Australian Government
Australian Law Reform Commission

NSW
Law Reform
Commission
Justice & Attorney General

Family Violence: Improving Legal Frameworks

CONSULTATION PAPER
SUMMARY

ALRC CPS 1
NSWLRC CPS 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.

There are a range of ways to make a submission or comment on the proposals and questions posed in the Consultation Paper Summary. You may respond to as many or as few questions and proposals as you wish.

Online submission tool

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Written submissions

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

Submissions should be sent to:

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General comments not addressing the questions and proposals in the Consultation Paper Summary can also be submitted via the ALRC's website:

www.alrc.gov.au/inquiries/current/family-violence/index.html

Open inquiry policy

As submissions provide important evidence to each inquiry, it is common for the Commissions to draw upon the contents of submissions and quote from them or refer to them in publications. Non-confidential submissions are made available to any person or organisation upon request after completion of an inquiry. For the purposes of this policy, an inquiry is considered to have been completed when the final Report has been tabled in Parliament. Non-confidential submissions may also be published on the ALRC website.

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

1. Introduction to the Inquiry

Background

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 March 2009 report, *Time for Action*, produced by the National Council to Reduce Violence against Women and their Children (the National Council).[1]

Terms of Reference

Time for Action recommended that the ALRC be given two specific tasks, which are reflected in the two branches of the Terms of Reference for this Inquiry:

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.

In relation to both these issues, the ALRC has been asked to consider 'what, if any, improvements could be made to relevant legal frameworks to protect the safety of women and their children'.[2] The NSWLRC received parallel terms of reference.

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

The first Term of Reference requires the Commissions to consider 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.

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.

The second Term of Reference requires the Commissions to focus on two key issues: inconsistency in the interpretation or application of laws; and a specific focus on sexual assaults committed by a person with whom the complainant is in a domestic or family relationship. The focus on sexual assault committed in a family violence context reflects the fact that most sexual assaults are committed by someone known to the victim.

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, a separate term of reference was warranted. In addition, at the intersection of all the areas under consideration 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.

Other inquiries and reviews

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.

In addition, the Commissions have been directed not to duplicate significant other work. The Commissions have taken into account the 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). The review was completed at the end of November 2009, and released on 28 January 2010. The Commissions have also considered the Family Law Council 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.

Matters outside this Inquiry

The Commissions recognise that the Inquiry concerns only a narrow range of the vast number of issues raised by the prevalence of family violence—when women and children encounter the legal system in its various manifestations.

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. A consideration of such schemes 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 these and other legislative schemes not falling within the present Terms of Reference.

Processes of reform

Working with NSWLRC

The Consultation Paper and this Consultation Paper Summary are released as joint documents of the ALRC and the NSWLRC. The use of the term 'the Commissions' throughout the documents reflects the joint nature of the Inquiry.

Consultation with designated bodies and groups

The consultation strategy for this Inquiry includes all of the bodies identified expressly in the Terms of Reference as well as key stakeholder groups. To date, consultations include—in addition to those required by the Terms of Reference—the police, offices of public prosecutions, lawyers, legal services, judicial officers, the Family Law Council, the Australian Institute of Family Studies (AIFS), the Australian Centre for the Study of Sexual Assault (ACSSA), specialist courts, academics and the Australian Family and Domestic Violence Clearinghouse (AFDVC).

Consultation Paper and Consultation Paper Summary

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 a different approach to provide appropriate opportunities for community engagement.

Only one Consultation Paper will be produced—accompanied by this Consultation Paper Summary—before the production of the final report. In these documents, the Commissions have posed questions—particularly in highly contested areas—as well as proposing options for reform.

E-newsletter

In this Inquiry the ALRC has adopted a new and additional consultation strategy, by way of monthly Family Violence Inquiry e-newsletters. Each e-newsletter also seeks views, experiences and recommