 4% of orders relating to burglary and/or stealing were fully paid, and 20% of orders relating to injury to property; in the second year, the percentages were 8% and 12%: K Warner and J Gawlik, 'Mandatory Compensation Orders for Crime Victims and the Rhetoric of Restorative Justice' (2003) 36 *Australian and New Zealand Journal of Criminology* 60.

99 The relevance of this factor is discussed in *RK v Mirik* [2009] VSC 14.

100 This is also discussed critically in Ibid. This is because the procedure is summary and not well-suited to lengthy and complex investigations.

certain jurisdictions.[101] Finally, this option requires the victim to take the matter to court.[102]

19.114 For most victims, therefore, the only practical method of financial redress is through statutory victims' compensation schemes, funded by state and territory governments. All Australian state and territory governments currently provide such schemes. Although these are available to victims of family violence, there are problems with the ways such schemes operate in this context, limiting the capacity of the schemes to provide effective support to such victims. Although this discussion is not confined to issues of integration, it is convenient to deal with these issues here.

19.115 The difficulties of using statutory victims' compensation schemes in the context of family violence have been comprehensively reviewed by Isobelle Barrett Meyering in a paper produced for the Australian Domestic and Family Violence Clearinghouse in 2010.[103] The key problem is that the schemes,

> like the criminal law, are premised on a 'stranger violence model'. The schemes assume that the victim does not know the assailant, that the violence is a random act and that the victim is not dependent on the assailant. … As such, many schemes have historically included—and in some cases continue to include—specific requirements that discriminate against women who experience domestic violence …[104]

19.116 Six types of provisions in victims' compensation legislation have been identified in the literature as problematic for victims. There are, however, examples of Australian legislation that have addressed—at least in part—these concerns.

Criminal acts and injuries

19.117 Legislation usually links victims' compensation to the commission of specific criminal acts of violence and the suffering of criminal injuries. This typically has the effect of under-compensating victims of family violence, for several reasons. First, acts of family violence may not be recognised as criminal,[105] and in some jurisdictions only specified offences can trigger compensation.[106] Secondly, there is a

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101 For example, in the ACT and the Northern Territory, only the Director of Public Prosecution can apply for such an order: *Crimes (Sentencing) Act 2005* (ACT) s 18; *Sentencing Act 1995* (NT) s 91; and in NSW, there is a statutory maximum of $50,000 in relation to compensation for injury, and the court must consider any contributory conduct, as to which see the discussion below: *Victims Support and Rehabilitation Act 1996* (NSW) ss 72(1), 73(a), 77D.

102 In most jurisdictions, the order is enforceable as a civil debt: see, eg, *Sentencing Act 1991* (Vic) s 85M; *Sentencing Act 1997* (Tas) s 69.

103 I Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview* (2010) Australian Domestic and Family Violence Clearinghouse.

104 Ibid, 5.

105 C Forster, 'Good Law or Bad Lore? The Efficacy of Criminal Injuries Compensation Schemes for Victims of Sexual Abuse: A New Model of Sexual Assault Provisions' (2004) 32 *University of Western Australia Law Review* 264, 265.

106 Breaches of protection orders are not included in some jurisdictions, such as Victoria, Queensland and the ACT: *Victims of Crime Assistance Act 1996* (Vic) s 3; *Victims of Crime Assistance Act 2009* (Qld) s 25(8); *Victims of Crime (Financial Assistance) Act 1983* (ACT) s 3. The Queensland and ACT Acts allow for criminal acts to be prescribed in regulations, but none are presently prescribed.

need to prove each discrete 'incident' and 'injury', which poses problems in the context of the pattern of abuse that, typically, constitutes family violence.[107]

19.118 For example, the Chief Compensation Assessor in Western Australia concluded in one case:

> In considering the application, it was necessary for me to distinguish the impact of the years of domestic violence asserted by the applicant, some occurring outside WA and most not reported to the police and including events after the date of the incident the subject of the present application, together with the impact on her of psychiatric illness, unstable accommodation and difficulty in managing her own children. I accepted that it was likely that the incident in June 2001 for which I am able to compensate the applicant would have contributed to her condition, however in light of the review of the applicant's background referred to herein, the contribution of this particular incident can only be said to have been relatively minor.[108]

19.119 Another issue is that the definition of 'injury' emphasises physical injury and does not include all the psychological harms typical of family violence. For example, suicide attempts, drug addictions, eating disorders, guilt, self-mutilation, nightmares, low self-esteem, a lack of trust, vocational setbacks, and educational deprivation are typical forms of harm that are not necessarily recognised as 'mental injuries' for the purposes of compensation legislation in all jurisdictions.[109] Neither does this restrictive definition necessarily recognise the 'differing impact of violence and sexual abuse on the variety of cultures and communities that make up Australian society'.[110]

19.120 These limitations have been addressed in NSW by providing in the legislation that an act of violence extends to domestic violence and sexual assault, and listing both 'domestic violence' and 'sexual assault' as specific compensable injuries.[111] (As discussed in Chapter 15, sexual assault often forms part of a pattern of family violence.) Legislation in the Northern Territory also defines 'domestic violence injuries' as a specific injury.[112] In NSW, victims of family violence can elect to claim a specific (listed) physical, psychiatric or psychological injury, or claim for 'domestic violence injuries' or an injury of 'sexual assault'. The injury of 'domestic violence' has a standard compensation amount of $7,500–$10,000. There are three categories of

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107 The nature and dynamics of family violence are discussed in Ch 4.

108 *Ware* [2009] WACIC 59.

109 C Forster, 'The Failure of Criminal Injuries Compensation Schemes for Victims of Intra-Familial Abuse: The Example of Queensland' (2002) 10 *Torts Law Journal* 143, 162–164. See also L Finestone, 'Crimes Compensation: A National Perspective' in M Heenan (ed) *Legalising Justice for All Women: National Conference on Sexual Assault and the Law* (1996) 198, 200.

110 C Forster, 'The Failure of Criminal Injuries Compensation Schemes for Victims of Intra-Familial Abuse: The Example of Queensland' (2002) 10 *Torts Law Journal* 143, 164.

111 *Victims Support and Rehabilitation Act 1996* (NSW) ss 5(2), Dictionary, sch 1 cls 6, 7A.

112 *Victims of Crime Assistance Regulations* (NT) regs 5, 22. Regulation 4 defines sexual offences as violent acts for the purposes of the governing Act.

sexual assault including, as the most serious, a category that includes cases where there is a 'pattern of abuse'.[113]

19.121 The principal benefit of these provisions is that the standard of evidence is lower than for other applications, but the standard amount awarded for these injuries is considerably less than for other injuries.[114] These special provisions are used by the overwhelming majority of victims of family violence in NSW, with 85% of awards to family violence victims made as a consequence of an injury of 'domestic violence'.[115]

19.122 In other jurisdictions, compensation claims must still be founded on specific criminal acts. However, in some jurisdictions there may be higher awards available in the context of family violence. In the ACT, Victoria and Queensland, 'special financial assistance' (in addition to compensation for actual loss) may be available to certain family violence victims. In the ACT, an amount of $50,000 (rather than the standard $30,000) is available to sexual assault victims,[116] while in Victoria and Queensland specified acts of violence, including sexual assaults, are eligible for special financial assistance in amounts up to $10,000.[117] Higher amounts are available in Victoria for repeated sexual assaults or acts of violence.[118] Further, these awards may be granted not only in respect of 'injuries' but also in respect of 'significant adverse impacts'.[119] In Victoria, this includes in addition 'grief, distress, [or] trauma',[120] while in Queensland the definition of adverse impacts in relation to sexual offences is more specific and extensive.[121]

Related acts or injuries

19.123 All Australian jurisdictions also have provisions deeming that related acts of violence or related injuries should be treated as one claim, or reducing the amount

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113 *Victims Support and Rehabilitation Act 1996* (NSW) sch 1 cls 6, 7A, Table. The most serious category also includes cases of unlawful sexual intercourse in which: serious bodily injury is inflicted; two or more offenders are involved; or in which the offender uses an offensive weapon. The standard amount for the most serious category of sexual assault is $25,000–$50,000.

114 I Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview* (2010) Australian Domestic and Family Violence Clearinghouse, 6.

115 Victims Compensation Tribunal (NSW), *Chairperson's Report 2007–2008*, 17–18.

116 *Victims of Crime Act 1994* (ACT) s 10(1)(f).

117 *Victims of Crime Assistance Act 1996* (Vic) s 8A; *Victims of Crime Assistance Act 2009* (Qld) s 39(h), sch 2. See I Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview* (2010) Australian Domestic and Family Violence Clearinghouse, 7.

118 *Victims of Crime Assistance (Special Financial Assistance) Regulations 2000* (Vic), regs 6, 7. In contrast, the Queensland legislation restricts the amount of special financial assistance to that payable for a crime in the highest category: *Victims of Crime Assistance Act 2009* (Qld) sch 2, cl 1(2).

119 These provisions were inserted by the *Victims of Crime Assistance (Amendment) Act 2000* (Vic) which commenced on 1 January 2001.

120 *Victims of Crime Assistance Act 1996* (Vic) s 3.

121 *Victims of Crime Assistance Act 2009* (Qld) s 27. These include a sense of violation; reduced self worth or perception; lost or reduced physical immunity; lost or reduced physical capacity, including the ability to have children; increased fear or increased feelings of insecurity; adverse effects of others reacting adversely to the person; adverse impact on lawful sexual relations; and adverse impact on feelings. This provision was introduced in 1995: *Criminal Offence Victims Regulation 1995* (Qld) regs 1A(1), (3).

available for related acts or injuries.[122] These provisions were enacted in response to increasing claims by victims of family violence for separate compensable events in the 1970s.[123] Christine Forster has criticised these provisions as follows:

> The 'related acts' provisions manipulate the legal concept of harm to act as a gatekeeper by fictionalising continuous and multiple criminal events into a single compensable event, specifically reducing the amount that can be claimed by any individual claimant. Apart from the financial repercussions for victims of intra-familial harm, other broader systemic inequalities are also entrenched. The harm is presented as isolated, random and impersonal, mystifying the reality that intra-familial harm most often forms part of a continuing and repetitive pattern.[124]

19.124 The scope of these provisions varies between the jurisdictions. In Queensland, South Australia and the Northern Territory, the definition of related acts encompasses acts committed by the same person or group of persons, so all incidents within a pattern of family violence are likely to be deemed a single act.[125] As well, the interpretation by courts of whether an act is 'related' varies both within, and between, the jurisdictions.[126] In 2009, for example, the Supreme Court of New South Wales ruled that over 500 sexual assaults committed over 11 years by a member of a foster family were not 'related' acts for the purpose of compensation legislation.[127] In Victoria and Queensland, there are provisions requiring that the applicant be given an opportunity to object to the treatment of claims as related.[128]

19.125 In some jurisdictions, other provisions reduce the amount available for multiple claims. In Western Australia and Tasmania, a (higher) maximum limit applies to acts committed by the same offender.[129] As already noted, higher maximum limits also apply for repeated sexual assaults in NSW, Victoria and the Northern Territory. In

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122 *Victims Support and Rehabilitation Act 1996* (NSW) s 5(3), (4); *Victims of Crime Assistance Act 1996* (Vic) s 4; *Victims of Crime Assistance Act 2009* (Qld) s 25(4); *Victims of Crime Act 2001* (SA) s 23(2); *Criminal Injuries Compensation Act 1985* (WA) s 33; *Victims of Crime Assistance Act 2006* (NT) s 5(3); *Victims of Crime (Financial Assistance) Act 1983* (ACT) s 4(2).

123 C Forster, 'The Failure of Criminal Injuries Compensation Schemes for Victims of Intra-Familial Abuse: The Example of Queensland' (2002) 10 *Torts Law Journal* 143, 154.

124 Ibid, 158.

125 *Victims of Crime Assistance Act 2009* (Qld) s 25(4); *Victims of Crime Act 2001* (SA) s 23; *Victims of Crime Assistance Regulations* (NT) reg 5(3).

126 This is reviewed in C Forster, 'The Failure of Criminal Injuries Compensation Schemes for Victims of Intra-Familial Abuse: The Example of Queensland' (2002) 10 *Torts Law Journal* 143, 156.

127 *Moore v Victims Compensation Fund Corporation* [2009] NSWSC 1300.

128 *Victims of Crime Assistance Act 1996* (Vic) s 4(1); *Victims of Crime Assistance Act 2009* (Qld) s 70. In Victoria, this applies unless the Tribunal considers that they should not be treated as related.

129 *Criminal Injuries Compensation Act 1985* (WA) ss 33, 34; *Victims of Crime Assistance Act 1976* (Tas) s 6A(2). Since 2003, the Western Australian provisions apply whether or not the acts were related. Judges in Western Australia have not tended to interpret acts of family violence as related if they do not occur at a similar time: C Forster, 'The Failure of Criminal Injuries Compensation Schemes for Victims of Intra-Familial Abuse: The Example of Queensland' (2002) 10 *Torts Law Journal* 143, 155. The maximum limit is twice the maximum limit applicable to the last offence committed. The Tasmanian provision allows a different maximum limit to be prescribed in relation to a series of offences.

NSW and the Northern Territory, claims for multiple injuries may be subject to substantial reductions.[130]

Reporting and conviction requirements

19.126 In the ACT, a person who does not report a crime to the police is disqualified from compensation,[131] while in Western Australia and Tasmania, reasonable cooperation with law enforcement is a necessary condition for a compensation order.[132] In other states and territories, failure to report and cooperate with law enforcement can be considered as a discretionary factor in deciding whether to grant a claim.[133] Since family violence is typically under-reported,[134] these requirements can have the effect of precluding or restricting access for victims of family violence.[135]

19.127 In NSW, Queensland and Victoria, this effect has been addressed to some degree by requiring assessors to consider, when deciding whether it was reasonable not to report the crime, particular factors such as the nature of the injury, the nature of the relationship between the victim and the offender, reports to a health professional or practitioner, and fear or threats.[136]

19.128 While all jurisdictions no longer require a conviction before compensation can be granted,[137] two jurisdictions retain restrictive provisions that link compensation to court proceedings. These provisions preclude many claims from victims of family violence because such violence is typically under-reported and rarely leads to prosecutions and any convictions.[138]

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130 In NSW, if a person receives two or more compensable injuries, the victim may receive only 10% and 5% of the standard amount in respect of the second and third most serious injuries, and no further amount: *Victims Support and Rehabilitation Act 1996* (NSW) sch 1 cl 3. In the Northern Territory, the reductions are 30% and 15% respectively, but this reduction does not apply to the specific injury of 'domestic violence': *Victims of Crime Assistance Regulations* (NT) reg 18.

131 *Victims of Crime (Financial Assistance) Act 1983* (ACT) s 12.

132 *Criminal Injuries Compensation Act 1985* (WA) s 38; *Victims of Crime Assistance Act 1976* (Tas) s 5(3A).

133 See, eg, *Victims of Crime Act 2001* (SA) s 20(7); *Victims of Crime Assistance Act 2006* (NT) s 41.

134 Under-reporting is discussed specifically in the context of sexual assault in Ch 17.

135 L Jurevic, 'Between a Rock and a Hard Place: Women Victims of Domestic Violence and the Western Australian Criminal Injuries Compensation Act' (1996) 3(2) *Murdoch University Electronic Journal of Law* <http://www.murdoch.edu.au/elaw/issues/v3n2/jurevic.html>, [54]–[73]. This is even more true in the case of Indigenous victims: see C Forster, 'Good Law or Bad Lore? The Efficacy of Criminal Injuries Compensation Schemes for Victims of Sexual Abuse: A New Model of Sexual Assault Provisions' (2004) 32 *University of Western Australia Law Review* 264, 265.

136 *Victims Support and Rehabilitation Act 1996* (NSW) s 30(2), (2A); *Victims of Crime Assistance Act 1996* (Vic) ss 52–53; *Victims of Crime Assistance Act 2009* (Qld) ss 81–82.

137 Queensland was the last jurisdiction to retain this requirement, but it was removed in 2009.

138 Further, it has been suggested that in practice there is an unofficial requirement that a conviction must be obtained: C Forster, 'Good Law or Bad Lore? The Efficacy of Criminal Injuries Compensation Schemes for Victims of Sexual Abuse: A New Model of Sexual Assault Provisions' (2004) 32 *University of Western Australia Law Review* 264, 277. Forster's analysis of 114 judgments showed that, of those, only five proceeded without a conviction.

19.129 In South Australia, a compensation order may only be made if an offence has been admitted or proved beyond reasonable doubt in a court, or admitted in related statutory proceedings or can be reasonably inferred from admissions in such proceedings.[139] The Attorney-General has a discretionary power to make an ex gratia payment in specified circumstances.[140] In Western Australia, the legislation allows compensation only in respect of 'proved' offences with the following important exceptions: if the person alleges another person committed the offence; the person was acquitted on the ground of unsoundness of mind or found mentally unfit to stand trial; or for specified reasons the charge is not determined; or if no person is charged.[141]

Contributory conduct

19.130 A common consideration in awarding victims' compensation is that the victim did not contribute to the injury.[142] Claims may also be reduced in some jurisdictions on the basis that a victim engaged in criminal conduct, which may be relevant where victims may also be engaging in assault as part of the dynamic of family violence.[143] In some jurisdictions, victims must also take reasonable steps to mitigate their injury.[144] In the ACT, a deduction is required if the victim was intoxicated at the time of the offence (although victims of sexual assault are excepted).[145]

19.131 These provisions have been criticised for blaming the victim and failing to recognise the behaviour of victims in the context of family violence.[146] For example, in Western Australia, compensation claims have been reduced because a victim picked up

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139 *Victims of Crime Act 2001* (SA) s 22(2). Further, if no person is charged for the offence, the evidence of the victim alone is sufficient without corroboration: s 22(3).

140 Ibid s 27(4)(b). This discretion is not subject to review: s 27(5).

141 *Criminal Injuries Compensation Act 1985* (WA) ss 12–17.

142 *Victims Support and Rehabilitation Act 1996* (NSW) s 30; *Victims of Crime Assistance Act 1996* (Vic) s 54; *Victims of Crime Assistance Act 2009* (Qld) s 85; *Victims of Crime Act 2001* (SA) s 20(4); *Criminal Injuries Compensation Act 1985* (WA) s 40; *Victims of Crime Assistance Act 1976* (Tas) s 5(3); *Victims of Crime (Financial Assistance) Act 1983* (ACT) s 31; *Victims of Crime Assistance Act 2006* (NT) s 41(1).

143 *Victims Support and Rehabilitation Act 1996* (NSW) s 30(1)(c); *Victims of Crime Assistance Act 2009* (Qld) ss 79, 80; *Criminal Injuries Compensation Act 1985* (WA) s 39; *Victims of Crime (Financial Assistance) Act 1983* (ACT) s 38; *Victims of Crime Assistance Act 2006* (NT) s 43. In Queensland, however, criminal conduct on the part of the victim must be the 'primary or only reason for the acting being committed': *Victims of Crime Assistance Act 2009* (Qld) ss 21(2), 79, 80. In South Australia, it is restricted to consideration of indictable offences which materially contributed to the risk of injury, unless the court was satisfied it was otherwise unjust: *Victims of Crime Act 2001* (SA) s 20(5).

144 *Victims Support and Rehabilitation Act 1996* (NSW) s 30; *Victims of Crime Act 2001* (SA) s 20(8); *Victims of Crime Assistance Act 2006* (NT) s 41.

145 *Victims of Crime (Financial Assistance) Act 1983* (ACT) s 37.

146 L Jurevic, 'Between a Rock and a Hard Place: Women Victims of Domestic Violence and the Western Australian Criminal Injuries Compensation Act' (1996) 3(2) *Murdoch University Electronic Journal of Law* <http://www.murdoch.edu.au/elaw/issues/v3n2/jurevic.html>, [24]–[53]; R Langer, 'Battered Women and the Criminal Injuries Compensation Board: Re AL' (1991) 55 *Saskatchewan Law Review* 453, 459.

a knife to defend herself; and because a victim pushed the offender toward the door telling him to leave.[147]

19.132 In NSW, these issues have been partly addressed by requiring the assessor to consider the relationship between the victim and the offender in assessing whether the victim failed to take reasonable steps to mitigate the injury.[148]

Advantage or benefit to offender

19.133 In Victoria, Western Australia and the Northern Territory, victims' compensation schemes may exclude claims on the basis that the offender might benefit from the claim.[149] This had the obvious effect of excluding most victims of family violence, especially where the victim continued to reside with the offender, and fails to take into account the fact the compensation award may be used to leave the offender.[150]

19.134 However, in jurisdictions such as Victoria and Queensland, where compensation is mostly paid on the basis of expenses incurred, the potential for awards to benefit the offender is limited. Another option may be to restrict offenders' access to funds.[151] For example, in Queensland prior to the replacement of its legislation in 2009, the administrative unit referred cases to the Public Trustee where victims might be at risk of psychological or emotional abuse by an offender who stood to benefit from an award.[152]

Time limitations

19.135 In all jurisdictions, victim compensation claims are also subject to time limitations, ranging from one to three years after the offence took place (or, in the case of child victims, usually after they turn 18).[153] In the context of family violence, this

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147 K Whitney, 'The Criminal Injuries Compensation Acts: Do They Discriminate Against Female Victims of Violence?' (1997) 1 *Southern Cross University Law Review* 92, 106. See also L Finestone, 'Crimes Compensation: A National Perspective' in M Heenan (ed) *Legalising Justice for All Women: National Conference on Sexual Assault and the Law* (1996) 198, 201.

148 *Victims Support and Rehabilitation Act 1996* (NSW) s 30(2A).

149 *Victims of Crime Assistance Act 1996* (Vic) s 54(e); *Criminal Injuries Compensation Act 1985* (WA) s 36; *Victims of Crime Assistance Act 2006* (NT) s 41.

150 L Jurevic, 'Between a Rock and a Hard Place: Women Victims of Domestic Violence and the Western Australian Criminal Injuries Compensation Act' (1996) 3(2) *Murdoch University Electronic Journal of Law* <http://www.murdoch.edu.au/elaw/issues/v3n2/jurevic.html>, [75]–[76].

151 K Whitney, 'The Criminal Injuries Compensation Acts: Do They Discriminate Against Female Victims of Violence?' (1997) 1 *Southern Cross University Law Review* 92, 98.

152 Queensland Government, *Victims of Crime Review Report* (2008), 35.

153 It is one year in the ACT and also, for secondary victims, one year after the death of the primary victim in South Australia: *Victims of Crime (Financial Assistance) Act 1983* (ACT) s 27; *Victims of Crime Act 2001* (SA) s 18(2); two years in NSW, Victoria, and the Northern Territory: *Victims Support and Rehabilitation Act 1996* (NSW) s 26; *Victims of Crime Assistance Act 1996* (Vic) s 29; *Victims of Crime Assistance Act 2006* (NT) s 31; and three years elsewhere: *Victims of Crime Assistance Act 2009* (Qld) s 54; *Victims of Crime Act 2001* (SA) s 18(2) (with a further six months to apply to the court after negotiations for settlement have ended); *Criminal Injuries Compensation Act 1985* (WA) s 9; *Victims of Crime Assistance Act 1976* (Tas) s 7 .

time limit may be too short, because 'the cycles of violence in which women find themselves [are] not about reason', and a period of time is needed to allow a woman to segregate a single assault from the continuum of violence and to take steps to secure her own and her family's well-being.[154] This may be particularly problematic in the cases of child sexual assault or children witnessing family violence, where effects may not show up until significantly later.[155]

19.136 However, in all jurisdictions there is discretion to extend these time periods. In some jurisdictions, the legislation provides greater guidance on extension in the case of family violence. In the Northern Territory, the legislation requires decision makers to consider the fact that the application involves sexual assault, family violence or child abuse in deciding to extend time,[156] while in NSW there is a presumption that leave to extend time should be given in such cases.[157] In Victoria and Queensland, assessors must consider whether the offender was a in position of power, influence or trust in deciding whether to extend time.[158] However, the Victims' Compensation Tribunal in NSW has called for a time limit for cases of sexual assault.[159]

Offender involvement

19.137 Australian jurisdictions differ in how decisions are made. While in some jurisdictions—such as NSW, Queensland and Western Australia—assessment is on the papers, in other jurisdictions there is a hearing by a tribunal (in Victoria) or a court (in South Australia and the ACT). Hearing-based models may require victims to 'endure the difficult and time-consuming process of re-living the details and effects of the crime', leading to the risk of re-victimisation by the process.[160] In Victoria, however, there are provisions that require hearings to be closed to the public and enable alternative arrangements for vulnerable witnesses.[161]

19.138 Re-victimisation by the process is even more likely where offenders are invited or entitled to attend hearings on the compensation claim. In South Australia, the model is unusual in that mediation by the Crown Solicitor is required before an application can be made to the District Court, and the offender must be joined in an application to the court unless the victim is a child or not of full legal capacity.[162]

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154 R Langer, 'Battered Women and the Criminal Injuries Compensation Board: Re AL' (1991) 55 *Saskatchewan Law Review* 453, 260.

155 C Forster and P Parkinson, 'Compensating Child Sexual Assault Victims Within Statutory Schemes: Imagining a More Effective Compensatory Framework' (2000) 23 *University of New South Wales Law Journal* 172. Child protection is dealt with in Part C and sexual assault in Part D of this Consultation Paper.

156 *Victims of Crime Assistance Act 2006* (NT) s 31(3)(a).

157 *Victims Support and Rehabilitation Act 1996* (NSW) s 26.

158 *Victims of Crime Assistance Act 1996* (Vic) s 29(3); *Victims of Crime Assistance Act 2009* (Qld) s 54(2). The Queensland provision gives as an example a person in the position of spouse, parent or carer.

159 Victims Compensation Tribunal (NSW), *Chairperson's Report 2007–2008*, 27.

160 Queensland Government, *Victims of Crime Review Report* (2008), 3–4.

161 *Victims of Crime Assistance Act 1996* (Vic) ss 42(3), 48.

162 *Victims of Crime Act 2001* (SA) ss 18(4a), 19.

19.139 In Victoria, the Victims of Crime Assistance Tribunal may give notice to any other person whom the Tribunal considers to have a legitimate interest in the matter, and any person whom the Tribunal thinks has a substantial interest in the matter is entitled to appear. [163] However, the Tribunal cannot give notice to an alleged offender without first giving an opportunity for the applicant to object at a directions hearing.[164]

19.140 Concerns have been expressed over an increasing tendency in Victoria of informing offenders of the claim. Although the alleged offender only appears in a relatively small number of cases, 'for many [victims] the clear message they receive when told of the Tribunal's decision to notify is that once again they are not being believed'.[165]

Access to victims' compensation

19.141 Other practical barriers may also impede victims' access to compensation. One important issue is whether victims can access compensation quickly. For example, as noted above, quick access to compensation may enable a person to secure their safety (such as by changing the locks).

19.142 All jurisdictions allow for the making of interim awards, although the conditions for these vary. Typically, the legislation provides that such payments can only be made if it is likely that an award will be made.[166] In some jurisdictions, other circumstances are also required to justify an interim award.[167]

19.143 In Queensland and Victoria, however, the power to award interim assistance is broader. In Queensland, the only condition is that the assessor must be reasonably satisfied it is necessary to incur the expenses before the application is decided.[168] In Victoria, the Tribunal can make interim awards 'in any circumstances it considers appropriate'.[169]

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163 *Victims of Crime Assistance Act 1996* (Vic) ss 34(2), 35.

164 Ibid s 34(3).

165 L Finestone, 'Crimes Compensation: A National Perspective' in M Heenan (ed) *Legalising Justice for All Women: National Conference on Sexual Assault and the Law* (1996) 198, 203–204.

166 In Tasmania and the ACT, the decision-maker must be satisfied that financial assistance should be awarded and there is insufficient information to decide the amount of the award: *Victims of Crime Assistance Act 1976* (Tas) s 5(6); *Victims of Crime (Financial Assistance) Act 1983* (ACT) s 43.

167 In NSW, the assessor must also be satisfied that the person is either in financial hardship, funeral expenses are due, or there are other circumstances where the assessor considers it appropriate: *Victims Support and Rehabilitation Act 1996* (NSW) s 33. In South Australia, the Attorney-General has absolute discretion to make an interim award to a person who is 'in necessitous circumstances' and is likely to be awarded statutory compensation: *Victims of Crime Act 2001* (SA) s 27(4). In the Northern Territory, the Director must also be satisfied that the financial loss has been or will be suffered or incurred, and the financial loss results from the violent act: *Victims of Crime Assistance Act 2006* (NT) s 27. There is a cap of $5,000 on this immediate payment, which is payable within 28 days of the decision: *Victims of Crime Assistance Act 2006* (NT) ss 27(5), 29. In Western Australia, the interim payment also must be warranted: *Criminal Injuries Compensation Act 1985* (WA) s 23.

168 *Victims of Crime Assistance Act 2009* (Qld) s 98.

169 *Victims of Crime Assistance Act 1996* (Vic) s 56.

19.144 The Commissions understand that the power to make interim payments has proven to be very useful in the Specialist Family Violence courts in Victoria (discussed in Chapter 20). The Commissions are unaware, however, of whether there are problems with the current law and practice concerning the availability of interim payments.

19.145 It is unclear whether there are also other practical barriers, such as lack of knowledge, which limit access to victims' compensation for victims of family violence. This is partly because, apart from NSW (which has the advantage of a specific 'domestic violence injury'), data collected on victims' compensation do not identify separately victims of family violence.[170] In NSW, the 2007–08 report of the Victims Compensation Tribunal stated that domestic violence (28%) and sexual assault (27%) were the second and third highest category of offences for which compensation were claimed. The report also stated that, of claims made by Indigenous peoples, 41% (310) claims were for domestic violence and 30% (227) for sexual assault.[171]

19.146 It is notable, however, that in the financial year following the establishment of the specialist Victorian Family Violence Courts in Heidelberg and Ballarat, 31% of all applications for financial assistance lodged with the Victims of Crime Assistance Tribunal came within the jurisdiction of those courts.[172] This increase in applications 'highlights the capacity of specialist courts to provide holistic support to domestic violence victims'.[173]

19.147 One way of improving access to victims' compensation is through the provision of information about this option to victims. For example, Victoria Legal Aid's publication for victims of sexual assault includes a section on victims' compensation.[174]

Commissions' views

19.148 Although victims' compensation schemes are not a method of integration, they provide an important support mechanism for victims which facilitates, and possibly enables, a victim to navigate the legal system. The Commissions heard, in consultations in the specialist courts in Victoria, that this jurisdiction is a practically important one, enabling (for example) safety measures such as the changing of locks, where a victim remains in the same home, or emergency accommodation, where the victim leaves.

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170 The legislation in the ACT requires a brief description of each claim, from which cases of family violence can be identified to some degree: *Victims of Crime (Financial Assistance) Act 1983* (ACT) s 71.

171 See Victims Compensation Tribunal (NSW), *Chairperson's Report 2007–2008*, 13.

172 I Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview* (2010) Australian Domestic and Family Violence Clearinghouse, 10.

173 Ibid.

174 Victoria Legal Aid, *Sexual Assault: The Law, Your Rights as a Victim* (5th ed, 2009), 24–27.

19.149 While the issue of compensation for victims is often overlooked in the context of family violence, it has been dealt with in some detail here because in practice this legal framework has the potential to improve victims' abilities to navigate through different legal systems. If a key purpose of many of the legal frameworks governing family violence is to ensure the safety of the victim—and this is the central focus of the Terms of Reference of this Inquiry—this is one practical measure that can help achieve that safety. For example, victims' compensation can assist victims in securing their home; leaving relationships; and accessing health services.

19.150 This potential, however, does not appear to be achieved in a number of jurisdictions, in part because of restrictive legislative provisions. The Commissions' preliminary view is that Australian state and territory governments should amend their victims' compensation legislation to ensure the legislative provisions do not unfairly discriminate against victims of family violence. In particular, the Commissions make a number of specific proposals towards these ends.

19.151 First, the Commissions consider that the definition of the act and injuries that trigger compensation needs to be revisited to ensure that the pattern of violence that is characteristic of family violence can be considered in assessing victims' compensation claims, rather than focusing exclusively on specific incidents. This objective may be achieved in a number of ways, and different methods may be more appropriate to different legislative schemes. One approach would be to specify that evidence of a pattern of family violence can be considered when assessing the probability that an act of violence or injury has occurred. Another method is to adopt the approach of NSW, and deem 'domestic violence' to be an act of violence and a specific form of injury, which would be defined as involving a pattern of violence. Another approach is to extend the definition of injury to enable consideration of adverse impacts, as is done with sexual offences in Victoria and Queensland.

19.152 Secondly, state and territory legislation should be amended so that the mere fact that the same offender committed the crime does not mean the crimes are 'related'. This does not mean that states or territories cannot reduce the amounts payable for multiple claims, as is already done in some jurisdictions. This may be necessary because of the resource implications of such claims. In the Commissions' view, however, to treat all criminal incidents of family violence as if they constituted a 'single' incident discriminates unfairly against victims of family violence. Further, the state and territory legislation should allow a victim to object if claims are to be treated as 'related'.

19.153 Thirdly, victims' compensation legislation should be amended so that a failure to report the criminal incident to the police, or to provide reasonable cooperation with law enforcement, does not automatically disqualify a victim of family violence from claiming compensation. A pre-requisite that a victim report to the police or cooperate with law enforcement impacts particularly upon victims of family violence (including victims of sexual abuse) who choose not to report or cooperate for

fear of the offender. This proposal affects the Western Australian, Tasmanian and ACT legislation. This should be a discretionary factor, as it is in other jurisdictions.

19.154 In all jurisdictions, the legislation should provide that decision makers consider the nature of the relationship between the offender and the victim when assessing these discretionary factors (as is done in NSW, Victoria, and Queensland), in light of the nature and dynamics of family violence. Similarly, the legislation should be amended to provide that the nature of the relationship, in light of the nature and dynamics of family violence, should also be considered when assessing whether a victim contributed to the injury and (where the legislation so provides) whether a victim failed to take reasonable steps to mitigate the injury. As well, decision-makers should be required to consider, when deciding whether to extend the time for making an application, the fact that a claim is made on the basis of family violence, sexual assault, or child abuse (as is done in NSW and the Northern Territory), or the fact that the offender was in a position of power, influence, or trust (as in Victoria and Queensland).

19.155 In the view of the Commissions, the legislation in Victoria, South Australia and the ACT should also be amended to ensure that victims of family violence are not required to attend hearings in the presence of offenders. Clearly, there is the potential for the victim to suffer trauma as a result, and the risk that victims will be unfairly deterred from claiming compensation. Instead, the legislation should require that alternative arrangements, such as remote witness facilities, should be employed in cases of family violence.

19.156 The Commissions also propose the repeal of provisions in the Victorian, Western Australian, and Northern Territory legislation excluding compensation on the basis that it would advantage or benefit the offender, as has been done in other jurisdictions. These provisions discriminate against victims of family violence who remain in relationships with the offender. The Commissions are interested, however, in hearing from stakeholders whether any mechanisms can and should be adopted to ensure that offenders cannot access victims' compensation awards, and whether there are any issues as to the availability of interim compensation awards.

19.157 The Commissions consider that there is a clear need for better data collection in relation to claims and awards of victims' compensation. The reports of the Compensation Tribunal of NSW provide a useful model, as they identify victims of family violence, including those who claim for other types of injuries. These reports also usefully separately identify claims made by victims from Indigenous communities. The *Time for Action* report has highlighted the disproportionate representation of Indigenous women and child victims of family violence.

19.158 Finally, the Commissions consider that Commonwealth, state and territory governments should ensure that information about victims' compensation is readily available in all courts dealing with family violence matters.

Proposal 19–4 State and territory victims' compensation legislation should:

(a) provide that evidence of a pattern of family violence may be considered in assessing whether an act of violence or injury occurred;

(b) define family violence as a specific act of violence or injury, as in s 5 and the Dictionary in the *Victims Support and Rehabilitation Act 1996* (NSW) and cl 5 of the *Victims of Crime Assistance Regulation* (NT); or

(c) extend the definition of injury to include other significant adverse impacts, as is done in respect of some offences in ss 3 and 8A of the *Victims of Crime Assistance Act 1996* (Vic) and s 27 of the *Victims of Crime Assistance Act 2009* (Qld).

Proposal 19–5 State and territory victims' compensation legislation should provide that:

(a) acts are not 'related' merely because they are committed by the same offender; and

(b) applicants should be given the opportunity to object if multiple claims are treated as 'related', as in s 4(1) of the *Victims of Crime Assistance Act 1996* (Vic) and s 70 of the *Victims of Crime Assistance Act 2009* (Qld).

Proposal 19–6 State and territory victims' compensation legislation should not require that a victim report a crime to the police, or provide reasonable cooperation with law enforcement authorities, as a condition of such compensation for family violence-related claims.

Proposal 19–7 State and territory legislation should provide that, when deciding whether it was reasonable for the victim not to report a crime or cooperate with law enforcement authorities, decision makers must consider factors such as the nature of the relationship between the victim and the offender in light of the nature and dynamics of family violence.

Proposal 19–8 State and territory victims' compensation legislation should require decision makers, when considering whether victims contributed to their injuries, to consider the relationship between the victim and the offender in light of the nature and dynamics of family violence. This requirement should also apply to assessments of the reasonableness of victims' failures to take steps to mitigate their injuries, where the legislation includes that as a factor to be considered. Section 30(2A) of the *Victim Support and Rehabilitation Act 1996* (NSW), which makes such provision in relation to a failure to mitigate injury, should be referred to as a model.

Proposal 19–9 State and territory victims' compensation legislation should not enable claims to be excluded on the basis that the offender might benefit from the claim.

Proposal 19–10 State and territory victims' compensation legislation should ensure that time limitation clauses do not apply unfairly to victims of family violence. These provisions may take the form of providing that:

(a) decision makers must consider the fact that the application involves family violence, sexual assault, or child abuse in deciding to extend time, as set out in s 31 of the *Victims of Crime Assistance Act 2006* (NT); or

(b) decision makers must consider whether the offender was in a position of power, influence or trust in deciding to extend time, as set out in s 29 of the *Victims of Crime Assistance Act 1996* (Vic) and s 54 of the *Victims of Crime Assistance Act 2009* (Qld).

Proposal 19–11 State and territory victims' compensation legislation should ensure that victims of family violence are not required to be present at a hearing with an offender in victims' compensation hearings.

Proposal 19–12 State and territory governments should ensure that data is collected concerning the claims and awards of compensation made to victims of family violence under statutory victims' compensation schemes. The practice of the Victims' Compensation Tribunal in NSW provides an instructive model.

Proposal 19–13 State and territory governments should provide information about victims' compensation in all courts dealing with family violence matters. The Australian Government should ensure that similar information is available in federal family courts.

Question 19–2 In practice, are the current provisions for making interim compensation awards working effectively for victims of family violence?

Question 19–3 Should measures be adopted to ensure that offenders do not have access to victims' compensation awards in cases of family violence? If so, what measures should be introduced?

Training and education

19.159 The importance of training and education is both a common feature of integrated responses, and a common theme in this Consultation Paper. A proper appreciation of the nature and dynamics of family violence (discussed in Chapter 4)

including sexual assault (discussed in Chapter 15) is fundamental to its proper handling by the legal system.

19.160 This section addresses briefly different issues relating to education and training in the context of family violence. Specific training needs are discussed elsewhere in the Consultation Paper. While quality training and education are critical, it must be recognised that training and education are subject to limitations—including the receptiveness of its audience and the persistence of social and cultural norms. Training cannot and will not fix systemic problems.

Existing proposals and recommendations

19.161 In this Consultation Paper, the need for effective training and education is discussed in the context of definitions of family violence in Chapter 4 and in relation to federal offences relevant to family violence in Chapter 5. The training of police and prosecutors is discussed in Chapters 5, 6 and 7; proposals for judicial training are made in the context of family law and family violence in Chapter 7 and 8; and training in the context of family dispute resolution is discussed in Chapter 11.

19.162 Training is discussed in the context of sexual offences in Chapter 15; in relation to specialist police and prosecutors, inter-sectoral training, and training in interviewing in the context of sexual offences in Chapter 17; and in relation to judicial training on issues relating to sexual offences in Chapter 18.

19.163 Training and education have also been addressed in the reports commissioned by the Australian Government by the National Council, Australian Institute of Family Studies, Richard Chisholm, and the Family Law Council.[175]

19.164 A key theme of the National Council's 2009 report, *Time for Action*, was the need for 'attitudinal change at all levels of government and society', which involves 'adequate funding and professional training of the workforce'.[176] The report included a number of strategies relating to training and education in different fields.[177]

19.165 The National Council advocated for the establishment of a National Centre of Excellence for the Prevention of Violence against Women.[178] This would, among other things, provide a national resource for the development of policy and benchmarks, and develop and promote 'gold-standard' practice to reduce violence against women and their children across Australia.[179] Further, there should be a

175 The Terms of Reference for this Inquiry instruct the ALRC not to duplicate the work of the Australian Institute of Family Studies in particular: see Ch 1.

176 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), 21.

177 Ibid, Recs 1.3.2, 3.1.1, 3.1.4, 3.1.5, 3.3.8.

178 Ibid, 41.

179 Ibid.

specific funding stream to address prevention education policy, including training and accreditation of staff and programs.[180]

19.166 In particular, the National Council recommended that, in achieving the outcome of ensuring just responses, a key strategy was to 'ensure judicial officers, law enforcement personnel and other professionals within the legal system have appropriate knowledge and expertise'.[181] In particular, it recommended that a national education and professional development framework be developed that recognised the specific roles of those involved in the legal system. This framework should

> be designed with these specific audiences in mind; be informed by research on the social context within which violence against women and children takes place; emphasise the diversity of experiences and needs of victim/survivors of violence in the community; and enhance understanding of the intent and operation of relevant legislation.[182]

19.167 In addition, the National Council recommended that a model Bench Book be produced, in consultation with jurisdictions and as part of a national professional development program for judicial officers, which would include a social context analysis and case law.[183] This recommendation is endorsed in this Consultation Paper.[184]

19.168 The Australian Institute of Family Studies report, while not making any explicit recommendations, noted that there continued to be 'difficulties arising from a lack of understanding among professionals, including lawyers and decision-makers, about family violence and the way in which it affects children and parents'.[185]

19.169 Chisholm recommended that: there should be consideration of ways in which those working in the family law system 'might be better educated in relation to issues of family violence'; lawyers' organisations and legal education bodies 'give due weight to the importance of including programs about issues relating to family violence, including its effects on children'; and family law courts review the use of existing best practice principles in relation to family violence,[186] and consider measures to make those principles more influential.[187]

19.170 A key recommendation by the Family Law Council concerned the development of a 'common knowledge base' by an expert panel and reference group

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180 Ibid, 68.
181 Ibid, Rec 4.4.
182 Ibid, Rec 4.4.1.
183 Ibid, Rec 4.4.2. This is also discussed in Ch 15.
184 Proposal 7–3.
185 Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009), 364.
186 Family Court of Australia, *Best Practice Principles for Use in Parenting Disputes When Family Violence or Abuse is Alleged* (2009).
187 R Chisholm, *Family Courts Violence Review* (2009), Recs 4.3, 4.6, 4.8.

for those working in the family law system.[188] The reference group would include representatives of a diverse range of organisations and be involved in reviewing Australian and international research findings to ensure that the common knowledge base is evidence based and current, and advising the Government on its research agenda in the area of family violence.[189] It recommended that professional and peak bodies should use the common knowledge base to guide good practice and underpin training programs and professional development,[190] and that family pathways networks are aware of and disseminate information from the family violence common knowledge base.[191]

19.171 The Family Law Council also recommended that the expert panel and reference group 'endorse the content of education and training on family violence for those involved in the system', including family dispute resolution practitioners, lawyers, independent children's lawyers, family consultants, and experts who provide evidence to courts and judicial officers.[192] It recommended that all key players should undertake relevant ongoing training at least annually.[193] The training and education would be conducted by, or performed under the auspices of, bodies including the Family Law Section of the Law Council, state law societies and foundations, the Australian Institute of Judicial Administration, National Legal Aid and the federal family courts.[194] The Family Law Council also recommended the revision and periodic updating of the *Best Practice Guidelines for Lawyers Doing Family Law Work*.[195]

19.172 Judicial training and education were also identified as key issues by the Victorian Law Reform Commission in its reports on family violence and sexual assault laws[196] and as key areas in strategic frameworks for addressing family violence, including the *Australasian Policing Strategy for the Prevention and Reduction of Family Violence*.[197]

19.173 The Commissions endorse the recommendations of the National Council, Chisholm and the Family Law Council that there be further training of those in the family law system in relation to family violence, including judicial officers, lawyers and family dispute resolution practitioners. The Commissions make further proposals in this Consultation Paper, building upon these recommendations.

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188 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), Recs 6.1–6.7. This is also noted in Ch 15.
189 Ibid, Recs 6.3–6.4.
190 Ibid, Rec 6.7.
191 Ibid, Rec 6.9.
192 Ibid, 40.
193 Ibid.
194 Ibid.
195 Ibid, [6.8].
196 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), chs 5, 6, 12; Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), Rec 171.
197 *Australasian Policing Strategy on the Prevention and Reduction of Family Violence* (2008).

Types of education

19.174 One of the main needs for education and training is in relation to the context of family violence—matters such as its nature, its prevalence, its dynamics, its effects, and the barriers faced by victims. Understanding family violence better helps those working with victims—including judicial officers—to make better decisions.

19.175 This type of training should include the following material:

- the primacy of the safety of the victim;
- the key principles and theories of family violence;
- the role of gender in family violence;
- the different needs and contexts of particular marginalised victims, such as Indigenous victims, victims from culturally and linguistically diverse backgrounds, victims with disabilities, victims in same-sex relationships, and victims of parental abuse; and
- how to protect children from family violence.[198]

19.176 Another need is for training on the law itself. Family violence may engage a range of overlapping legal frameworks, and familiarity and competence in these frameworks by legal professionals and judicial officers is vital to improving the interaction of those legal frameworks from the perspective of victims.

19.177 Further, there is a need for education about the roles of different players within the system itself. For example, government staff and community workers benefit from understanding the legislation and how the court system works, just as the court system benefits from understanding the social and financial consequences of their decisions.[199] As discussed in Chapter 4, there are a range of legislative definitions of family violence, which do not always sit well with non-legislative definitions.[200]

19.178 Finally, training in communication skills, including cross-cultural communication, may be needed particularly to address the different needs and contexts of family violence in the case of marginalised groups.

Audiences for training

19.179 This Consultation Paper addresses the need for training of different categories of people. First, Chapters 8 and 15 address the need for training of judicial

198 S Stewart (Education Centre Against Violence), *Consultation*, By telephone, 18 February 2010.
199 The legislative framework appears to be commonly used as a basis for training, at least in NSW: Ibid.
200 This was identified by the Education Centre Against Violence as a key issue for agency workers: Ibid.

officers. In particular, there appears to be limited training of judicial officers—even those in some specialised courts—about the context of family violence. This has been identified as a key concern of those involved in the family law system.[201] This is in contrast to specialised family violence courts in the US, where training of all staff is a prominent feature.

19.180 Secondly, another key target for training is that of lawyers. Lawyers engaging with issues of family violence need to be trained to be more aware of family violence issues, and lawyers need to be equipped to navigate through the different legal frameworks that apply. Family violence should be addressed in university law courses and in continuing professional development requirements.

19.181 An issue that has been raised with the Commissions is the need for better training of lawyers at both an undergraduate level and in continuing professional development training. In the Commissions' view, the curriculum of degree courses in law and continuing professional development frameworks need to be reviewed in order to ensure that issues of family violence are being addressed appropriately.

Proposal 19–14 Australian universities offering law degrees should review their curriculums to ensure that legal issues concerning family violence are appropriately addressed.

Proposal 19–15 Australian law societies and institutes should review continuing professional development requirements to ensure that legal issues concerning family violence are appropriately addressed.

19.182 Thirdly, as addressed in the next chapter, training for specialised police units, specialised prosecutors, and those involved in specialised courts needs to be a priority.

19.183 More generally, other targets of education include: operational police; court staff, especially in specialised courts; government agency workers; and victim support workers, in the sense of understanding how the court system works. It is important, in addressing these more general training needs, that managers and policy workers be trained, in addition to frontline workers.[202]

Good practice and existing resources

19.184 Education and training may take many forms, including: formal training programs, training conducted face to face; seminars; online programs; and educational resources such as bench books or DVDs.

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201 Ibid.
202 Ibid.

19.185 There is already a wealth of information, training programs and educational resources in the field of family violence, and many committed and highly skilled professionals throughout the family violence sector. Further, there are a number of existing bodies who are responsible for training judicial officers and legal professionals. The Commissions' proposals for further training are directed towards building upon these existing resources and bodies, and existing good practice. For example, in Chapter 8, the Commissions propose that judicial training be provided in conjunction with the National Judicial College of Australia, the Judicial Commission of NSW and the Judicial College of Victoria.[203]

19.186 For example, as already noted, the Family Court of Australia has published best practice principles in relation to parenting disputes where allegations of family violence are raised.[204] The Australian Institute of Judicial Administration has published useful bench books and other resources including, relevantly, the *Solution-Focused Judging Bench Book* (including an excellent chapter on the nature of family violence), and the *Bench Book for Children Giving Evidence in Australian Courts*.[205] The Judicial Commission of NSW and the Judicial College of Victoria have published other bench books on sexual assault and sentencing issues (including family violence).[206] The Australasian Institute of Judicial Administration has made family violence the subject of a conference, and the National Judicial College of Australia has conducted a gender audit of its programs.[207]

19.187 As noted above, the *Time for Action* report recommended the development of a model bench book on family violence and sexual assault issues and the Commissions endorse this recommendation. An excellent comparative example of a bench book dealing with family violence issues has been published in Canada by the National Judicial Institute. This covers, among other things, the use and misuse of social context information; understanding and assessing family violence; and interpreting victim and offender behaviour.[208] This is a very useful precedent for a similar bench book in Australia. Legal Aid Queensland have also produced best practice guidelines for

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203 Proposal 8–13.

204 Family Court of Australia, *Best Practice Principles for Use in Parenting Disputes When Family Violence or Abuse is Alleged* (2009).

205 M King, *Solution-Focused Judging Bench Book* (2009); Australasian Institute of Judicial Administration, *Bench Book for Children Giving Evidence in Australian Courts* (2009).

206 See Judicial Commission of New South Wales, *Sexual Assault Handbook* (2009) <www.judcom.nsw.gov.au/publications/benchbks/sexual_assault/index.html> at 14 April 2010; Judicial Commission of New South Wales, *Sentencing Bench Book* (2009) <www.judcom.nsw.gov.au/publications/benchbks/sentencing/index.html> at 21 February 2010; Judicial College of Victoria, *Victorian Sentencing Manual* (2009), Judicial College of Victoria, *Sexual Assault Manual* (2008) <www.judicialcollege.vic.edu.au/publications/sexual-assault-manual> at 21 February 2010.

207 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), 117.

208 L Neilson, *Domestic Violence and Family Law in Canada: A Handbook for Judges* (2009).

working with clients affected by family violence and sexual violence,[209] which could be adopted more widely in Australia.

19.188 A number of organisations also already conduct specific training on family violence. For example, the Education Centre Against Violence (ECAV), a part of NSW Health, provides specialised training and resources for NSW Health and inter-agency workers in the field of sexual assault and domestic and family violence.[210] The Queensland Centre for Domestic and Family Violence Research and the Domestic Violence Resource Centre in Victoria also provide training and resources for the community and professionals.[211]

19.189 In 2009, ECAV conducted an audit of domestic and family violence training conducted by government and non-governmental organisations in NSW, as part of the Intersectoral Domestic & Family Violence Education and Training project, established under the NSW government's new whole of government approach to domestic and family violence in NSW. This audit involved a survey of key agencies of training conducted in those agencies in 2008. The survey was followed by a number of regional cross-sector focus groups on training needs. This audit has not yet been published.[212]

19.190 The Commissions are not aware of any similar audits being conducted in other states or territories. The Commissions consider that it is desirable, before implementing any recommendations regarding training, that a national audit of existing family violence training should be conducted, in order to ensure that existing resources are best used, to evaluate whether existing training meets best practice principles, and to promote the development of best practice in training.

Proposal 19–16 The Australian Government and state and territory governments should collaborate in conducting a national audit of family violence training conducted by government and non-governmental agencies, in order to:

(a) ensure that existing resources are best used;

(b) evaluate whether such training meets best practice principles; and

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209 Legal Aid Queensland, *Working with Clients Who Have Experienced Domestic or Family Violence* (2008); Legal Aid Queensland, *Best Practice Guidelines for Lawyers Working with Clients Who Have Experienced Sexual Violence* (2009).

210 NSW Health, *Education Centre Against Violence* <www.ecav.health.nsw.gov.au> at 14 April 2009.

211 Queensland Centre for Domestic and Family Violence Research, *Queensland Centre for Domestic and Family Violence Research* <www.noviolence.com.au/purpose.html> at 14 April 2010; Domestic Violence Resource Centre Victoria, *The Domestic Violence Resource Centre (Vic)* <www.dvirc.org.au/> at 21 February 2010.

212 S Stewart (Education Centre Against Violence), *Consultation*, By telephone, 18 February 2010.

(c) promote the development of best practice in training.

Ensuring quality

19.191 Ensuring that training is effective, and measuring the effectiveness of training, is a challenge. It is essential to ensure that training and education is sensitive, specific, and relevant to the needs of particular stakeholders and that training programs are designed with the ultimate aim of improving service responses to victims of domestic and family violence. In particular, it must recognise the time constraints of those being trained and the aversion to training that can result if training is not appropriately designed. It needs to be ongoing and substantive, rather than superficial. It also needs to be based on solid evidence, and open to diverse viewpoints. The Commissions recognise that calls for further education and training are easy to make, but that ensuring that training is relevant, useful, and has a meaningful impact on behaviour is much more difficult.

19.192 ECAV has identified a number of challenges in ensuring the quality of family violence training. These include the adequacy of the content of training (discussed above); the adequacy of the length of training, with most training programs reported on in the audit averaging less than four hours;[213] and the number and qualifications of trainers.[214] Most training is not subject to accreditation and not otherwise assessed for quality or longer term impacts on practice.[215]

19.193 One key challenge is ensuring that training is delivered in an appropriate way. Research has long proven that adults learn best by applying skills in practice and engaging in critical reflection on their own practice. However, it appears that less appropriate classroom-based learning continues to be prevalent in family violence training. It is also not generally appropriate to conduct such training through e-learning packages.

19.194 Another significant challenge is that of cost. Training needs to be resourced adequately and less visible costs of training need to be considered in funding training.

19.195 Adequate access to training is also important. All staff should be trained when they start the job, and workers in remote or regional areas need better access to training. Another issue is the impact of organisational cultures and practices in training, such as attitudes to releasing staff for training.[216]

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213 Ibid. Training can vary from competency-based courses delivered over a number of months. Clearly, the adequacy of the length of training depends greatly on the position of those being trained.

214 Training should preferably be conducted by at least two trainers, with specific qualifications or experience in family violence as well as workplace training: Ibid.

215 Ibid.

216 Ibid.

19.196 The quality and effectiveness of training also needs to be regularly monitored and evaluated. In order to do this effectively, minimum standards for assessing the quality of training in family violence have to be developed. Further, the development of training should be based on evidence of the needs of those being trained.

19.197 The Commissions' preliminary view is that it is important to propose ways to ensure the quality of training and education. A number of strategies appear necessary to achieve this aim. First, there need to be minimum standards for assessing the quality of family violence training, and training needs to be evaluated according to those standards. In addition, best practice guidelines for quality family violence training—including key issues such as the content, length, and format of such training—should be developed.

19.198 Secondly, agencies should conduct an assessment of the training needs of staff, to ensure that training is sensitive and specific to the needs of those being trained. Agencies should also foster training in conjunction with other agencies, to improve the cooperation and collaboration between key players in the legal system.

19.199 Thirdly, the Commissions support the strategy of developing a comprehensive professional development framework for professionals working in family violence, as recommended in the *Time for Action* report. It also supports proposals for a coordinating body to have a primary role in training and education, either in the form of a National Centre of Excellence (as proposed in the *Time for Action* report) or an expert panel and reference group (as recommended by the Family Law Council).

Proposal 19–17 The Australian Government and state and territory governments should ensure the quality of family violence training by:

(a) developing minimum standards for assessing the quality of family violence training, and regularly evaluating the quality of such training in relevant government agencies using those standards;

(b) developing best practice guidelines in relation to family violence training, including the content, length, and format of such training;

(c) developing training based on evidence of the needs of those being trained, with the ultimate aim of improving outcomes for victims; and

(d) fostering cross-agency and collaborative training, including cross-agency placements.

Data collection and evaluation

19.200 Finally, an important part of integrated responses is the need for ongoing data collection and evaluation. Throughout this Consultation Paper, the need for a solid evidence base has been repeatedly noted to underpin recommendations for change. The Commissions have noted repeatedly the inadequacy of current data, including: data on federal prosecutions relevant to family violence;[217] court statistics in relation to family violence-related criminal matters;[218] data on the extent of sexual violence against children, women from culturally and linguistically diverse backgrounds, Indigenous women and children;[219] data on the reporting and prosecution of sexual offences;[220] and data on victims' compensation claims in the context of family violence. The Commissions have also noted the effect of different definitions of family violence on the comparability of statistics.[221]

19.201 Other gaps in the system include the absence of a national protection order database,[222] and the absence of evaluations of restorative justice and family violence offender programs.[223] The Commissions have also noted the need for (and made some proposals in relation to) evaluations of: a Tasmanian protocol between police, the Magistrates Court and Family Court;[224] screening and risk assessment tools for family dispute resolution practitioners;[225] and specialist courts.[226]

19.202 Proposals for data collection and evaluation include proposals for: a central statistical database of federal prosecutions relevant to family violence;[227] state and territory courts to ensure that their statistical data capture separately criminal matters in a family-violence related context;[228] the establishment of a national protection order database;[229] and prioritising the collection of comprehensive data on attrition rates and outcomes in sexual assault cases.[230]

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217 See Ch 5.
218 See Ch 6.
219 See Ch 15.
220 See Ch 17.
221 See Ch 4.
222 See Chs 8 and 10. As discussed there, the Australian Government has committed to working with the states and territories to establish a national scheme for the registration of protection orders. Details have not yet been released about how such a national scheme would operate.
223 See Ch 11, 20.
224 See Ch 8, Proposal 8–11.
225 See Ch 11, Proposal 11–2.
226 See Ch 20.
227 Proposals 5–2, 5–3.
228 Proposal 6–16.
229 Proposal 10–15.
230 Proposal 17–1.

19.203 The need to build the evidence base was identified as an important theme in the *Time for Action* report.[231] It envisaged that its proposed National Centre of Excellence, discussed above, would have a 'primary role … in data collection and analysis as well as policy and program advice'.[232] Similarly, the Family Law Council's proposal for an expert panel and reference group, discussed above, would also provide coordinating bodies for improving data collection and analysis.

19.204 There are many existing examples of good practice in relation to data collection and analysis, however. As noted above, a number of integrated responses have been evaluated, including the ACT's FVIP program; the Tasmanian Safe at Home program; the DVICM model in NSW; the Joondalup specialised court in Western Australia; and the offender program in NSW. There are, however, operational challenges in ensuring the quality of evaluations. The Victorian government has also published since 1999 detailed statistical information in its Victorian Family Violence Database, the most comprehensive such database in Australia. The Australian Government has published economic analysis of the costs of family violence.[233]

19.205 As with training, the quality of data collection and evaluation is critical. Long-term programs of data collection and evaluation are necessary to ensure that systems continually improve and reflect upon their practice. The methodology of such evaluations needs to withstand scrutiny, and should enable comparisons across time and across different variables. A commitment to quality data collection and evaluation is crucial to ensure systemic change and improvement.

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231 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), 47–48, 52, 68, 89, 122, 143, 167.

232 Ibid, 181.

233 Access Economics, *The Cost of Domestic Violence to the Australian Economy, Part I* (2004); Access Economics, *The Cost of Domestic Violence to the Australian Economy, Part II* (2004).

20. Specialisation

Contents

Introduction

20.1 A common element of integrated responses, discussed in Chapter 19, is the specialisation of key personnel such as the police, prosecutors and courts. Specialisation is also a strategy that can be used outside of specific integrated response programs. The importance of specialisation warrants separate discussion in this chapter, although elements of integration and specialisation tend to co-exist and reinforce each other in best practice.

20.2 Specialisation is discussed in this chapter as a method of improving the interaction in practice of the legal frameworks governing family violence, and improving the consistency of the interpretation and application of laws for victims of sexual assault in the context of family violence, with an overall objective of improving

the safety of women and children. This chapter addresses the value of specialisation generally, and in the specific contexts of specialised police, prosecutors, and courts, as a method of improving interactions and consistency. It focuses in particular on specialised courts and describes specialised family violence and sexual assault courts in Australia and overseas. Key issues for this Inquiry are examined, including the jurisdiction and features of such courts; the potential of 'problem-solving' courts; ways of 'mainstreaming' benefits of specialised courts; and the role of the federal government in supporting specialised courts.

Advantages and challenges of specialisation

20.3 Specialised approaches have been promoted as a strategy for achieving best practice in dealing with family violence. There are a number of advantages of specialisation. One advantage of specialisation is that the majority of victims of family violence will be dealt with by those with an understanding of the nature and dynamics of family violence, and who know how to deal best with family violence. Specialists can also develop and foster a shared understanding of family violence that benefits victims of family violence. Specialists also assist victims in navigating the legal, social and health systems by connecting together legal frameworks and social services.[1]

20.4 Specialisation can also improve consistency and efficiency in the interpretation and application of laws, as a result of shared understandings and the awareness and experience of a smaller number of decision makers. Specialists can identify and solve problems more quickly. Specialists can also develop best practice, drive change in the system, and provide support for generalists. As a result of these advantages, specialists are likely to be more effective in addressing family violence, including sexual assault in the context of family violence.

20.5 One concern commonly expressed about specialisation is that, at least initially, specialised units, because of the resources they require, may only reach a certain segment of the population, meaning other victims of family violence are no better off. This can lead to a degree of arbitrariness in which some victims receive better treatment than others.

20.6 There are also challenges associated with the operation of specialised units and courts. These include: the appropriate selection of specialists; the risk specialists will suffer burnout due to the difficult nature of their work; and the ongoing need to ensure, and maintain, adequate resourcing and support.

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1 For example, magistrates in the specialised family violence courts in Victoria, discussed below, routinely ask questions in applications for protection orders about pending prosecutions or past convictions, pending or past family law proceedings, the use of counselling and drug programs, and applications for victims' compensation: *Court Observation: Sunshine Magistrates' Court of Victoria: Family Violence List*, 25 January 2010.

Specialisation v mainstreaming

20.7 There is a real debate about whether resources—such as funding, staffing and administrative support—are better concentrated in specialised units and courts, or dispersed more generally throughout the system. A number of points, however, may be made about this genuine concern.

20.8 The first point to make is that specialisation has the advantage of being a feasible and practical measure to improve the system. Stakeholders have commented on the impossibility of ensuring that all judicial officers and police, for example, understand and engage with the nature of family violence, and act consistently with each other. Specialisation does not require systemic, wholesale, changes in attitudes, behaviours and practices, which are by their nature very difficult to achieve—although, of course, highly desirable.

20.9 Secondly, the resources required by specialisation can benefit the general system as well. Professionals can be rotated in and out of specialist positions, enabling them to bring specialist knowledge into the general system. Specialists can also drive change in the generalist system, by developing and mainstreaming best practice. Improvements in efficiency through specialisation will offset some of the increases required in resources. Dedicated lists enable resources and training to be targeted more effectively. Further, specialised courts may result in better outcomes that may result in substantial savings elsewhere in government—for example, earlier and more effective legal intervention may result in fewer cases requiring child protection, and fewer demands on medical and psychological services.

20.10 Thirdly, the particular model of specialisation adopted is crucial in determining the resources required, and the coverage of specialised units. Not all elements of specialisation are resource-intensive and (as discussed later) some of those elements could be readily 'mainstreamed' into generalist courts. The model may also specify criteria that enable specialisation to be directed towards those in greatest need (as discussed below).

20.11 Perhaps most importantly, the model of specialisation need not be confined to a few geographical sites. For example, Western Australia has committed itself to expanding its network of specialised family violence courts to all metropolitan areas; Victoria has extended specialist family violence services to other courts; and the United Kingdom has committed itself to an ambitious program of 128 Specialist Domestic Violence Courts (SDVCs) by 2011.

Operational challenges

20.12 A number of issues have been identified in relation to specialised units and courts. One issue is how specialists are selected. Clearly, the attitudes and aptitudes of specialists are key to ensuring quality outcomes. Many models of specialisation,

however, lack clarity about the selection criteria for specialised roles.[2] Most specialised courts in Australia, for example, do not require specialised judicial officers to receive particular training.[3] A related issue is the need to ensure that there are incentives to take up such specialised positions. For example, in 2006, the New South Wales (NSW) Ombudsman commented in relation to specialised police known as Domestic Violence Liaison Officers (DVLOs):

> Unfortunately, there are still few, if any, incentives for police officers to act in the role, apart from the availability of regular daytime shifts. Conversely, the inability of DVLOs to work 12-hour shifts and have up to six consecutive rest days is one of the less appealing aspects of the role for many officers. There is no special allowance payable to DVLOs, and no recognised career path associated with the position. Partly for these reasons, there is little status attached to being a DVLO.[4]

20.13 Stakeholders have also commented on the difficult and traumatising nature of the work specialists undertake, particularly in the area of family violence and sexual offences. Specialists in this field of work may suffer 'burnout' as a result, unless care is taken. This may be a factor to consider in developing models of specialisation. For example, it may be beneficial to consider a rotation model of specialisation. As well, judicial officers and other staff could be provided with counselling including, for example, debriefing sessions to deal with the traumatic nature of their job.

20.14 Another issue is the need to ensure that adequate resources are available for specialists, and that there is a commitment to long-term resourcing. For example, the NSW Ombudsman noted that the effectiveness of DVLOs was being hampered by inadequate access to vehicles, computers and mobile phones.[5]

Specialised police

20.15 In a number of jurisdictions, police officers specialise in family violence and sexual assault. The role of specialised police in the context of sexual assault is discussed in Chapter 17. In that Chapter, the Commissions ask questions about the effectiveness, and the need for training and resources.[6] This section briefly describes the role of specialised police in the context of family violence outside of the context of sexual assault.

20.16 As discussed in Chapters 5 and 6, police have a major role both in the criminal legal system and in applying for protection orders in the civil system. Most Australian

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2 See, eg, NSW Ombudsman, *Policing Domestic Violence in NSW* (1999), 47–48. This issue was not addressed in the report of the NSW Ombudsman, *Domestic Violence: Improving Police Practice* (2006).

3 Under s 4H of the *Magistrates' Court Act 1989* (Vic), the Family Violence Court Division is constituted only by magistrates gazetted by the Chief Magistrate. The Chief Magistrate is required to 'have regard to the magistrate's relevant knowledge and experience in dealing with matters relating to family violence'.

4 NSW Ombudsman, *Domestic Violence: Improving Police Practice* (2006), 27.

5 Ibid, 29.

6 Questions 17–1, 17–2.

jurisdictions have established specialised police roles in relation to family violence. Most commonly, the functions of such specialised positions include:

- development of police strategies and policies concerning family violence;
- development and representation of inter-agency networks, and coordination and liaison with relevant government and non-government agencies;
- conducting training, education and research on family violence issues;
- providing advice and guidance to other police officers on family violence issues;
- supervising, monitoring or providing quality assurance in relation to police responses to family violence incidents;
- liaising with courts and prosecutors; and
- providing information and support to victims.[7]

20.17 The Tasmanian specialised units have other responsibilities, including providing case coordination; attending integrated case coordination meetings, assessing applications to vary police family violence orders, and conducting safety audits and preparing safety plans.[8] These responsibilities arise under the 'Safe at Home' integrated response in place in that jurisdiction.[9]

20.18 NSW and Queensland also have specialised police prosecutors who apply for protection orders on behalf of victims. In both jurisdictions, reports have noted that the heavy workloads involved and limited time for preparation reduce the quality of the representation.[10]

20.19 Another factor to bear in mind is the release of the *Australasian Strategy on the Prevention and Reduction of Family Violence* in November 2008. This strategy includes principles and objectives, as well as a program for action. Relevantly, measures in this program include an audit of training and a review of workforce development; audits of research and the development of an Australasian knowledge base of best practice across jurisdictions; and audits of current legal and policy responses, including confirming the role of specialised responses.[11]

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7 Victim support is discussed in Ch 19.
8 Successworks, *Review of the Integrated Response to Family Violence: Final Report* (2009), 11–12.
9 The Safe at Home project is discussed in Ch 19.
10 Queensland Crime and Misconduct Commission, *Policing Domestic Violence in Queensland* (2005), 64–65; New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report No 103 (2003), [3.21]; NSW Ombudsman, *Domestic Violence: Improving Police Practice* (2006), 33.
11 *Australasian Policing Strategy on the Prevention and Reduction of Family Violence* (2008).

20.20 There are wide variations in the structure of specialised police. For example, Victoria and Western Australia employ more comprehensive models that provide for specialisation in policy and strategy, inter-agency and community engagement, and training and advice. In other jurisdictions, such as South Australia and the Northern Territory, the role of DVLOs appears primarily to be as a contact point for victims.

20.21 There is little information or research, on the role and value of specialised police in Australia. However, the value of the DVLO in NSW has been recorded by the NSW Ombudsman:

> The overall message communicated was that an effective DVLO is indispensable. Services were forthcoming with acknowledgement of and praise for such DVLOs. They commonly expressed to us the view that DVLOs should have more seniority as well as support at the corporate and local operational level. The following comments, by a women's refuge manager and a Regional Violence Prevention Specialist respectively, sum up the feelings of many people with whom we spoke:
>
> *DVLOs almost always try to help. Some go far beyond what is required of them.*
>
> *DVLOs often provide a positive face of police to the community. They are … in the main excellent facilitators of action around the policing of domestic violence.*[12]

20.22 In the US, 11% of police departments have specialised family violence units. Research there indicates that specialised units which emphasise repeated victim contact and evidence gathering

> have been shown to significantly increase the likelihood of prosecution, conviction and sentencing. Specialized domestic violence units are generally associated with more extensive inquiries by police department call takers … Domestic violence units are also more likely to amass evidence to turn over to prosecutors.[13]

20.23 Further, there was evidence that specialised responses were associated with victims leaving their relationships earlier; reporting repeated incidents more frequently; and being more likely to secure protection orders.[14] There is some evidence that they also reduce violence.[15]

20.24 Specialisation of police typically occurs in three key areas: as a point of contact and support for victims; in promoting best practice through training, advice, and monitoring; and in developing and shaping policy and strategy, and liaising with other agencies.

20.25 As a primary contact for victims, specialised police would have the following key advantages. They would have greater understanding of the nature and dynamics of family violence; be able to assist victims in navigating the system at an early point in

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12 NSW Ombudsman, *Domestic Violence: Improving Police Practice* (2006), 27.

13 A Klein, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges* (2009) National Institute of Justice, ch 5, section 2.

14 Ibid, ch 5, section 3.

15 Ibid, ch 5, section 4.

the process, especially between the civil and criminal legal frameworks; and could promote and drive best practice in police responses. In providing training, advice, and monitoring, specialisation would promote consistency in the application of laws, and develop and promote best practice. The development and shaping of policy and strategy by specialists would also promote consistency, efficiency, best practice, and effectiveness of strategies. Finally, a specialised role would facilitate ongoing inter-agency collaboration (discussed in Chapter 19).

Commissions' views

20.26 There is substantial merit in the use of specialised police units. Liaison officers provide an important early point of contact, and continuity in contact, for victims and assist them in navigating the legal system. Specialised police at all levels provide contact points for inter-agency collaboration, and may form a key element of integrated responses. Further, monitoring and supervision by specialised police is likely to improve consistency in the application of laws in the context of family violence. In particular, the comprehensive models in Victoria and Western Australia, which designate specialised units at different levels of command and across a wide range of functions, appear most promising. The use of specialised police, however, is a complement to, rather than a substitute for, important general measures such as a Code of Practice and training of operational police.

20.27 The Commissions consider that each state and territory police force should ensure that:

- victims have access to a primary police contact person, who specialises in, and is trained in, family violence issues;
- a police officer is designated as a primary point of contact for government and non-government agencies involved in the family violence system;
- specially trained police have responsibility for supervising, monitoring or assuring the quality of police responses to family violence incidents, and providing advice and guidance to operational police and police prosecutors (who may apply for protection orders on behalf of victims) in this regard; and
- there is a central forum or unit responsible for policy and strategy concerning family violence within the police.

20.28 In expressing these views, the Commissions are aware that there is relatively little information on the roles of specialised police, and relatively little empirical evidence of their value. Further, the Commissions recognise that police services have different needs, strengths, policy frameworks and organisational structures, and operate in different policy and operational contexts.

20.29 In light of this, the Commissions invite stakeholders to provide further information about the operation of specialised police units, and any other issues that arise in relation to them.

Proposal 20–1 Each state and territory police force should ensure that:

(a) victims have access to a primary contact person within the police, who specialises and is trained in family violence issues;

(b) a police officer is designated as a primary point of contact for government and non-government agencies involved in responding to family violence;

(c) specially trained police have responsibility for supervising, monitoring or assuring the quality of police responses to family violence incidents, and providing advice and guidance to operational police and police prosecutors in this regard; and

(d) there is a central forum or unit responsible for policy and strategy concerning family violence within the police.

Question 20–1 What issues arise in practice concerning the role and operations of police who specialise in family violence matters?

Specialised prosecutors

20.30 This section deals with prosecutors responsible for criminal prosecutions in the context of family violence. The term 'prosecutors' is sometimes also used to describe police officers who represent police applying for protection orders—which are civil in nature—on behalf of victims of family violence.[16] Prosecution of sexual assault, in the context of family violence, is also discussed in Chapter 17.

20.31 In some jurisdictions, there are prosecutors who specialise in dealing with family violence or sexual assault. The ACT Office of the Director of Public Prosecutions (ODPP), for example, has for several years had specialised family violence prosecutors as part of the Family Violence Intervention Program (FVIP).[17] They are assisted by three witness assistants. The ODPP states that:

> Having specialist prosecutors allows for a consistency of approach and for continuity for victims. Specialisation also enhances the relationships with other essential

16 See Ch 6.

17 The Family Violence Intervention Program is discussed in Ch 19. In 2009–2010, the ODPP intend to establish a specialist unit for sexual offences as well: Office of the Director of Public Prosecutions (ACT), *Annual Report 2008–2009* (2009), 16.

> agencies—the police, the Office of Children and Youth and Family Support, the Domestic Violence Crisis Service and Victims Support ACT.[18]

20.32 The Tasmanian Safe at Home project included funding for six specialised family violence prosecutors. However, the review of the Safe at Home project in 2009 reported:

> This aspect of Safe At Home has not been implemented as intended. Police report that difficulties have arisen with the allocation of family violence clients to specialist prosecutors because of the limited capacity of the Courts to cluster family violence matters into specialist family violence listings.[19]

20.33 This experience may be a result of a smaller jurisdiction, where specialised approaches are less likely to achieve efficiencies because of the smaller number of cases.

20.34 As discussed below, specialised prosecutors are a feature of some specialised courts in Australian jurisdictions. For example, the Victorian family violence courts included funding for specialist police prosecutors. There has been variation in implementing this aspect of the courts, with a reluctance to allocate and maintain the specialist role in all specialised courts. However, it is reported that, in practice, many police prosecutors undertake this role with great enthusiasm.[20]

20.35 Specialised prosecutors are also used in related fields. For example, Victoria has established a Specialist Sexual Offence Unit, including a regional office in Geelong. The Office of Public Prosecutions (OPP) in that state reports:

> The work of the OPP's Specialist Sexual Offences Unit … has proven that the co-location of specialist prosecutors and solicitors under the leadership of an experienced Crown Prosecutor can produce significant improvements in the handling of such sensitive and traumatic prosecutions.[21]

20.36 In the US, specialised family violence prosecutors are more common. The National Institute of Justice has helpfully summarised the research available in the US on the effectiveness of specialised prosecutors. It notes that the research is limited and, because of the variation of programs and their co-existence with specialised courts in many cases, it is 'difficult to pinpoint what works and what does not'.[22] However, 'in general, the research suggests that these programs work well on a number of levels'.[23] There is evidence of increased victim satisfaction; significant increases in prosecution

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18 Ibid, 15.

19 Successworks, *Review of the Integrated Response to Family Violence: Final Report* (2009), 12.

20 Magistrate Noreen Toohey, *Consultation*, Melbourne, 25 January 2010.

21 Office of Public Prosecutions and Director of Public Prosecutions (Vic), *Annual Report 2008–2009*, 7. The Victorian OPP also has legal prosecution specialists in other areas, such as organised crime: 17.

22 A Klein, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges* (2009) National Institute of Justice, ch 6.

23 Ibid.

and conviction rates; and more robust outcomes that are better monitored and enforced.[24]

Commissions' views

20.37 There may be significant value in specialised prosecutors dealing with family violence issues, including cases of sexual assault. This appears to have been of significant benefit in the ACT, and the weight of evidence in the US suggests that, provided such units are adequately funded, they are effective. There are also potential benefits when specialised prosecutors work in conjunction with specialised courts, as noted below, as their greater understanding of the nature and dynamics of family violence and sexual assault improves outcomes and levels of victim satisfaction.

20.38 The Commissions consider, however, that further exploration of this issue is required to justify making a proposal. It may be that other options, such as specialised training for all prosecutors or prosecution guidelines specific to family violence (as, for example, already exist in some Australian jurisdictions),[25] are better approaches. The Commissions invite stakeholders to provide further information on whether there is value in creating positions for specialised prosecutors for family violence matters.

Question 20–2 What are the benefits of specialised family violence prosecutors, and the disadvantages or challenges associated with them, if any? Could the benefits of specialised prosecutors be achieved in other ways, such as by training or guidelines on family violence?

Specialised courts

20.39 The use of specialised courts dealing with family violence are of particular interest to this Inquiry. Since the 1990s, specialised courts have flourished in Australia and overseas, in the form of drug courts, mental health courts, community courts and—most importantly, for the purposes of this Inquiry—family violence courts. In Australia, family violence courts now operate in the NSW, Victoria, Queensland, Western Australia (WA) and the ACT.[26] Such a court has also been recommended recently for Tasmania.[27] In the US, where they originated, over 200 family violence courts now exist,[28] and since 1999 the UK has rolled out over 120 SDVCs in an

24 Ibid.

25 See Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, Appendix E; Office of the Director of Public Prosecutions (NT), *Guidelines*, ch 21. There is also (limited) specific reference to family violence in Office of the Director of Public Prosecutions (WA), *Statement of Prosecution Policy and Guidelines* (2005), [41]–[44].

26 An overview of these courts is set out below.

27 Successworks, *Review of the Integrated Response to Family Violence: Final Report* (2009), 64–65.

28 A national project on such courts in the US identified 208 courts with specialised dockets or dedicated judges at the end of 2009, although this was restricted to courts dealing with criminal cases: M Labriola and others, *A National Portrait of Domestic Violence Courts* (2009) Center for Court Innovation, ix. See

ambitious program.[29] Canada has several well-established specialised family violence courts.[30] Some have also been established in New Zealand.[31]

20.40 Specialised courts for sexual assault have also been established in some countries, most notably in South Africa. Specialised sexual assault courts are much less common than family violence courts. A specialised child sexual assault jurisdiction has been piloted in NSW, and Victoria operates special sexual offences lists.[32] Specialised sexual assault courts are considered in this section.

Defining 'specialised courts'

20.41 This section uses the term 'specialised courts' to refer to specialised courts designed to improve experiences and outcomes for victims and the community at large through a range of features including specialist personnel within the courts; the provision of victim and defendant support services; and collaboration with other agencies and non-governmental organisations. However, as discussed further below, the model of specialisation and the features of such courts differ markedly. The term 'family violence courts' is used to refer to specialised courts dealing with family violence.

20.42 It is important to define here the term 'specialised courts', because this term can be used to refer to a number of different things. For example, courts that deal with a particular subject-matter—such as the Family Court—'specialise' in that subject-matter. This section does not deal with such courts.[33]

20.43 The term can also be confusing in that, generally speaking, specialised courts are not usually separately constituted courts, but rather operate as divisions or special programs within existing courts, usually in a local or magistrates Courts.

20.44 Specialised courts, as the term is used in this section, should also be distinguished from specialist *approaches* adopted by courts, such as judicially managed lists and case management. However, a specialised court will often also adopt

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DE Shelton and E Donald, *The Current State of Domestic Violence Courts in the United States, 2007* (2007); S Kelitz, R Guerrero, AM Jones and DM Rubio, *Specialization of Domestic Violence Case Management in the Courts: A National Survey* (2001) National Center for State Courts; JA Helling, *Specialized Criminal Domestic Violence Courts* (2005).

29 See Crime Reduction Centre Information Team, *Safety and Justice: The Government's Proposals on Domestic Violence* (2003) Home Office.

30 See L Tutty, J Ursel and F Douglas, 'Specialized Domestic Violence Courts: A Comparison of Models' *What's Law Got to Do With It? The Law, Specialized Courts and Domestic Violence in Canada* (2008) 69.

31 See New Zealand Family Violence Clearinghouse, *Evaluating the Waitakere Family Violence Court* (2007).

32 This was based on the recommendation of the Victorian Law Reform Commission that a special list be piloted for child sexual assault and sexual assault for those with cognitive impairments: Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), Rec 50.

33 The Family Court of Australia and the Family Court of Western Australia is dealt with in detail in Chs 2, 8, 9, and 14. The Magellan and Columbus programs in the Family Court are considered in Ch 14.

specialist approaches. A common approach adopted in many (largely metropolitan) courts in Australia is to operate a dedicated or 'special' list, in which certain categories of cases are heard on certain days of the week. It is common, for example, for Australian metropolitan courts to have days of the week reserved for hearing applications for protection orders. In some, but not in all cases, these may be heard by a specially assigned judicial officer. This section does not discuss courts that simply adopt such a dedicated list, although all specialised courts also use dedicated lists.

20.45 It is also important to note that some family violence courts are located within a broader strategy, often known as an 'integrated response' or 'coordinated community response' to family violence. Integrated responses are considered in detail in Chapter 19. In Australia, the family violence court in the ACT is located within such an integrated response, the FVIP.[34] Robyn Holder, the Victim of Crimes Coordinator in the ACT and chair of the steering committee of the FVIP, has noted that it may be more appropriate to refer to the ACT as a 'specialist jurisdiction' rather than focus on the element of the specialised court.[35]

Family violence courts in Australia

20.46 As noted above, family violence courts have been established in NSW, Victoria, Queensland, WA and the ACT. All these are part of the local or magistrates court in that jurisdiction. In most of these jurisdictions, there is either one or only a few such courts, with the exception of WA. The models of specialisation, and the elements of these courts, differ quite significantly.

Jurisdiction

20.47 One particularly important way in which these courts differ is in their jurisdiction. Although all state and territory local or magistrates courts have broad jurisdiction over a range of matters—including criminal matters, protection orders, and family law (to the extent that this is conferred)—the full extent of this jurisdiction is not necessarily exercised in family violence courts. A commentator in the US has identified three different models of family violence court, depending on the jurisdiction that is covered:

- Dedicated Civil Protection Order Docket: the operation of a specialised 'list' or docket dealing with protection orders;

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34 The 2009–2010 Queensland family violence program of action also indicates that the Rockhampton court will form part of an integrated response in that community: Queensland Government, *For Our Sons and Daughters: A Queensland Government Strategy to Reduce Domestic and Family Violence Program of Action 2009–2010* (2009), 5.

35 R Holder, 'The Emperor's New Clothes: Court and Justice Initiatives to Address Family Violence' (2006) 16 *Journal of Judicial Administration* 30, 33.

- Criminal Model: the separation of criminal cases dealing with offences relating to family violence for specialised handling by a particular judicial officer or judicial officers; and

- Domestic Violence Courts with Related Caseload: this model merges the civil proceedings related to family law and protection orders with related criminal proceedings.[36]

20.48 As noted above, many local and magistrates courts in Australia operate a specialised list for protection orders.[37] Family violence courts in NSW, WA, and the ACT—described below—follow the 'criminal model', in that they deal exclusively with criminal matters related to family violence. This is also the model used in the SDVCs in the UK. The South Australian specialised family violence court deals with both criminal matters and applications for protection orders.

20.49 In Australia, only the Family Violence Court Division (FVCD) of the Magistrates' Court of Victoria operates a broader model, exercising jurisdiction over protection orders; summary criminal proceedings; committals for indictable offences; civil personal injury claims; compensation and restitution; and (to the extent conferred upon the Magistrates' Court) jurisdiction over family law and child support.[38] It can also sit as the Victims of Crime Assistance Tribunal to hear applications for statutory victims' compensation in family violence cases.[39]

Elements

20.50 Family violence courts typically include some of the following elements:

- *Specialised personnel*: Typically, there are specialised judicial officers, but it may also extend to specialised prosecutors, lawyers, victim support workers, community corrections officers, and police. In some cases, these personnel may be chosen because of their specialised skills, or be given specialised training in family violence.

- *Specialised procedures:* Commonly, these will include special days in court dedicated to family violence matters ('dedicated lists'). They may include 'case coordination mechanisms' to identify, link, and track cases related to family violence, such as integrated case information systems, or the use of 'specialised

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36 E Sack, *Creating a Domestic Violence Court: Guidelines and Best Practices* (2002) Family Violence Prevention Fund. Sack further identifies three sub-categories within the Domestic Violence Courts with Related Caseload, depending upon which (if any) related cases are assigned to a single judge.

37 The Family Court of Western Australia, which exercises federal family law jurisdiction as well as non-federal jurisdiction in relation to adoption and surrogacy and child protection, is also not considered here, although it might be conceived of as a 'specialised court' in some ways. This court is discussed in Ch 2.

38 *Magistrates' Court Act 1989* (Vic) s 4I.

39 Department of Justice—Victoria, *Family Violence Court Division—Overview* <www.justice.vic.gov.au> at 10 December 2009.

intake procedures' (specialised procedures that apply when a victim first enters the court system).[40] They may also involve other types of procedures, such as special practice directions, fast-tracking of cases, or case management.

- *Emphasis on support services:* Typically, there will be a worker—employed by the court or an independent advocate—available to support victims in managing the court process, and often these workers are responsible for referring victims to other services they may need, such as counselling. In some courts, there may also be workers to assist defendants or children. There may also be legal advice or representation available.

- *Special arrangements for victim safety:* Some courts will also include specially designed rooms to ensure the safety of victims, and may offer facilities which enable vulnerable witnesses to give evidence remotely.

- *Offender programs:* Some courts have the capacity to order or refer an offender to a program which aims to educate the offender and address personal issues to prevent re-offending, usually through counselling. This is discussed further below.

- *Problem-solving or therapeutic approaches:* Some courts adopt broader approaches aiming to 'solve problems' and achieve therapeutic outcomes. This is discussed further below.

20.51 The following table sets out the elements of each family violence court in Australia.[41] A brief description of the courts in each jurisdiction follows.

40 S Kelitz, R Guerrero, AM Jones and DM Rubio, *Specialization of Domestic Violence Case Management in the Courts: A National Survey* (2001) National Center for State Courts, 5–6, describes case management in the US courts.

41 This is based on published information about the courts available as at January 2010, and in some cases there is insufficient information to establish whether the court includes a particular element.

Table: Family Violence Courts in Australia

Features	ACT	NSW	Qld
Locations	Canberra	Campbelltown; Wagga Wagga	Rockhampton
Jurisdiction	Criminal matters pre-trial	Criminal matters pre-trial	Criminal matters
Specialised personnel	Judicial officers, prosecutors, police	None	Prosecutors
Specialised training	Prosecutors and police	None	None
Special procedures	Dedicated list; case tracking; practice direction	Case tracking; practice direction	Dedicated list
Victim support services	Witness assistant; Domestic Violence Crisis Service	Victim advocate; referrals to services	Victim support workers; referrals to services
Victim safety arrangements	None	'Safe' waiting rooms	Remodelling of facilities
Inter-agency collaboration	Part of coordinated community response; coordinating committee; protocols; memorandums of understanding; case tracking	Management plan; memorandum of understanding; strategic and operational committees at senior and regional level; case tracking	Stakeholder meetings; improved communication and liaison
Offender programs	Yes	Yes	Yes

Table continued: Family Violence Courts in Australia

Features	SA	Vic	WA
Locations	Elizabeth; Port Adelaide; Adelaide	Ballarat; Heidelberg[42]	Joondalup; Fremantle; Rockingham; Midland; Armadale; Perth
Jurisdiction	Criminal matters; protection orders	Criminal matters; protection orders; civil and statutory compensation;[43] family law[44]	Criminal matters (with some trials) and protection orders
Specialised personnel	Judicial officers	Judicial officers, prosecutors, registrars, legal aid lawyers for victims and defendants	Judicial officers, police prosecutors, defence lawyer[45]
Specialised training	None	All	None
Special procedures	Dedicated list	Dedicated list	Dedicated list; case management
Victim support services	Support workers for victim, defendant and children; counselling for children and victims[46]	Victim and offender support workers; family violence outreach workers; referrals to services	Victim support worker; referrals services
Victim safety arrangements	None	Extra security officers; remote witness rooms	None
Inter-agency collaboration		Court users group	Steering committee for policy; case management
Offender programs	Yes	Yes	Yes

42 This column refers to the Family Violence Division of the Magistrates' Court of Victoria. There are also courts which have a Specialist Family Violence Service, which is discussed further below.

43 The Division sits as the Victims of Crime Assistance Tribunal to hear claims of statutory victims' compensation.

44 To the extent that jurisdiction is conferred on the Magistrates' Court.

45 Only in Joondalup is there a dedicated defence lawyer.

46 Counselling may be available to children and victims where the offender is in an offender program.

Australian Capital Territory

20.52 As noted above, one of the components of the ACT's integrated response, the FVIP, is a specialised family violence list in the ACT Magistrates Court.[47] This deals with criminal charges related to family violence, which are managed pre-trial by a coordinating magistrate. The Family Violence list does not deal with protection orders.[48] Matters tagged as family violence-related are heard weekly. A practice direction imposes tighter time limits and earlier disclosure of evidence. The court has the benefit of specialised police officers and (as discussed earlier) specialised family violence prosecutors. Victim support services include Police Victim Liaison Officers, a Witness Assistant, and the Domestic Violence Crisis Service, a victim support organisation.[49]

20.53 Independent evaluations of the program indicate that the specialised court has led to earlier finalisation of cases through guilty pleas, with the majority of cases being finalised within 13 weeks.[50] Earlier evaluations also recorded positive responses by the majority of victims to the court process.[51]

New South Wales

20.54 In 2005, two family violence courts, known as the Domestic Violence Intervention Court Model (DVICM), were piloted in Wagga Wagga and Campbelltown. These courts focused on inter-agency collaboration through a Memorandum of Understanding between the NSW Attorney-General's Department, the police, the Department of Community Services,[52] the Department of Corrective Services, the Legal Aid Commission of NSW and the NSW Department of Housing.

20.55 The DVICM program focused on improved evidence collection by police; automated referrals of victim services; and increased information-sharing and co-ordination from key agencies through Regional Reference Groups and Senior Officers Groups. The Local Court implemented a Practice Note requiring earlier disclosure of evidence,[53] and stakeholder agencies meet weekly to update matters before court.

20.56 An independent evaluation in 2008 indicated that the pilots did not have any significant impact on the finalisation of cases by early pleas, the withdrawal of

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47 The FVIP is discussed in Ch 19.

48 Protection orders are dealt with by the Protection Unit of the Magistrates Court.

49 The Domestic Violence Crisis Service offers court support, but it notes that it has been forced to reduce the availability of this service significantly, because of inadequate resources: Domestic Violence Crisis Service (ACT), *Annual Report 2008* (2008), 45.

50 Urbis Keys Young, *Evaluation of the ACT Family Violence Intervention Program Phase II* (2001); Urbis Keys Young, *Evaluation of the ACT Family Violence Intervention Program Phase II* (2001). Another evaluation was conducted in 2009 but has not yet been published.

51 Urbis Keys Young, *Evaluation of the ACT Family Violence Intervention Program Phase II* (2001).

52 Now known as Community Services.

53 Local Court, *Local Court Practice Note No. 1 of 2006*.

prosecutions, the time for finalisation, or penalties.[54] The most successful aspect of the pilot was increased access to victim support.[55] While the DVICM has been made permanent in those locations, there are no plans to roll it out elsewhere in NSW. However, practice directions mandating stricter time limits have been issued in other local courts.[56]

Queensland

20.57 A pilot was developed after 2006 in Rockhampton Magistrates Court, under the leadership of the Chief Magistrate. The pilot included a specialised police prosecutions team; a dedicated list; domestic violence support officers in court; improved information and referrals to service providers; changes to police procedure; greater communication and liaison through regular stakeholder meetings and co-ordination; and offender programs. While the pilot began without funding,[57] the 2009–10 Queensland family violence strategy indicates that the specialised court program will form part of an integrated response being tested in Rockhampton.[58]

South Australia

20.58 South Australia has three Family Violence Courts. Unlike the model used in NSW, Queensland and the ACT, these hear both criminal matters and protection order matters. Where both criminal and civil matters arise in a case, these are heard together. While the courts have specially assigned magistrates, there is no specialised training for judicial officers.[59]

20.59 The South Australian model also provides support workers for victims, offenders and children; and can refer offenders to offender programs (known as Violence Intervention Programs), with access to counselling for children and women victims.[60]

Victoria

20.60 The FVCD of the Magistrates' Court of Victoria, established in 2005, has both the broadest jurisdiction and the most features of a family violence court. In addition, a Specialist Family Violence Service (described below) operates in courts in Frankston, Melbourne, Sunshine and Werribee.

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54 L Rodwell and N Smith, *An Evaluation of the NSW Domestic Violence Intervention Court Model* (2008) NSW Bureau of Crime Statistics and Research.

55 Ibid, 55.

56 NSW Government Department of Premier and Cabinet (Office For Women's Policy), *Discussion Paper on NSW Domestic and Family Violence Strategic Framework* (2008).

57 A Hennessy, *Specialist Domestic and Family Violence Courts: The Rockhampton Experiment* (2008) <www.archive.sclqld.org.au/judgepub/2008/Hennessy160608.pdf> at 2 October 2009.

58 Queensland Government, *For Our Sons and Daughters: A Queensland Government Strategy to Reduce Domestic and Family Violence Program of Action 2009–2010* (2009), 5.

59 Deputy Chief Magistrate Andrew Cannon and R McInnes, *Consultation*, By telephone, 25 September 2009.

60 Courts Administration Authority South Australia, *Magistrates Court Violence Intervention Program* <www.courts.sa.gov.au/courts/magistrates/index.html> at 16 February 2010.

20.61 The Victorian Government committed $5.2 million over four years to the resourcing of the FVCD, with a separate allocation for the offender programs associated with the FVCD.[61] Funding has been continued for those two sites. The FVCD was evaluated in 2009, but the evaluation has not yet been made public.

20.62 The FVCD differs from other Australian family violence courts in a number of ways. It is the only such court that has a legislative base.[62] As noted above, it is also the only such court that exercises jurisdiction over civil compensation claims, statutory compensation claims, and family law and child support matters as well as criminal matters and protection orders.[63] The same judicial officer hears related cases, but each case is heard using the applicable standard of proof and procedure. Judicial officers report satisfaction with managing these processes.[64]

20.63 At its inception, all judicial officers and staff received specialised training, with some training continuing afterward. In addition to specialised magistrates and police prosecutors, it also has support workers for victims and offenders, family violence outreach support workers, legal aid and community lawyers for victims and defendant, and a specialised registrar. The FVCD is therefore the closest example of a 'one stop shop' model for victims of family violence in Australia. As it is a pilot, however, it is available only where victims or offenders are residing in, or the family violence was committed in, postcodes specified by a gazetted notice.[65]

20.64 The Specialist Family Violence Service courts have similar features, with three key exceptions: they do not formally have the same combined jurisdiction of the FVCD (although the Victims of Crime Assistance Tribunal is co-located with the family violence registry in Melbourne);[66] they do not have power to order counselling; and they do not have a support worker for the defendant.

20.65 Victoria has also established a Neighbourhood Justice Centre in 2007 as a pilot program. This is a multi-jurisdictional court focused on the neighbourhood of the City of Yarra, which sits as a Magistrates' Court and Children's Court, Victorian Civil and Administrative Tribunal (VCAT) and Victims of Crime Assistance Tribunal (VOCAT). Its jurisdiction in relation to family violence is the same as those in the FVCD.[67] In addition, it has jurisdiction over guardianship and administration, residential tenancies (sitting as VCAT) and victims' compensation claims (sitting as

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61 Department of Justice (Vic), *Family Violence Court Division—Overview* <www.justice.vic.gov.au/> at 16 February 2010.

62 It is established by *Magistrates' Court Act 1989* (Vic) s 4H.

63 Ibid s 4I.

64 Magistrate Noreen Toohey, *Consultation*, Melbourne, 25 January 2010.

65 *Magistrates' Court Act 1989* (Vic) s 4I(4).

66 As noted above, all magistrates courts have the same jurisdiction as the FVCD. While there is no legislative support for co-listing of cases in the Specialist Family Violence Service courts, this does occur in practice at the direction of some specialist judicial officers.

67 Department of Justice (Vic), *Neighbourhood Justice Centre* (2009) <www.neighbourhoodjustice.vic.gov.au/site/page.cfm> at 16 February 2010.

VOCAT). It is a 'one stop shop' for a range of services including counselling, legal advice and representation, mediation, housing support, personal and material aid, and employment and training support. It also includes restorative justice processes.[68]

20.66 The Neighbourhood Justice Centre has an on-site officer from the family law courts on some mornings. The officer can provide forms, contact details for referral agencies, advice on Family Court and Federal Magistrates Court processes, advice on what clients can expect in a court room, and confirm listing dates for matters already before the family courts.[69]

Western Australia

20.67 Western Australia has developed the most geographically extensive program of family violence courts in Australia, with courts in Joondalup, Fremantle, Rockingham, Midland, Armadale, and Perth. The plan is to roll out such courts in all metropolitan areas of Western Australia.[70]

20.68 After Victoria, the Western Australian model has the most features of a family violence court in Australia. While there are variations between the individual courts, in general the courts can deal with criminal matters pre-trial, and have some capacity to deal with trials as well as protection orders. There are specialised magistrates and police prosecutors, support workers, a coordinating committee for strategy and policy, and inter-agency case management for operational matters.[71] Offender programs are available and there is some monitoring of progress by judicial officers halfway through the program. It also provides customised programs for Indigenous and other cultural groups.

20.69 The Joondalup court was evaluated in 2000–01. The evaluation found that far more charges were laid as a result of a specialised police family violence investigation unit.[72] Only slightly more offenders were referred to offender programs in the pilot court. More breaches of the requirements of the program were detected and recorded in the pilot court, which may have been the result of case management. Case management was seen to be beneficial, and overall the court was described as a 'qualified success'.[73]

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68 Restorative justice processes are discussed in Ch 11.

69 Department of Justice (Vic), *Neighbourhood Justice Centre* (2009) <www.neighbourhoodjustice.vic.gov.au/site/page.cfm> at 16 February 2010.

70 Law Reform Commission of Western Australia, *Court Intervention Programs*, Consultation Paper (2008), 132–133.

71 As noted in the table, above, there is a dedicated defence lawyer at Joondalup.

72 In 39% of cases as compared to 7.1% in non-specialised districts: Law Reform Commission of Western Australia, *Court Intervention Programs*, Consultation Paper (2008), 131.

73 Ibid.

International comparisons

20.70 This section discusses some overseas models of specialised family violence courts that may be instructive. As noted above, there are over 200 courts in the US operating specialised family violence courts. More than half of the courts have been established in New York, Washington, Florida, California, and Alabama.[74] Many of these, however, simply operate dedicated lists for matters relating to protection orders. Many others adopt the 'criminal model' of streaming all criminal matters related to family violence.[75]

20.71 Perhaps the most notable example is the New York model, which includes both Domestic Violence Courts and Integrated Domestic Violence Courts (IDVCs). There are now 44 IDVCs in operation, servicing approximately 90% of the population of New York.[76] While the Domestic Violence Courts deal with criminal matters relating to intimate partners, cases are transferred to the IDVCs where there are overlapping civil, criminal, or family law claims arising out of a family violence incident between intimate partners.[77] In IDVCs, a single judge conducts all related criminal, civil and family law matters from beginning to end.[78] As in other specialised courts, the cases are not consolidated, but rather remain separate civil, criminal, and family law matters. As a result, each case has its own burden of proof and is conducted as any other like case would be. A resource coordinator keeps judges informed of offender compliance and refers the defendant to appropriate services.

20.72 Another notable model is the Domestic Violence Unit in the District of Columbia, which includes a fully integrated court that handles civil, criminal, and family law matters in relation to disputes 'where the parties are related by blood, legal custody, marriage, cohabitation, a child in common, or a romantic relationship'.[79] The court hears protection order hearings and all misdemeanour criminal charges and, once a case has been brought to it, any family law matters involving the same parties. These are consolidated and heard in the Domestic Violence Court.[80] The court is serviced by two intake centres that serve as a 'one stop shop' for victim support (discussed further

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74 S Moore, *Two Decades of Specialized Domestic Violence Courts: A Review of the Literature* (2009) Center for Court Innovation, 2.

75 See DE Shelton and E Donald, *The Current State of Domestic Violence Courts in the United States, 2007* (2007); see also M Labriola and others, *A National Portrait of Domestic Violence Courts* (2009) Center for Court Innovation.

76 New York State Unified Court System, *Integrated Domestic Violence Courts* <www.nycourts.gov/courts/problem_solving/idv/home.shtml> at 16 February 2010.

77 IDVCs have authority to hear a whole range of matters, including criminal domestic violence cases, protection order hearings, and all related family issues, including custody, visitation, and divorce: New York State Division of Criminal Justice Services, *New York State Domestic Violence Courts Program Fact Sheet*.

.78 The Center for Court Innovation, *Integrated Domestic Violence Courts* <www.courtinnovation.org/> at 16 February 2010.

79 D Epstein, 'Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System' (1999) 11 *Yale Journal of Law and Feminism* 3, 29.

80 Superior Court of District of Columbia, *Domestic Violence Unit Rules* <www.dccourts.gov/dccourts/docs/Rules-DV.pdf> at 16 February 2010.

below), and a Domestic Violence Coordination Unit, a specialised section of the court registry. Meetings are also held with a range of interested representatives every two weeks.

20.73 This court operates under federal legislation which requires related cases to be assigned for the duration of those proceedings to the same judge or magistrate judge, '[t]o the greatest extent practicable, feasible, and lawful'.[81] The legislation also requires an ongoing program in multi-disciplinary training, the provision of accessible materials, and an integrated computerised case management system.[82]

20.74 A notable feature of many of the American models, in comparison with the Australian models, is a commitment to extensive judicial monitoring of compliance. The Commissions understand that, in Victoria, some judicial officers take an oversight role to ensure attendance at offender programs, but this is not a formal part of the judicial role. In contrast, the Dorchester Domestic Violence Court in Boston, Massachusetts has a mandatory review process in which a minimum of three 'judicial review hearings' are held typically 30, 60, and 120 days after sentencing. These review hearings are 'automatically scheduled and [are] not dependent on lack of compliance to trigger the hearing'.[83] In New York, in the Domestic Violence courts and IDVCs, offenders are automatically required to return regularly to court to report on their compliance with court orders. Many New York courts also employ a resource coordinator who, among other things, monitors defendants' compliance with court orders, such as whether they are attending court-mandated rehabilitation programs.[84]

20.75 In Canada, over 50 family violence courts are in operation.[85] The first, and most studied, court was established in 1990 in Manitoba. The Manitoba court has specialised staff, special rooms and victim support services dealing with spousal abuse, child abuse and elder abuse.[86] An evaluation of that court found a significant reduction in domestic homicide and recidivism, and earlier and more frequent reporting of violent offenders.[87] The broadest program operates in Ontario, where there is a specialised family violence court in every jurisdiction.[88] In Calgary, the specialised team includes

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81 *District Court of Columbia Family Court Act of 2001* 11 DC CODE ANN §11–1104 (US).

82 Ibid.

83 A Harrell, L Newmark and C Visher, *Final Report on the Evaluation of the Judicial Oversight Demonstration* (2007) Urban Institute, Justice Policy Centre, 24.

84 The Center for Court Innovation, *Integrated Domestic Violence Courts* <www.courtinnovation.org/> at 16 February 2010.

85 S Moore, *Two Decades of Specialized Domestic Violence Courts: A Review of the Literature* (2009) Center for Court Innovation.

86 See J Ursel and C Hagyard, 'The Winnipeg Family Violence Court' *What's Law Got to Do With It? The Law, Specialized Courts and Domestic Violence in Canada* (2008) 95.

87 A Hennessy, *Specialist Domestic and Family Violence Courts: The Rockhampton Experiment* (2008) <www.archive.sclqld.org.au/judgepub/2008/Hennessy160608.pdf> at 2 October 2009, 3.

88 Ministry of the Attorney General (Ontario), *Programs and Services for Victims of Crime* <www.attorneygeneral.jus.gov.on.ca/english/ovss/programs.asp#domestic> at 16 February 2010. See M Dawson and R Dinovitzer, 'Specialized Justice: From Prosecution to Sentencing in a Toronto Domestic Violence Court' *What's Law Got to Do With It? The Law, Specialized Courts and Domestic Violence in Canada* (2008) 120.

probation officers, police, and court caseworkers. Caseworkers contact the victims shortly after the police lay charges and review each case, checking whether the victims' wishes have changed, ensuring that victims are aware of the status of the case, as well as conducting risk assessments.[89] As in the US, the exact models vary greatly between jurisdictions.[90]

20.76 The UK has probably the most ambitious program, with 141 family violence courts already in operation.[91] These deal only with criminal matters. While models vary, the UK has a National Resource Manual that lists 12 key components for successful IDVCs, including a steering group; multi-agency risk assessment conferences; trained and specialised staff; identification of family violence and data collection; victim and children support services; and a focus on equality and diversity.[92]

20.77 The first 25 SDVCs were evaluated in 2007–08.[93] The performance of individual SDVCs varied significantly, which obscured the success of some individual SDVCs.[94] In more successful SDVCs, there was evidence of higher arrests and more successful prosecutions; higher rates of victim support in court; and improve confidence in the criminal justice system by both victims and the community. The review concluded that

> omission of any of the core components led to less successful outcomes in one or more of the measures. The combination of the overall components was pivotal in delivering success.[95]

20.78 In New Zealand, two specialised family violence courts have been established in Waitakere and Manukau. The features of these courts include stakeholder meetings, dedicated lists, specialised staff, duty solicitors, victim advisors, and linkages with community services. While these courts deal primarily with criminal matters related to family violence, applications for protection orders (which, in the New Zealand legal system, are dealt with by the Family Court of New Zealand) can be made before the specialised criminal court. If those orders are consented to, the family violence court

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89 See L Tutty, K McNichol and J Christensen, 'Calgary's HomeFront Specialized Domestic Violence Court' *What's Law Got to Do With It? The Law, Specialized Courts and Domestic Violence in Canada* (2008) 152.

90 See L Tutty, J Ursel and F Douglas, 'Specialized Domestic Violence Courts: A Comparison of Models' *What's Law Got to Do With It? The Law, Specialized Courts and Domestic Violence in Canada* (2008) 69.

91 See Department of Justice (UK), 'More Specialist Domestic Violence Courts Offer Tailored Support to Victims' (Press Release), 19 March 2010). This exceeds the 128 planned to roll out by 2011: Her Majesty's Government (UK), *National Domestic Violence Delivery Plan—Annual Progress Report 2008–2009*.

92 Crime Reduction Centre Information Services Team, *Specialist Domestic Violence Court Programme Resource Manual* (Revised ed, 2008).

93 Her Majesty's Courts Services (UK), Home Office (UK) and Crown Prosecution Service (UK), *Justice with Safety: Specialist Domestic Violence Courts Review 2007–08* (2008).

94 Ibid, 5.

95 Ibid, 6.

arranges for the application to be processed in the Family Court of New Zealand. If the order is not consented to, the application is referred to the Family Court. The process is facilitated by a 'Family Court Coordinator', who is jointly responsible with Victim Advisors for information sharing between the Family Court and the Family Violence Court.[96] A recent evaluation indicates that the courts have had some success 'in spite of considerable difficulties', including lack of resources and training.[97]

Specialised sex offences courts

20.79 As noted above, in a few locations specialised sex offences courts have also been established. As with family violence courts, these may be created either with a legislative basis or within an already existing court structure.

20.80 Like specialised family violence courts, specialist sex offences courts are designed to improve experiences and outcomes for victims and the community at large, using measures similar to those used in specialised family violence courts. As with specialised family violence courts, specialised sex offences courts may be distinguished from specialised approaches to sex offences.

20.81 There are, however, factors that complicate the prosecution of sex offences. These include: the unique needs of victims; misconceptions and prejudices held by jurors;[98] the lack of corroborating evidence; particular evidentiary and procedural hurdles;[99] as well as few guilty pleas by defendants and low conviction rates.[100] Other factors include the relatively short sentences for sex offenders, and recidivism rates.

20.82 In addition, there are particular characteristics of child sexual assault that require a more specific criminal justice response, including:

- the relatively high incidence of child sexual abuse in the Australian community;
- the much higher incidence of child sexual abuse in Indigenous communities compared to the non-Indigenous population;
- the fact that a majority of offenders are either related or known to their victims and the reality of continued access to those children;
- that offender behaviour is usually responsible for delays in making complaints and the lack of corroborating evidence;

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96 Ministry of Justice (NZ), *Family Violence Courts National Operating Guidelines* (2008).

97 T Knaggs, *The Waitakere and Manukau Family Violence Courts: An Evaluation Summary* (2008) Ministry of Justice—New Zealand.

98 See Ch 15.

99 These include: separate versus joint trials; difficulties with the admissibility of types of evidence; and issues with cross-examination, discussed in Ch 17.

100 See Ch 17.

- the difficulties associated with detection and the high rate of under-reporting; and

- the high attrition rate of reported cases.[101]

Specialisation in Australia

20.83 There are no specialist courts in Australia for prosecuting sex offences. However, the Magistrates' Court of Victoria and the County Court of Victoria established Sexual Offences Lists (SOLs) as a result of recommendations made by the Victorian Law Reform Commission.[102] As well, a specialist sex offences unit was established within the Victorian OPP.

20.84 A SOL operates in the Melbourne Magistrates' Court as well as in six regional Magistrates' Courts.[103] A SOL now also operates in the Children's Court. The SOL deals with sexual offences being tried summarily and committal proceedings for sexual offences. The SOL is designed to track all cases relating to a charge for a sex offence in order to reduce delay,[104] to enable the use of special facilities for vulnerable witnesses,[105] and to 'provide a greater level of consistency in the handling of these cases'.[106] The SOL is supported by remote witness facilities and a child witness service.[107]

20.85 The SOL operating in the County Court of Victoria covers all cases involving sex offences against children,[108] and all directions hearings and pre-trial issues are heard by a specialised judge. A practice note applies, which is designed to expedite the hearing of cases through pre-trial management and directions hearings, with the aim of ensuring early identification of, and rulings on, procedural and evidential issues.[109]

20.86 In NSW, a specialised child sexual assault jurisdiction was piloted in 2003 in Parramatta following the recommendation of the NSW Legislative Council Standing Committee on Law and Justice.[110] The objectives were to: reduce delay; improve the

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101 National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 316.

102 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), 183–184.

103 *Magistrates' Court Act 1989* (Vic) s 4R(1). The pilot SOL commenced in Melbourne on 7 April 2006, and on 1 July 2007 in Ballarat, Bendigo, Geelong, La Trobe Valley, Mildura and Shepparton.

104 Under Schedule 5 of the *Magistrates Court Act* 1989 (Vic), sexual offences in the committal stream are to be determined within 60 days of the first or final committal mention date.

105 Facilities for vulnerable witnesses are discussed in Chs 17–18.

106 Magistrates' Court of Victoria, *Sexual Offences List* (2009) <www.magistratescourt.vic.gov.au/> at 16 February 2010.

107 Ibid.

108 This SOL was introduced as a pilot on 1 October 2005.

109 County Court of Victoria, *Sex Offences List—Practice Note*, PNCR 2-2008.

110 The recommendation of the Committee, however, was not fully implemented by this pilot, as it did not employ specialist judicial officers or prosecutors.

physical environment of the court and assist child witnesses; and increase the skills of the legal professionals in the court process.[111]

20.87 The features of the NSW pilot included specialised training for judicial officers and prosecutors; child-friendly facilities and schedules; remote witness facilities; pre-trial hearings between judicial officers and counsel; and evidentiary presumptions to reduce secondary victimisation of child witnesses. These were implemented to varying degrees, with a subsequent evaluation noting technological difficulties and a lack of training and practice directions.[112]

20.88 The evaluation of this pilot, which was limited by its small size and variations in practice between the specialised courts, did not find any significant benefits beyond the use of the remote witness facilities.[113] It had no impact on reducing delays,[114] and little or no impact on courtroom culture and the conduct of the child.[115]

20.89 In 2005, the Criminal Justice and Sexual Offences Taskforce established by the NSW Government reported on the feasibility of a specialised sex offences court. After the Taskforce recommended the use of specialised case management hearings, supported by a number of measures such as appropriately equipped courtrooms, specially trained prosecutors and judicial officers, and the creation of a cross-agency monitoring body.[116] This recommendation has not been implemented.

20.90 The National Child Sexual Assault Reform Committee[117] has recommended the establishment of a child sexual offences court in each Australian jurisdiction, with features including specialist judicial officers and prosecutors; training programs; specialist listing arrangements; case management; special facilities for giving evidence and evidentiary measures; offender programs; and ongoing monitoring.[118]

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111 J Cashmore and L Trimboli, *An Evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot* (2005) NSW Bureau of Crime Statistics and Research, ix.

112 Ibid, 7–14.

113 Ibid, 64.

114 Ibid, 26.

115 Ibid, 52, 54.

116 Criminal Justice Sexual Offences Taskforce (NSW Attorney General's Department), *Responding to Sexual Assault: The Way Forward* (2005) rec 66.

117 The National Child Sexual Assault Reform Committee was formed in 2000 and comprises Directors of Public Prosecutions, judges, Children's Commissioners, academics, Legal Aid representatives, senior police officers, Crime Commissioners and others. The Terms of Reference of the Committee direct it, in summary, to (i) to document the best practice (or minimum) standards in each Australian jurisdiction for the conduct of the child sexual assault trial; (ii) to document the outcomes of prosecuting child sex offences in each Australian jurisdiction in terms of reporting, attrition and conviction rates; and (iii) to research and consider alternative models for prosecuting child sex offences: National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 6–7.

118 Ibid.

Sexual offences courts overseas

20.91 South Africa is the primary jurisdiction in which specialised sexual assault courts have been established. The first was established in 1993 in Wynberg, as part of the Magistrates' Court.[119] It hears cases of sexual assault against women and children, and its features include: specialised police units; specialised prosecutors; specialised case managers; multidisciplinary training; special facilities to ensure the safety of witnesses; and a victim support worker. Magistrates rotate through the system once every six weeks, and prosecutors are assigned to a case until it is finalised. In addition, since 2000 South Africa has established several Thuthuzela Centres, which are 'one stop shops' for sexual assault victims, comprising investigative, prosecutorial, and hospital medical and psychological services. The procedure and rules of evidence are the same as in all South African courts, with special provision also for children to give evidence by closed circuit television.[120]

20.92 Since 1999, over 50 similar Sexual Offences Courts (SOCs) have been established in South Africa, and the policy is to establish such a court in every regional court.[121] This policy has been driven by the Sexual Offences and Community Affairs Unit, which developed in 2002 a national blueprint identifying essential requirements for SOCs.[122]

20.93 Several evaluations of these courts have been conducted, and have found increases in convictions and reductions in delays.[123] There continue, however, to be issues concerning victims feeling re-traumatised by the experience. Problems include under-funding and related high caseloads and high staff turnover.[124]

20.94 The specialised family violence court in Manitoba, Canada, also has jurisdiction over cases of physical and sexual assault of children, and adult survivors of child sexual assault. The court has the following features relevant to child abuse: a specialised police unit; specialised prosecutors; victim support programs; specially designated courtrooms; and a child friendly courtroom.[125] This court is one of the most extensively evaluated, and the evidence is that it has improved conviction rates.[126]

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119 Although called Regional Magistrates Courts, the sexual offences courts are analogous to District Courts in Australia.

120 See Criminal Justice Sexual Offences Taskforce (NSW Attorney General's Department), *Responding to Sexual Assault: The Way Forward* (2005), 149–154; A Cossins, 'Prosecuting Child Sexual Assault Cases: To Specialise or Not, That is the Question' (2006) 18 *Current Issues in Criminal Justice* 318, 323.

121 A Cossins, 'Prosecuting Child Sexual Assault Cases: To Specialise or Not, That is the Question' (2006) 18 *Current Issues in Criminal Justice* 318, 322.

122 The development of SOCs is detailed in J Reyneke and H Kruger, 'Sexual Offences Courts in South Africa: Quo Vadis?' (2008) 33 *Journal for Juridical Science* 32.

123 The conviction rate is more than 15% higher in SOCs, and the overall conviction rate is even higher where the court is linked to a Thuthuzela Centre: Ibid, 54, 64.

124 A Cossins, 'Prosecuting Child Sexual Assault Cases: To Specialise or Not, That is the Question' (2006) 18 *Current Issues in Criminal Justice* 318, 153.

125 Ibid, 325.

126 The overall conviction rate was 54% compared with 46% nationally: J Ursel and K Gorkoff 'Court Processing of Child Sexual Abuse Cases: The Winnipeg Family Violence Court Experience', in

20.95 New York also piloted a specialised sexual offences court in 2005, in Oswego County, New York State. This was the first such court in the US. By January 2009, six similar courts had been established in other counties in New York.[127] The court has jurisdiction over criminal cases involving felony sexual offences that fall under New York's *Sex Offender Registration Act*.[128] The court is also responsible for monitoring and imposing special conditions for sexual offence cases involving pleas and for sex offenders who move into the jurisdiction.[129] However, any sexual assaults that occur in a domestic violence context remain under the jurisdiction of either the domestic violence courts or IDVCs.[130]

20.96 The sex offence courts in New York feature specialised, trained judicial officers; trained court personnel; extensive and regular review of compliance by defendants; and coordination and collaboration with criminal justice agencies, probation departments and community service providers, including through inter-agency planning meetings.[131]

Value of specialised courts

20.97 The first issue that arises for this Inquiry is whether specialised courts should be established more widely in Australia. The general advantages of specialisation have been discussed above. These apply to specialised courts in the following ways:

- greater sensitivity to the special context of family violence, and the needs of victims, through mechanisms such as victim support, gathering and treatment of evidence, greater emphasis on speed, specialised training and skills of staff;

- greater integration and coordination of the management of cases, through mechanisms such as case tracking, inter-agency collaboration, referrals of victims to services, and the capacity to deal with related legal matters;

- greater consistency in the handling of family violence cases both within and across legal jurisdictions;

- greater efficiency in court processes, through mechanisms such as case management;

D Hiebert-Murphy and L Burnside (eds), *Pieces of a Puzzle: Perspectives on Child Sexual Abuse* (2001) 88.

127 New York State Unified Court System, *Problem Solving Courts—Sex Offense Courts* (2009) <www.courts.state.ny.us/courts/problem_solving/so/courts.shtml> at 16 February 2010.

128 New York State Unified Court System, *Sex Offense Courts—Mission Statement and Key Principles* <www.courts.state.ny.us/courts/problem_solving/so/mission_goals.shtml> at 16 February 2010.

129 J Ana, *Establishing a Model Court: A Case Study of the Oswego Sex Offense Court* (undated) Center for Court Innovation <www.courtinnovation.org> at 16 February 2010.

130 New York State Unified Court System, *Sex Offense Courts—Mission Statement and Key Principles* <www.courts.state.ny.us/courts/problem_solving/so/mission_goals.shtml> at 16 February 2010.

131 LW Sherman and H Strang, *Restorative Justice: The Evidence* (2007) Smith Institute.

- development of best practice, through the improvement of procedural measures in response to regular feedback from court users and other agencies; and

- better outcomes in terms of victim satisfaction, improvements in the response of the legal system (for example, better rates of reporting, prosecution, convictions and sentencing in the criminal context), and—potentially—changes in offender behaviour.[132]

20.98 For the purposes of this Inquiry, one key benefit in terms of improving the interaction between legal frameworks is the greater integration and coordination of the management of cases. Key methods of integration may include:

- identification and clustering of family violence cases into a dedicated list for handling by specialised staff;

- the integrated provision of information and services to victims and offenders;

- management of individual cases by a single judicial officer (at least pre-trial);

- collaboration with government agencies and non-governmental organisations at a policy level, through committees, protocols and memoranda of understanding;

- collaboration with government agencies and non-governmental organisations at an operational level, through the exchange of information about individual cases; and

- a single judicial officer or court handling related cases across different legal frameworks.

20.99 The evaluations of specialised family violence courts in Australia (discussed above) provide some evidence of the benefits of such courts. Variations in models, methodologies of evaluation, and the challenges of implementation, need to be taken into account in assessing those evaluations.

20.100 In the US, considerable research into the effectiveness of specialised family violence courts has been done. The implications to be drawn from this research have been stated as follows. Some, but not all, family violence courts are associated with reduced levels of reoffending. Family violence courts are associated with increased

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132 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); Law Reform Commission of Western Australia, *Court Intervention Programs: Final Report* Project No 96 (2009), 92; S Eley, 'Changing Practices: The Specialised Domestic Violence Court Process' (2005) 44 *The Howard Journal of Criminal Justice* 113, 114–115; S Kelitz, R Guerrero, AM Jones and DM Rubio, *Specialization of Domestic Violence Case Management in the Courts: A National Survey* (2001) National Center for State Courts, 5.

rates of conviction and decreased dismissal rates. Victims of family violence rate their satisfaction in specialised courts more highly. Victims of family violence who were aware that there was a family violence court reported greater willingness to report repeat offending. Family violence courts are associated with more efficient case processing. Finally, family violence courts report higher levels of offender compliance.[133]

Commissions' views

20.101 The Commissions have visited the ACT specialised court, and two of the Specialist Family Violence Service courts in Victoria, and consulted with the magistrates there, as well as with magistrates in the South Australia family violence court.[134] The observations conducted, and the discussions with magistrates and other stakeholders in those jurisdictions, suggest that victims of family violence are treated with sensitivity and consistency. As well, the observations in the Specialist Family Violence Service courts indicated that those magistrates, the registrars and—in particular—legal and non-legal victim support workers were of great assistance to victims in helping them to navigate through different legal frameworks, and ensuring they are referred appropriately to social services.

20.102 The Commissions consider that family violence courts offer many potential benefits, and this is supported by evaluations. Family violence courts should be established more widely in Australia, as the Western Australian government has begun to do.

20.103 In the Commissions' preliminary view, state and territory governments should establish and foster specialised family violence courts in their jurisdictions. This view is reflected in Proposal 20–4, set out after consideration of the features such courts should have.

20.104 As noted elsewhere in this Consultation Paper, the Commissions are concerned to ensure that sexual assault is recognised as a form of family violence.[135] It is therefore critical that personnel in specialised family violence courts receive training on the nature and dynamics of sexual assault. This Inquiry, however, considers sexual assault only in the context of family violence, and therefore does not comment upon the desirability of establishing specialised courts dealing with sexual assault generally. If such courts were to be established, however, the Commissions endorse the approach in New York, where sexual assault cases in the context of family violence are dealt

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133 A Klein, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges* (2009) National Institute of Justice. See also M Labriola and others, *A National Portrait of Domestic Violence Courts* (2009) Center for Court Innovation, 9.

134 Deputy Chief Magistrate Andrew Cannon and R McInnes, *Consultation*, By telephone, 25 September 2009, Magistrate Noreen Toohey, *Consultation*, Melbourne, 25 January 2010, *Court Observation: Melbourne Magistrates' Court of Victoria: Family Violence List*, 24 November 2009; *Court Observation: Sunshine Magistrates' Court of Victoria: Family Violence List*, 25 January 2010.

135 See Chs 3, 4, 15.

with by the specialised family violence court, as sexual assault should not be isolated from a surrounding context of family violence.

Designing specialised courts

20.105 Jurisdictions vary in their needs, strengths and approaches to family violence, and legal frameworks. Specialised courts need to be developed in close consultation with local community organisations, service providers, and court staff, including judicial officers, drawing on leadership and best practice. Further, specialised courts need the ability to evolve and learn lessons, and adapt to changing circumstances and needs. The establishment and further development of specialised courts, however, need to be guided and facilitated by state and territory governments. For example, governments need to provide funding, programs of action, and policy and operational support, including support across affected government departments.

20.106 The Commissions recognise the need for a degree of flexibility in designing specialised courts, and the many operational matters which should be decided at a local level. These aspects of the design of specialised courts not discussed here. The following features of specialised courts are discussed in this section: the jurisdiction that should be conferred on such courts; the features that should be included, with a particular focus on offender programs, problem-solving or therapeutic approaches, and judicial supervision of offenders; and ways of adopting features of specialist courts as best practice in generalist courts.

20.107 The Commissions express preliminary views about core, or minimum, features of such courts in this section and encourage the adoption of features that represent best practice, to the extent that this is feasible.

Jurisdiction

20.108 Most specialised courts in Australia focus on criminal cases only; in South Australia, protection orders are dealt with alongside criminal cases. Only Victoria employs a ‘one stop shop’ model, which deals with all related matters within the jurisdiction of the Magistrates’ Court. This more expansive model is also rare overseas, although there are notable exceptions such as New York and Washington DC. There are options short of a ‘one stop shop’ that may have similar effects of improving information sharing and minimising the burden on the victim—for example, co-locating courts, integrated case management systems, and centralised ‘intake’ procedures.

20.109 The ‘one stop shop’ approach has obvious appeal as a way of ensuring integration and consistency across multiple related legal proceedings, and minimising the burden on the victim. One judicial officer in the US has described the combination of civil and criminal jurisdictions as the ‘single best thing’ about the creation of his

court.[136] A recent study has concluded that the benefits of a combined model outweigh the detriments.[137] Consultations with one of the magistrates at the Ballarat FVCD in Victoria also indicated that the 'one stop shop' model was beneficial for victims, who had the advantage of familiarity with the court throughout related proceedings.[138]

20.110 One key concern with a 'one stop shop' is the need to respect the underlying policy rationales of different legal frameworks, and ensure that different legal proceedings did not prejudice a fair trial or pressure victims to testify in order to receive civil remedies. This concern has been expressed in relation to the 'one stop shop' models in the US.[139]

20.111 This concern may be capable of being addressed appropriately at a procedural level. The FVCD and South Australian courts do not appear to find this difficult, as magistrates are used to dealing with different legal frameworks.[140] As noted above, the IDVCs in New York also handle this issue at a procedural level.

20.112 There may also be a range of pragmatic difficulties with multi-jurisdictional courts, including: the need for judicial officers to be familiar with different legal frameworks; the greater organisational and cultural shift required to implement such an approach; and the greater resources required for such an undertaking.

20.113 In Australia, another difficulty is that the federal legal system is primarily responsible for family law, while the states and territories have responsibility for most other legal frameworks relevant to family violence.[141] Under the *Australian Constitution*, federal jurisdiction can be conferred on state or territory courts, but state or territory jurisdiction cannot be conferred on federal courts.[142]

20.114 Another jurisdictional issue concerns how victims access specialised courts. In all Australian courts, including (at this stage) the FVCD in Victoria,[143] jurisdiction is determined by geography. In contrast, the jurisdiction of the IDVCs in New York is triggered by a computer system which identifies overlaps between cases in the criminal and civil jurisdictions. The IDVC judges may also transfer cases from generalist courts.

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136 As cited in J Plotnikoff and R Woolfson, *Review of the Effectiveness of Specialist Courts in Other Jurisdictions*, DCA Research Series 3/05 (2005), 58.

137 Ibid, 58.

138 Magistrate Noreen Toohey, *Consultation*, Melbourne, 25 January 2010.

139 J Moye, 'Don't Tread on Me to Help Me: Does the District of Columbia Family Court Act of 2001 Violate Due Process by Extolling the One Family, One Judge Theory' (2004) 57 *Southern Methodist University Law Review* 1521.

140 This view was expressed in consultations: see Magistrate Noreen Toohey, *Consultation*, Melbourne, 25 January 2010.

141 The position of the Family Court in Western Australia is an exception. See the discussion in Ch 2.

142 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511. The constitutional framework is discussed in Ch 2.

143 The FVCD is a pilot which may be rolled out to other courts at a later stage, which will reduce the impact of the geographical restrictions.

20.115 One possible model is to establish a mechanism by which judicial officers from general courts could make referrals to specialised courts. This could be designed either so that referrals would automatically result in the case being transferred, or so that the specialised court would decide whether the case should be accepted upon referral. A mechanism of referral would have the advantage of prioritising cases which would benefit more from treatment by specialised courts, and widening access to specialist courts.

20.116 Criteria would need to be specified for when such referrals could be made, such as:

- where there are concurrent claims or actions in relation to the same family;
- where there have been multiple legal actions in relation to the same family in the past;
- where, for exceptional reasons, a judicial officer considers that the nature of the case warrants specialised treatment.

20.117 Of course, courts would also need to consider the practicality of any referral, such as whether a victim would be able to travel to the specialised court, and the cost of such travel.

Commissions' views

20.118 There appear to be considerable benefits, from the perspectives of victims and families, in enabling specialised courts to address issues across different legal frameworks. Most judicial officers dealing regularly with family violence issues already have experience both in criminal proceedings and in protection order proceedings. As discussed in Chapter 6, many courts have the power, or are required to, make protection orders following criminal proceedings related to family violence. The multi-jurisdictional nature of the South Australian and Victorian family violence courts does not appear to have caused difficulties in practice. The Commissions consider that, when establishing family violence courts, state and territory governments should establish courts which deal with both criminal proceedings and protection orders in relation to family violence.[144] This can be achieved relatively rapidly in many existing courts.

20.119 The Commissions' preliminary view is that there is much advantage in the multi-jurisdictional model used in the FVCD in Victoria, which includes civil and statutory claims for compensation, as well as child support and family law matters (to

144 Local courts and magistrates courts already have such jurisdiction under their enabling statutes.

the extent to which such jurisdiction is conferred on the state or territory).[145] This jurisdiction is already available in Austarlian local and magistrates courts.

20.120 The Commissions note that most existing family violence courts are not multi-jurisdictional courts. As discussed above, the different needs, strengths and operational contexts of jurisdictions need to be borne in mind, and the decision not to adopt a multi-jurisdictional model in specialised courts may have been influenced by these factors. While the Commissions consider that, at a minimum, courts should deal with criminal proceedings and protection orders, they are interested in hearing from stakeholders on the feasibility of multi-jurisdictional courts. The Commissions propose, at this stage, that state and territory governments should review whether specialised family violence courts should exercise other jurisdiction relevant to family violence.

20.121 The Commissions also consider that, in order to maximise the potential of specialised family violence courts and improve access to such courts, a mechanism for referral from general to specialised family violence courts should be established. Referral should be based on principled criteria, such as concurrent or multiple claims or actions in relation to the same family. A more general discretion could be conferred, such as where a judicial officer considers it necessary for exceptional reasons. There may be other criteria demonstrating a particular need for the use of specialised family violence courts. The Commissions are interested in hearing stakeholder views on this issue.

Proposal 20–2 State and territory governments should ensure that specialised family violence courts determine matters relating to protection orders and criminal proceedings related to family violence. State and territory governments should review whether specialised family violence courts should also be responsible for handling related claims:

(a) for civil and statutory compensation; and

(b) in child support and family law matters, to the extent such jurisdiction is conferred in the state or territory.

Proposal 20–3 State and territory governments should establish mechanisms for referral of cases involving family violence to specialised family violence courts. There should be principled criteria for determining which cases could be referred to such courts. For example, these criteria could include:

(a) where there are concurrent family-related claims or actions in relation to the same family issues;

145 The jurisdiction of state and territory courts in relation to family law is discussed in Ch 2.

(b) where there have been multiple family-related legal actions in relation to the same family in the past;

(c) where, for exceptional reasons, a judicial officer considers it necessary.

Features of specialised family violence courts

20.122 As discussed above, the features of specialised family violence courts vary markedly from jurisdiction to jurisdiction. While state and territory governments, in close consultation with stakeholders, should ultimately be responsible for selecting particular elements, there is strong evidence that some features are either essential, or represent best practice.

20.123 A key concern expressed by many stakeholders is the need to ensure that judicial officers understand the nature and dynamics of family violence. The literature emphasises that the selection of the right judicial officers, with the right attitude and the capacity to deal sensitively with family violence victims, is critical to the success of specialised courts.[146] The Commissions note that there is presently a lack of transparency about the criteria for the selection of judicial officers for specialised courts. The Victorian model, in which the Chief Magistrate may only assign magistrates to the FVCD after having regard to 'the magistrate's relevant knowledge and experience in dealing with matters relating to family violence', appears to be a constructive one.[147] This assignment was to be supported by ongoing comprehensive judicial training, which has been maintained in part.[148] However, the Commissions have heard that the specialisation has been diluted in practice by the assignment of many magistrates to the court for operational reasons.[149]

20.124 A national survey conducted in the US also indicates that specialised judges offer significant benefits. In that survey, a particular advantage of specialised judges was reported to be consistency.[150] As one prosecutor responded to that survey:

> The experience and knowledge of the [specialised] judge regarding domestic violence cases and dynamics are the most critical pieces of the puzzle.[151]

20.125 Another issue is that in Australia there is no specialised training in family violence in a number of specialised courts.[152] In contrast, the vast majority of

146 See, eg, M Labriola and others, *A National Portrait of Domestic Violence Courts* (2009) Center for Court Innovation, 71–72.
147 *Magistrates' Court Act 1989* (Vic) s 4H.
148 As noted above, the evaluation of the FVCD is due shortly.
149 Magistrate Noreen Toohey, *Consultation*, Melbourne, 25 January 2010.
150 M Labriola and others, *A National Portrait of Domestic Violence Courts* (2009) Center for Court Innovation, 72–73.
151 Cited in Ibid, 71.

specialised family violence courts in the US include specialised training for judicial officers.[153] Research in the US found that training needs to be ongoing and remains a significant challenge in implementation.[154] In this Inquiry, stakeholders emphasised that such training is highly desirable.

20.126 An important feature of all family violence courts in Australia is the use of legal and non-legal victim support workers. As discussed in Chapter 19, victim support workers perform a crucial role in navigating victims through legal and social support systems. While such workers are not necessarily confined to specialised courts, they are an integral part of them.

20.127 Another feature of some family violence courts is adaptation of court facilities and practices to ensure victim safety. Victim safety in court should be a paramount consideration.[155] The use of separate waiting rooms, separate exits and entrances, and remote witness facilities are all strategies for ensuring that victims feel secure in courtrooms, and should be encouraged.

20.128 Finally, specialised courts should have mechanisms for collaborating and coordinating with other agencies, courts, and non-government organisations. This may take many forms. For example, it may take the form of court users' forums; steering committees; or case management procedures. As a prosecutor in a specialised family violence court in the US stated:

> Coordination, cooperation, and communication among all agencies involved—police, corrections officers, prosecutors, government victim advocates, nongovernmental victim advocates, judges, and probation officers—is essential to most effectively holding offenders accountable.[156]

Offender programs

20.129 A common feature of family violence courts in Australia is the capacity of the court to mandate or refer a person to an offender program (also known as perpetrator programs).[157] While these offender programs are characteristic of specialised courts, they are not necessarily linked to a family violence court and may be available to generalist courts as well.[158] These programs may relate to issues such as

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152 Training is discussed generally in Ch 19. See Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), Ch 6, recs 34, 38.

153 M Labriola and others, *A National Portrait of Domestic Violence Courts* (2009) Center for Court Innovation, 38–39, reports that 86% of judicial officers in that study reported receiving such training, and 91% of dedicated judges received such training.

154 Ibid, 71. This was the second most common theme in open-ended surveys used in that research.

155 Ibid, vi, reports that this is a significant concern among stakeholders in the US. See also Pt D of this Consultation Paper.

156 Cited in Ibid, 70.

157 These powers are discussed in Ch 6, in relation to the conditions of protection orders.

158 See especially the discussion of 'court intervention programs' as opposed to 'specialised courts' in Law Reform Commission of Western Australia, *Court Intervention Programs: Final Report* Project No 96 (2009), 1; Law Reform Commission of Western Australia, *Court Intervention Programs*, Consultation Paper (2008), 3.

drug and alcohol counselling, or be specific to family violence. Offenders may voluntarily use these programs, be referred to such programs by others (including by judicial officers), or be required to undertake such programs by judicial officers.

20.130 Offender programs aim to educate the offender and address personal issues to prevent re-offending, usually through counselling. Family violence offender programs in Australia differ in terms of content, duration, eligibility criteria, and monitoring of progress. For example, in the ACT, all family violence offenders are referred for assessment as to their suitability to participate in the Family Violence Self Change Program (FVSC), and in some cases such assessment is ordered by the court. The FVSC is available to men who have offended against an intimate partner or other family member, and involves a weekly two-hour group session over a nine to 12-month period, centred on changing the attitude and behaviour of the offender. Case tracking meetings are held weekly and partners or former partners are contacted throughout the program to raise awareness of risk levels and to address any safety concerns they may have.[159]

20.131 Such programs offer the potential to address and modify the underlying behaviour of offenders. Nevertheless, there are questions about the effectiveness of such programs, particularly in light of the resources required to sustain them. While a few evaluations of their effectiveness have been conducted, it is difficult to draw robust conclusions for several reasons, including the differences in the programs and in evaluation methodology, as well as the limitations of the data.

20.132 The most extensive evaluation in Australia has been of a year-long pilot program run in Penrith, NSW in 2001.[160] This evaluation found a relatively high rate of completion of the program (75%); a strongly positive response by the offenders; and a positive response by the majority of victims; and found that 63% of these men did not come to the attention of police in the two years of the evaluation, although the incidence of family violence increased after 12 months. However, women's feelings of safety while the men were attending the program were very mixed.[161]

20.133 In the US, where there have been more than 35 evaluations of such programs, those evaluations 'have yielded inconsistent results'.[162] While one study claimed that the 'vast majority of men' stop their violent behaviour,[163] others have

159 Information obtained from the Acting Victim of Crimes Coordinator (ACT), John Hinchey.

160 There has also been a much more limited evaluation of the perpetrator program in the ACT in 2009, which is not yet published, and in Western Australia: Court Services Division—Department of Justice and Crime Prevention and Community Support Division—West Australian Police Service, *Joondalup Family Violence Court: Final Report* (2002).

161 Urbis Keys Young, *Evaluation of the NSW Pilot Program for Perpetrators of Domestic Violence: Final Report* (2004).

162 A Klein, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges* (2009) National Institute of Justice, Ch 8, Section 1.

163 E Gondolf, 'Evaluating Batterer Counseling Programs: A Difficult Task Showing Some Effects and Implications' (2004) 9 *Aggression and Violent Behavior* 605, 623.

come to widely differing conclusions. One study which analysed a range of individual program evaluations concluded that there was only a 5% reduction in re-offending rates.[164] A few studies have found that such programs can even make offenders more likely to re-offend, or have found no reduction in re-offending at all, and another study of four offender programs concluded that approximately a quarter of offenders 'appear unresponsive and resistant' to intervention.[165] One report concluded from this research that:

> [offender] programs, in and of themselves, are not likely to protect most victims or new intimate partners of referred abusers from further harm from higher risk abusers. Consequently, if mandated or utilized, [offender] programs should be supplemented by other measures to assure victim safety from these abusers.[166]

Commissions' views

20.134 The Commissions' preliminary view is that, at a minimum, specialised family violence courts should have a number of features. There is strong evidence that some features are necessary to maximise the potential benefits of such courts.

20.135 First, all judicial officers in a family violence court should be especially selected for their roles. The attitude, knowledge and skills of a judicial officer are critical to the success of such a court and it is important that selection be based on these criteria. The mechanisms for selection, however, should be determined by those establishing the court, in close consultation with stakeholders.

20.136 Secondly, specialised and ongoing training on family violence issues is key to ensuring a shared understanding of family violence within the court. Ideally, this training should be provided to all staff, as was done with the Victorian FVCD. At a minimum, training should be provided to the following key participants: judicial officers, prosecutors, registrars, and the police who appear in those courts. If there are specialised lawyers in the court, they should also participate in this training.

20.137 Thirdly, as stakeholders have emphasised, victim support workers play a key role in ensuring the success of such courts. Such workers may be employed directly by the court or a community organisation may be funded to provide such workers. The Commissions are also of the view that there would be significant benefit in providing support for defendants but, given the impact on resources, they do not propose that this be required for all specialised family violence courts.

20.138 Family violence courts should also have special arrangements for victim safety at court, such as a separate waiting room for victims, separate entrances and

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164 J Babcock, C Green and C Robie, 'Does Batterers' Treatment Work? a Meta-Analytic Review of Domestic Violence Treatment' (2004) 23 *Clinical Psychology Review* 1023, 1032.

165 This research is discussed A Klein, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges* (2009) National Institute of Justice, ch 8, section 1.

166 Ibid, ch 8, section 1.

exits, remote witness facilities, and appropriately trained security staff. Finally, the Commissions propose that family violence courts should have mechanisms for collaboration with other agencies and non-government organisations. Those establishing such courts should determine precisely what kinds of mechanisms are desirable for each court, in close consultation with stakeholders.

20.139 The Commissions' preliminary view, however, is that offender programs should not be required as part of this minimum set of features. Offender programs are resource-intensive and, so far, the evidence of their effectiveness is equivocal.

Proposal 20–4 State and territory governments should establish or further develop specialised family violence courts in their jurisdictions, in close consultation with relevant stakeholders. These courts should have, as a minimum:

(a) especially selected judicial officers;

(b) specialised and ongoing training on family violence issues for judicial officers, prosecutors, registrars, and police;

(c) victim support workers;

(d) arrangements for victim safety; and

(e) mechanisms for collaboration with other courts, agencies and non-government organisations.

'Problem-solving' courts

20.140 Some specialised family violence courts are 'problem-solving courts' (also known as problem-oriented, solution-focused or collaborative justice courts).[167] Of the specialised family violence courts in Australia, only the Victorian FVCD and Specialised Family Violence Service courts expressly embrace a problem-solving approach.[168] There are different views about the value of 'problem-solving' courts, and in particular the appropriateness of those approaches in the context of family violence, which require some consideration.

20.141 While problem-solving courts come in many shapes and sizes, they have been defined as courts which seek 'to use the authority of the courts to address the

167 For a discussion of the terminology, see A Freiberg, 'Problem-Oriented Courts: Innovative Solutions to Intractable Problems?' (2001) 11 *Journal of Judicial Administration* 8.

168 Department of Justice (Vic), *Justice Statement 2* (2008), 28.

underlying problems of individual litigants, the structural problems of the justice system, and the social problems of communities'.[169] Such courts have their origins in experiments in the US with drug courts, and have since extended to mental health courts, community courts, and family violence courts. Problem-solving family violence courts typically include offender programs, including judicial monitoring of progress made in such programs; a shift away from an adversarial formal court process; and a focus on broader systemic changes and concrete outcomes in the health and well-being of victim and offender.[170]

20.142 The rapid introduction of problem-solving courts over the last two decades 'reflects a realisation that social problems require social solutions'.[171] It is also reflects a reaction against 'assembly line justice', in which people are processed quickly by the legal system without any appreciable effect on the underlying behaviour of the offender.[172] Problem-solving courts are also part of a wider movement focused on broadening dispute resolution beyond the legal system, including concepts of restorative justice (discussed in Chapter 11) and therapeutic jurisprudence, which are discussed below.[173]

20.143 The Center for Court Innovation based in New York, which has been a driving force for problem-solving courts in the US, has distilled the principles of such courts in the following way:

- *Enhanced information*: Better staff training and information can improve decision-making.

- *Community engagement*: Active engagement of local and community groups fosters trust in, and cooperation with, the legal system.

- *Collaboration*: Engagement of those working within the justice system and those working outside of it can improve communication, trust and innovative strategies.

- *Individualised justice*: Evidence-based referrals to community-based services can improve community safety and aid victims.

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169 A Freiberg, 'Problem-Oriented Courts: Innovative Solutions to Intractable Problems?' (2001) 11 *Journal of Judicial Administration* 8, 9.

170 A Freiberg, 'Problem-Oriented Courts: An Update' (2005) 14 *Journal of Judicial Administration* 196, 197–198; Law Reform Commission of Western Australia, *Court Intervention Programs*, Consultation Paper (2008), 130.

171 A Freiberg, 'Problem-Oriented Courts: Innovative Solutions to Intractable Problems?' (2001) 11 *Journal of Judicial Administration* 8, 9.

172 This is true of the protection order context, in which proceedings typically take three minutes: J Wangmann, '"She Said …" "He said …" : Cross Applications in NSW Apprehended Domestic Violence Order Proceedings', *Thesis*, University of Sydney, 2009, 104.

173 The relationship between restorative justice and therapeutic jurisprudence is discussed in Ch 11.

- *Accountability*: The justice system can send messages about the impact and consequences of all criminal behaviour, and can insist on regular monitoring and reporting by service providers.

- *Outcomes*: The regular collection and evaluation of data are important in continually improving processes and as a form of accountability.[174]

20.144 Professor Arie Freiberg has summarised the differences between traditional and problem-solving courts in the following table:[175]

Traditional process	***Transformed process***
Dispute resolution	Problem-solving dispute avoidance
Legal outcome	Therapeutic outcome
Adversarial process	Collaborative process
Claim or case oriented	People oriented
Rights based	Interest or needs based
Emphasis based on adjudication	Emphasis placed on non-adjudication and alternative dispute resolution
Judge as arbiter	Judge as coach
Backward looking	Forward looking
Precedent based	Planning based
Few participants and stakeholders	Wide range of participants and stakeholders
Individualistic	Interdependent
Legalistic	Common-sensical
Formal	Informal
Efficient	Effective

174 RV Wolf, *Principles of Problem-Solving Justice* (2007) Center for Court Innovation. See also Judicial Council of California, *Programs: Collaborative Justice* <www.courtinfo.ca.gov/programs/collab/> at 16 February 2010.

175 A Freiberg, 'Problem-Oriented Courts: Innovative Solutions to Intractable Problems?' (2001) 11 *Journal of Judicial Administration* 8, 10–11.

20.145 As with specialised courts generally, problem-solving courts can be distinguished from problem-solving *approaches* that take on some of these features, such as focusing on the needs of people in a collaborative, informal, commonsensical process. Such approaches may be adopted informally by judicial officers outside of problem-solving courts.

20.146 A key distinction between problem-solving courts and traditional courts is the role of the judicial officer. In traditional courts, the role of a judicial officer is to adjudicate innocence and guilt; in problem-solving courts, the focus of the judicial officer is on 'broader issues of improvements in the health and wellbeing of the offender, of public safety and amenity more broadly, and of the social and communal problems which may be conducive to criminal behaviour'.[176] In addition, judicial officers are typically required to monitor the progress of the offender by requiring the offender to report back to the court, and judicial officers directly engage with offenders as part of the process of making the court 'more meaningful' for participants.[177] This is illustrated particularly in drug courts.

20.147 In the US, as noted above, an important aspect of problem-solving courts is the use of judicial monitoring to ensure compliance with sentence conditions. According to a 2009 report, 56% of family violence courts surveyed in the US held regular compliance reviews 'often or always', and an additional 15% reported doing so 'sometimes'.[178] However, different courts used these 'compliance hearings' differently, leading the authors of the report to conclude that 'there are not currently any strategies that have been universally adopted as part of a best or "recommended practice" model for such hearings'.[179]

20.148 It was also reported that those working in these family violence courts were 'enthusiastic about monitoring and enforcement of court orders as a mechanism of accountability and deterrence'.[180] Empirical evidence into the effectiveness of judicial monitoring, however, is 'mixed, … which probably should not be surprising because the quality of judicial monitoring is undoubtedly mixed as well'.[181]

Therapeutic jurisprudence

20.149 Therapeutic jurisprudence is an interdisciplinary perspective on law that focuses on its 'impact on emotional life and psychological well-being'.[182] It is

176 A Freiberg, 'Problem-Oriented Courts: An Update' (2005) 14 *Journal of Judicial Administration* 196, 197.
177 Ibid, 198.
178 M Labriola and others, *A National Portrait of Domestic Violence Courts* (2009) Center for Court Innovation, 62.
179 Ibid, 63.
180 Ibid, 74.
181 A Klein, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges* (2009) National Institute of Justice, Ch 7, Section 16.
182 B Winick and D Wexler, 'Introduction' in B Winick and D Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (2003) 3, 7.

premised on the idea that 'the law is a social force that can produce therapeutic or antitherapeutic consequences'.[183] It is

> a mechanism for promoting law reform using wellbeing as the lens through which the law is studied and the behavioural sciences as the source of possible remedies that could be adapted for use within the legal system. It sees a commonality between the law and the behavioural sciences in their interest in the functioning of the human psyche and how healthy behaviour may be promoted.[184]

20.150 Therapeutic jurisprudence does not, however, suggest that therapeutic goals must trump all other goals in law. Rather, it provides a 'framework for asking questions and for raising certain questions that might otherwise go unaddressed'.[185]

20.151 Therapeutic jurisprudence developed out of mental health law. Its application, however, is far broader and it has been applied to other kinds of law including workers' compensation, family law and international law.[186] Most relevantly, it has been applied to family violence.[187] The use of therapeutic jurisprudence in judging has been endorsed in Australia and elsewhere.[188]

20.152 Therapeutic jurisprudence has been claimed as a 'theoretical foundation for problem-solving courts and approaches',[189] although its scope is far wider.[190] Principles of therapeutic jurisprudence 'shed light on how court structures and the conduct of individual judges can help people solve crucial life problems', and equip judicial officers with techniques to enable offenders to confront and solve their problems.[191] The Victorian family violence Courts employ a therapeutic approach.[192]

20.153 Therapeutic jurisprudence suggests that there are 'basic principles associated with motivation and positive behavioural change that are based on empirical research that should inform all judging and advocacy practices in problem-solving courts'.[193]

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183 Ibid, 7.

184 M King, *Solution-Focused Judging Bench Book* (2009), 24.

185 D Wexler, *Therapeutic Jurisprudence: An Overview* (1999) <www.law.arizona.edu/depts/upr-intj/> at 16 February 2010.

186 M King, *Solution-Focused Judging Bench Book* (2009), 24.

187 See B Winick, 'Applying the Law Therapeutically in Domestic Violence Cases' (2000) 69 *University of Missouri-Kansas City Law Review* 33; MS King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (2008) 32 *Melbourne University Law Review* 34.

188 In 2004, the Western Australian country magistrates resolved to apply it in their work, and it is included in the national curriculum for Australian judicial officers. It was also endorsed by the Conference of Chief Justices and the Conference of State Court Administrators in the US in 2000: M King, *Solution-Focused Judging Bench Book* (2009), 25.

189 B Winick and D Wexler, 'Introduction' in B Winick and D Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (2003) 3, 7.

190 M King, *Solution-Focused Judging Bench Book* (2009), 24.

191 B Winick and D Wexler, 'Introduction' in B Winick and D Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (2003) 3, 8.

192 Department of Justice (Vic), *Justice Statement 2* (2008), 28.

193 M King, *Solution-Focused Judging Bench Book* (2009), 26.

These include principles of self-determination or autonomy, and the promotion of procedural justice values.[194]

20.154 Giving participants the opportunity to enter offender programs or restorative justice practices may be one way of promoting participant self-determination. In contrast, paternalistic and coercive approaches are avoided because they 'promote resistance' and may be counter-productive.[195]

20.155 Another insight of therapeutic jurisprudence, associated with procedural justice research, is the importance of aspects of procedural justice in recognising people as competent human beings. Key aspects include the neutrality of the judicial officer, the respect accorded to individuals in the process, allowing individuals to explain their situation before the judicial officer, and the 'trustworthiness' of the judicial officer, in the sense of whether the judicial officer 'truly cares' about the litigant.[196]

20.156 The practical implications of therapeutic principles and problem-solving approaches in judging are spelled out in the *Solution-Focused Judging Bench Book* produced by Michael King.[197] This Bench Book sets out the findings of behavioural science research on matters such as substance abuse, mental health and family violence. It also includes chapters on judicial communication skills; judicial listening skills; and processes and strategies to encourage behavioural change.

Issues with problem-solving courts

20.157 A range of views have been expressed as to whether, and to what extent, courts should be problem-solving or 'therapeutic'. There are concerns that such courts, by moving away from the traditional paradigm of the courts, may threaten core judicial values, undermine procedural justice, and fail to recognise sufficiently the function of the criminal law in condemning behaviour. Others have suggested that such courts appeal to those who want 'simple solutions to complex social issues',[198] and warned that such solutions falsely assume that there is an underlying 'problem' and that there is consensus on how that can be conceptualised and 'solved'.[199]

20.158 The role of problem-solving courts in the context of family violence is especially controversial. One important concern is that family violence is 'not a health problem or disease—rather, it is the *cause* of a major public health problem' and is

194 Ibid, 26.
195 Ibid, 27.
196 Ibid, 29.
197 Ibid.
198 R Holder, 'The Emperor's New Clothes: Court and Justice Initiatives to Address Family Violence' (2006) 16 *Journal of Judicial Administration* 30, 36.
199 A Freiberg, 'Problem-Oriented Courts: Innovative Solutions to Intractable Problems?' (2001) 11 *Journal of Judicial Administration* 8, 21–22.

'based in conscious choice for which the offender must take responsibility'.[200] It is therefore inappropriate to consider family violence as a 'problem' capable of being 'solved'. Further, in family violence courts the principal objectives are usually the safety of victims (including children) and defendant accountability, while in other problem-solving courts the focus is on offender treatment.[201] The causes and complexity of family violence are less amenable to treatment than drug addiction—the domain of drug courts. Further, it has been noted that while drug courts arose as a way of attempting to divert offenders from the legal system, family violence courts arose in the context of under-enforcement of the law.[202]

20.159 There are a range of practical matters that need to be addressed in designing problem-solving courts. First, there is a need to fund such courts adequately—particularly in relation to maintaining offender programs and enabling continuous judicial supervision. To a lesser extent, of course, this point is applicable to specialised courts generally, and there are also arguments that such courts generate efficiencies.

20.160 Secondly, there are a number of specific issues in terms of the operational elements of problem-solving courts. For example, the Law Reform Commission of Western Australia has examined issues such as when a person should be eligible for such processes; the interaction between offender programs and the criminal law; the input accorded to the victim; and the role of monitoring.[203]

Commissions' views

20.161 The Commissions consider that much can be learnt from problem-solving courts. Many of the principles of such courts—including better training and information; community engagement; collaboration; and evidence-based referrals to community services—have been proposed above as minimum elements of family violence courts. In particular, many of the insights of therapeutic jurisprudence could be constructively applied generally in courts dealing with family violence issues.

20.162 However, a number of philosophical and practical concerns have been raised with the adoption of problem-solving approaches in the context of family violence. There are a range of views as to the appropriateness of problem-solving approaches in the context of family violence; the appropriateness of the changed role of the judicial officer; and the claims, implicit in such approaches, for the potential of the legal system to address deep-seated social problems. Further, offender programs and judicial supervision of the progress of offenders are resource-intensive and the empirical

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200 J Stewart, *Specialist Domestic/Family Violence Courts Within the Australian Context*, Australian Domestic & Family Violence Clearinghouse, Issues Paper 10 (2005), 17. See also Ch 1.

201 J Plotnikoff and R Woolfson, *Review of the Effectiveness of Specialist Courts in Other Jurisdictions*, DCA Research Series 3/05 (2005), 8.

202 R Holder and J Caruana, *Criminal Justice Intervention in Family Violence in the ACT* (2006), 36.

203 Law Reform Commission of Western Australia, *Court Intervention Programs: Final Report* Project No 96 (2009).

evidence of their effectiveness is mixed. Perhaps the greatest practical issue, however, is the willingness of the judicial officers to embrace a problem-solving approach.

20.163 For these reasons, the Commissions consider at this stage that the question of whether a problem-solving or therapeutic approach is adopted is properly a question for those establishing specialised courts. Ultimately, the efficacy of a problem-solving approach depends on the attitude, aptitude and desire of judicial officers to use such an approach. The evaluation of the Victorian FVCD may also shed further light on the desirability of such an approach.

Best practice in courts generally

20.164 Another issue for this Inquiry is whether elements of family violence courts can be adopted by non-specialised courts dealing with family violence. As the Victorian dual model shows, not all courts need be specialised to the same degree. Further, not all elements of specialised courts are necessarily resource-intensive.

20.165 Several elements of specialised family violence courts appear capable of being adopted in other courts as 'best practice'. First, it would appear efficient for proceedings relating to protection orders and, potentially, criminal proceedings related to family violence to be listed on the same day, where the caseload permits . The Commissions understand that this is already the practice in many courts. It may also be worth reviewing whether related claims (in, for example, child support and family law) can also be listed at the same time. As part of this review, it is also desirable for courts to review their capacity to identify and deal with family violence-related matters in their general lists, such as in bail applications.

20.166 If such listing practices are adopted, it would also be possible for the courts to facilitate the presence of victim support workers on those days, including legal aid lawyers. In addition, defendant support workers could also be employed. In Chapter 19, the Commissions propose that state and territory governments should, to the extent feasible, make victim support workers available at court proceedings related to family violence, and at the time the police are called out to family violence incidents. Of course, this requires additional funding. However, where there are victim support organisations in the region which already offer court support services, general courts could immediately facilitate the provision of court support by providing, for example, an office and other institutional support.

20.167 Assigning selected judicial officers to work on cases related to family violence may also be cost-effective, depending on the caseload of the court. This would likely provide an immediate benefit in terms of improving consistency and, provided the selection was done carefully, is likely also to improve the treatment of victims. If the caseload justifies it, specialised police and prosecutors could also be assigned. This would potentially result in long-term efficiencies. For example, it would be efficient to target training towards those dedicated to this work, rather than training all judicial officers.

20.168 Another practice that may be worth adopting is the use of practice directions for family violence cases. The ACT Magistrates Court uses a Practice Direction that sets out timelines for stages in the process and, in particular, specifies the information that is required at particular stages in the process.[204] The Local Court in NSW has also adopted a shorter practice direction, which also sets out a timeframe for certain stages in the process.[205] Similarly, a practice note in the New Zealand family violence courts sets a timetable for family violence prosecutions to minimise delay.[206] The adoption of similar practice directions elsewhere may be one way of ensuring more timely dispositions of family violence cases.[207] Such practice directions should enable courts to provide victims with some guidance as to the usual duration of court proceedings related to family violence.

20.169 Courts generally could also review existing court facilities and practices with a view to improving victim safety at court. For example, the use of separate exits and entrances, the use of a separate waiting room for victims, and the use of escorts to and from the courtroom may be ways of increasing victim safety.

20.170 Finally, another practice used in specialised courts that could be developed in courts generally is the establishment of a forum for feedback from, and discussion with, other agencies and non-government organisations. Many courts already have court users groups for this purpose.

20.171 In the view of the Commissions, there is likely to be considerable benefit in state and territory governments reviewing whether, and to what extent, these features have been adopted in the courts in their jurisdiction dealing with family violence, with a view to adopting them.

Proposal 20–5 State and territory governments should review whether, and to what extent, the following features have been adopted in the courts in their jurisdiction dealing with family violence, with a view to adopting them:

(a) identifying, and listing on the same day, protection order matters and criminal proceedings related to family violence, as well as related family law act and child protection matters;

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204 'Family Violence List', Practice Direction No 2 of 2009, Magistrates Court of the Australian Capital Territory.

205 'Procedures to be Adopted in Domestic Violence Matters', Practice Direction No 3 of 2008 (as amended), Local Court of New South Wales.

206 'Domestic Violence Prosecutions', Practice Note, Appendix to *Family Violence Courts National Operating Guidelines* (2008).

207 The Magistrates Court in Queensland has a practice direction relating to family violence, but it only relates to the recording of such applications: 'Domestic Violence (Family Protection) Act 1989 Recording of Applications for Domestic Violence Orders', Practice Direction No 5 of 2001, Magistrates Court of Queensland.

(b) providing victim and defendant support, including legal advice, on family violence list days;

(c) assigning selected and trained judicial officers to work on cases related to family violence;

(d) adopting practice directions for family violence cases;

(e) ensuring that facilities and practices secure victim safety at court; and

(f) establishing a forum for feedback from, and discussion with, other agencies and non-government organisations.

Intake services

20.172 As discussed above, the Superior Court of the District of Columbia has established an integrated Domestic Violence Unit, which includes within it a Domestic Violence Court, a Domestic Violence Coordination Unit, and a Domestic Violence Intake Center.

20.173 There are two Intake Centers within the District of Columbia, which serve as a 'one stop shop' for victims of family violence. The Intake Centers are staffed by government employees, as well as employees of non-governmental support agencies.[208] Victims are referred to the intake centres by police, shelters, and other support agencies. At the intake centre, an intake counsellor interviews the victim, explains the legal process in general terms, and helps the victim to fill out any forms. Intake counsellors also refer victims to non-governmental agencies and support services. A victim advocate from the US Attorney-General's Office will be involved if an arrest has been made and there is potential for criminal charges. Advocates from the Victim Advocacy Project answer questions, offer court support, and provide referrals for services and safety planning. Advocates also contact victims prior to hearings for final protection orders to remind them of the hearing and answer any questions.[209] As

208 The Domestic Violence Intake Centers have representatives from the Court as well as the following organisations: Office of the Attorney General for the District of Columbia (including a child support enforcement officer), DC Metropolitan Police Department, Women Empowered Against Violence (WEAVE), DC Coalition Against Domestic Violence, and the US Attorney's Office: Superior Court of District of Columbia, *Domestic Violence Unit— Intake Centers* <www.dccourts.gov/dccourts /superior/dv/intake.jsp> at 16 February 2010.

209 See generally D Epstein, 'Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System' (1999) 11 *Yale Journal of Law and Feminism* 3, 29–31; M Steketee, L Levey and S Keilitz, *Implementing an Integrated Domestic Violence Court: Systemic Change in the District of Columbia* (2000) State Justice Institute, 33–34; B Tsai, 'The Trend toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation' (1999) 68 *Fordham Law Review* 1285, 1304–1305.

noted above, the Domestic Violence Court deals with a broad range of legal matters including protection orders, criminal charges, paternity and child support issues.

20.174 There are some similarities between the Intake Centers and the Domestic Violence Advocacy Support Central in Perth. As discussed in Chapter 19, this also provides a 'one stop shop' of family violence services, through the co-location of refuge, legal, family support, police and counselling services.[210] A key point of difference, however, is that the Intake Center acts as a service centre for the Domestic Violence Court itself.

20.175 Providing a 'one stop shop' centre for a range of related services is one method of delivering the benefits of victim support, and would complement the existence of victim support workers at court or at the time the police were called.[211] Such a centre would minimise the burden on victims, and facilitate access to the full range of government and victim services.

20.176 The exact form in which such intake services should be delivered may differ depending on resources and needs in different jurisdictions. One option is to establish an intake unit to service courts in a region generally. For example, an intake unit could be established in a capital city, but service all courts within the metropolitan area. An intake unit that services several courts would improve the efficiency of those courts and provide many of the benefits of specialised family violence courts in the general system. If designed to service several courts, an intake unit could be open for extended hours, facilitating access to the courts beyond that available in family violence courts, which have dedicated family violence days. While victims may have to travel further to reach an intake unit than to reach a local court, this may be preferable to visiting several locations to perform the same functions. The centre could be established within a court, or within a victim support organisation. Another option would be to provide such services through telephone support, such as a 24-hour emergency hotline.

20.177 The intake services so provided could perform a range of functions. If staff are appropriately trained, they could assist in (for example) recording victim statements and complaints, and filing claims across a range of jurisdictions, including in the family law jurisdiction. An intake centre could act as a central point of contact for victims for basic information about pending court proceedings. For example, an intake centre could inform victims when court proceedings have been listed. It could also facilitate access to legal advice and other victim services. As in the Neighbourhood Justice Centre in Victoria, a family law courts officer could be available at certain times to provide information on family law courts. The Commissions consider that intake units could be a practical and affordable measure to ensure access to the benefits of specialised family violence courts across the court system generally. In its

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210 Legal Aid Western Australia, *Domestic Violence Advocacy Support Central* (2006) <www.legalaid.wa.gov.au/annualreport/section1/7dvasc.html> at 2 February 2010.

211 This is discussed in Ch 19.

preliminary view, state and territory governments should establish such units, where feasible.

Proposal 20–6 State and territory governments should establish centres providing a range of family violence services for victims, which would have the following functions:

(a) recording victim statements and complaints;

(b) facilitating access to victim support workers for referrals to other services;

(c) filing all claims relating to family violence from victims on behalf of the victim in relevant courts; and

(d) acting as a central point of contact for victims for basic information about pending court proceedings relating to family violence.

The role of the federal government

20.178 A particular issue for this Inquiry is the role of the federal government in supporting family violence courts. As family violence is largely governed by state or territory law, these courts would need to be established or maintained by state or territory governments. Clearly, the feasibility of establishing such courts will vary between and within state and territories, and there needs to be a 'bottom up' approach in developing such courts with the support of the leadership of the court and the partnership of local community organisations and service providers.

20.179 However, there are several ways for the federal government to support specialised family violence courts. One important national mechanism could be the use of funding. The Australian government has already provided federal funding for family violence programs, including the ACT's FVIP, under the Partnerships against Domestic Violence initiative (1997–2003), and currently under the Women's Safety Agenda initiative.[212] In the US, the federal government provides considerable funding under the STOP Violence against Women Formula Grant Program, which was first authorised as part of the *Violence Against Women Act 1994*.[213] The funding has been

212 Australian Government Department of Families, Housing Community Services and Indigenous Affairs, *Women's Safety Agenda* (2009) <www.fahcsia.gov.au/> at 16 February 2010. The Partnerships Against Domestic Violence initiative, launched in 1997, provided federal funding for national, state and territory projects.

213 *Violence Against Women Act of 1994* 42 USC §14043 (US). Each state receives a minimum of US$600,000 each year, and since its inception in 1995, agencies have received over US$750 million under this program: Office on Violence Against Women (US), *STOP Violence Against Women Formula Grant Program* <www.ovw.usdoj.gov/stop_grant_desc.htm> at 16 February 2010.

used, among other things, for specialised family violence and sexual assault units and family violence courts.[214]

20.180 The Australian Government could also assist by facilitating the transfer of knowledge and expertise across state and territory jurisdictions. For example, training could be provided by existing specialised courts or judicial officers; and research and evaluations of existing specialised courts could be funded for the benefit of other jurisdictions. The Center for Court Innovation in New York is an example of an organisation funded to provide research and expertise in the field of problem-solving courts. Similarly, appropriate funding could be provided to the National Judicial College of Australia for the purpose of providing ongoing judicial education in relation to family violence, including in relation to family violence courts. Other proposals relating to training and education are discussed in Chapter 19, which will have an impact on the education and training of those involved with specialised courts.

20.181 The Australian Government could also coordinate state and territory government action in relation to specialised courts. For example, a working party could be set up by the Standing Committee of Attorneys-General which could exchange information and collaborate on projects for such courts. Another way of fostering national cooperation and collaboration is by establishing a network of existing specialised family violence courts and judicial officers specialising in family violence or family law.

20.182 There is also a key role for the Australian Government in ensuring coordination between federal and state/territory courts. In New Zealand, as noted above, there is a position of Family Law Coordinator.[215] These coordinators liaise with people external to the court, including specialist report writers and counsellors. Importantly, for the purposes of this Inquiry, the coordinator also liaises with child protection services, as well as family violence courts.

20.183 A similar liaison position could be created within the Family Court and Federal Magistrates Court to facilitate communication between federal courts and state and territory courts. This liaison officer could act as a central point of contact for state and territory courts where there are concurrent family law proceedings, and thus facilitate information exchange between federal family law courts and state and territory courts. Further, a liaison officer could act also to develop and promote best practice in relation to greater coordination and integration between the federal, state and territory courts. For example, a liaison officer could be responsible for the negotiation of protocols between courts, and for addressing problems with interaction raised by the judicial officers and staff of the courts. The liaison officer could also

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214 O Trujillo and G Test, *Funding the Work: Community Efforts to End Domestic Violence and Child Abuse* (undated).

215 While New Zealand is not a federal state, there is a need for coordination between family law courts and other courts.

represent the federal family law courts in relevant forums for collaboration with agencies, courts and non-government organisations.

Proposal 20–7 The Australian Government should assist state and territory governments in the establishment, development and maintenance of specialist family violence courts by, for example, facilitating the transfer of specialised knowledge and expertise in dealing with family violence and sexual assault across federal and state and territory jurisdictions; and establishing and maintaining national networks of judicial officers and staff specialising in family violence or family law.

Proposal 20–8 The Australian Government should create positions for Family Law Courts liaison officers. These officers should have the following functions:

(a) facilitating information sharing between federal family law courts and state and territory courts;

(b) developing and promoting best practice in relation to information sharing between the federal family law courts and state and territory courts; and

(c) representing the federal family law courts in relevant forums for collaboration with agencies, courts and non-government organisations.

Appendix 1. List of Submissions

Name	*Submission Number*	*Date*
Association for Better Care of Children	FV 03	3 August 2009
	FV 20	9 February 2010
Confidential	FV 05	31 August 2009
Confidential	FV 13	23 October 2009
Confidential	FV 14	5 November 2009
Confidential	FV 15	11 November 2009
Confidential	FV 19	27 January 2010
T Dougall	FV 25	26 February 2010
B Fehlberg	FV 11	14 October 2009
J Fletcher	FV 01	27 July 2009
L Gomez	FV 10	13 October 2009
B Healey	FV 06	14 September 2009
C Humphreys	FV 04	23 August 2009
Inner City Legal Centre—Safe Relationships Project	FV 17	13 January 2010
National Peak Body for Safety and Protection of Parents and Children	FV 18	13 January 2010
	FV 21	29 January 2010
	FV 22	17 February 2010

C Nichols	FV 02	31 July 2009
J Matysek	FV 27	29 March 2010
Non-Custodial Parents Party (Equal Parenting)	FV 12	21 October 2009
B Smyth and R Kaspiew	FV 08	13 October 2009
Victims of Crime Assistance League Inc NSW	FV 23	23 February 2010
	FV 24	23 February 2010
R Wallace	FV 07	18 September 2009
	FV 08	13 October 2009
	FV 16	9 November 2009
B Wechner	FV 26	13 March 2010

Appendix 2. List of Agencies, Organisations and Individuals Consulted

Name	*Location*
ACT Policing	Canberra
Professor H Astor	Sydney
Australian Centre for the Study of Sexual Assault	Melbourne
Australian Domestic and Family Violence Clearinghouse	Sydney
Australian Institute of Criminology	Sydney
Professor T Brown	Sydney
G Calvert	Sydney
Children's Court, New South Wales	Sydney
Professor R Chisholm	Sydney
Dr A Cossins	Sydney
Dr K Cripps and M Davis	Sydney
Justice L Dessau, Family Court of Australia	Melbourne
Education Centre against Violence (ECAV)	Sydney
Judge R Ellis, District Court, New South Wales	Parramatta
Family Law Council	Sydney
Family Law Council, sub-committee	Sydney
Family Violence Magistrates, South Australia	Adelaide

Federal Magistrates	Sydney
Magistrate A Goldsbrough	Melbourne
Professor A Hayes, Australian Institute of Family Studies	Sydney
	Melbourne
Dr M Heenan	Melbourne
R Holder, Victims of Crime Coordinator (ACT)	Canberra
Judge P Fulton Hora and S King	Adelaide
Professor C Humphreys	Melbourne
Legal Aid Roundtable	Sydney
Legal and Support Services Roundtable	Brisbane
Magistrates, New South Wales	Sydney
Magistrates, Victoria	Melbourne
Dr E McInnes	Adelaide
Assistant Commissioner M Murdoch, NSW Police	Sydney
NSW Human Services Community Services	Sydney
NSW Police (JIRT)	Sydney
NSW Rape Crisis Centre	Sydney
S Odgers SC	Sydney
Office of the Director of Public Prosecutions (ACT)	Canberra
Office of the Director of Public Prosecutions (NSW)	Sydney
Office of the Director of Public Prosecutions (Qld)	Brisbane
Office of Public Prosecutions (Vic)	Melbourne
Professor P Parkinson	Sydney

Restorative Justice Unit (ACT)	Canberra
S Seymour	Sydney
Professor J Stubbs	Sydney
C Thompson, NSW Attorney-General's Department and M Paramaguru, NSWLRC	Sydney
Magistrate N Toohey, Victoria	Melbourne
Victorian Law Reform Commission	Sydney
Violence Against Women Advisory Group	Sydney
J Wells, Senior Prosecutor	Adelaide
Women's Legal Services NSW	Sydney

Appendix 3. List of Abbreviations

2004 Family Law Council advice	Family Law Council, *Review of Division 11—Family Violence* (2004)
2009 Family Law Council advice	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)
Abduction Convention	*Convention on Civil Aspects of International Child Abduction*
ABS	Australian Bureau of Statistics
ACSSA	Australian Centre for the Study of Sexual Assault
ADR	Alternative dispute resolution
ADVIP	Armadale Domestic Violence Intervention Project (WA)
ADVOs	Apprehended Domestic Violence Orders (NSW)
AFP	Australian Federal Police
AGD	Attorney-General's Department
AGS	Australian Government Solicitor
AIC	Australian Institute of Criminology
AIFS	Australian Institute of Family Studies
AIHW	Australian Institute of Health and Welfare
ALRC	Australian Law Reform Commission
ALRC 30	Australian Law Reform Commission, *Domestic Violence* (1986)

ALRC 69	Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)* (1994)
ALRC 84	Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process* (1997)
ALRC 102	Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law* (2005)
ALRC 103	Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (2006)
ALRC 108	Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* (2008)
APVOs	Apprehended Personal Violence Orders (NSW)
Best Practice Principles	Family Court of Australia, *Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged*
CAIT	ChildFirst Assessment and Interview Team (WA)
CALD	Culturally and linguistically diverse
CAT	Child Abuse Taskforce (NT)
CCTV	Closed circuit television
CDPP	Commonwealth Director of Public Prosecutions
CEDAW	*Convention on the Elimination of All Forms of Discrimination Against Women*
Child FIRST	Child and Family Information Referral Support Teams (Vic)
Chisholm Review	R Chisholm, *Family Courts Violence Review* (2009)
Commissions	ALRC and NSWLRC
CRIS	Client Relationship Information System (Vic)
CROC	*Convention on the Rights of the Child*

CWU	Child Wellbeing Unit (NSW)
DART	Domestic Assault Response Team (NSW)
DoCS	Department of Community Services
DPP	Director of Public Prosecutions
Duluth Model	Domestic Abuse Intervention Programs, *Duluth Model on Public Intervention*
DVCS	Domestic Violence Crisis Service (ACT)
DVICM	Domestic Violence Intervention Court Model (NSW)
DVLO	Domestic Violence Liaison Officer
DVPC	Domestic Violence Prevention Centre Gold Coast (Qld)
ECAV	Education Centre Against Violence (NSW)
FaHCSIA	Department of Families, Housing, Community Services and Indigenous Affairs
Family Court	Family Court of Australia
FDR	Family dispute resolution
FDR Regulations	*Family Law (Family Dispute Resolution Practitioners) Regulations (2008)*
FMC	Federal Magistrates Court
Form 4	Family Court of Australia, Form 4—Notice of Child Abuse or Family Violence
FRCs	Family Relationship Centres (Cth)
FSF	Family Safety Framework (SA)
FVCD	Family Violence Court Division (Vic)
FVIP	Family Violence Intervention Program (ACT)
FVSC	Family Violence Self Change Program (ACT)

GCDVIR	Gold Coast Domestic Violence Integrated Response (Qld)
Hague Convention	*Convention on the Civil Aspects of International Child Abduction*
HREOC	Human Rights and Equal Opportunity Commission
ICC	Integrated Case Coordination (Tas)
ICCPR	*International Covenant on Civil and Political Rights*
IDVAs	Independent Domestic Violence Advisors (UK)
IDVCs	Integrated Domestic Violence Courts (New York, USA)
IPPs	Information Privacy Principles
IVAWS	International Violence Against Women Survey
JIRT	Joint Investigative Response Team, NSW Police
Kearney McKenzie Report	Kearney McKenzie & Associates, *Review of Division 11* (1998)
Magistrates Court of Western Australia	Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia
MARACs	Multi-Agency Risk Assessment Conferences (UK)
MCCOC	Model Criminal Code Officers Committee
MDCs	Multidisciplinary Centres (Vic)
Moloney study	L Moloney and others, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-reform Exploratory Study,* (2007) Australian Institute of Family Studies.
MOUs	Memorandums of understanding
MRG	Mandatory Reporters Guidance
National Council	National Council to Reduce Violence against Women and their Children

NPPs	National Privacy Principles
NSW	New South Wales
NSWLRC	New South Wales Law Reform Commission
NZLC	New Zealand Law Commission
ODPP	Office of the Director of Public Prosecutions (ACT)
OPP	Office of Public Prosecutions (Vic)
Pyke Review	M Pyke, *South Australian Domestic Violence Laws: Discussion and Options for Reform* (2007)
QLRC	Queensland Law Reform Commission
RLREP	Rape Law Reform Evaluation Project
SACAT	Sexual Assault and Child Abuse Team (ACT)
SCAG	Standing Committee of Attorneys-General
SCAN	Suspected Child Abuse and Neglect (Qld)
Screening and Assessment Framework	Australian Catholic University and Australian Government Attorney-General's Department, *Framework for Screening, Assessment and Referrals in Family Relationship Centres and the Family Relationship Advice Line* (2008)
SDVCs	Specialist Domestic Violence Courts (UK)
SOCA	Sexual Offences and Child Abuse units (Vic)
SOCs	Sexual Offences Courts (South Africa)
SOCIT	Sexual Offences and Child Abuse Investigation Team (Vic)
SOL	Sexual Offence List (Vic)
Time for Action	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).

TLRI	Tasmania Law Reform Institute
UDHR	*Universal Declaration of Human Rights*
VATE	video or audio taping of evidence
VCAT	Victorian Civil and Administrative Tribunal
VLRC	Victorian Law Reform Commission
VOCAT	Victims of Crime Assistance Tribunal (Vic)
VPCU	Violence Prevention Coordination Unit (NSW)
VSRT	Victim Safety Response Team (Tas)
WA	Western Australia
Wood Inquiry	J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008)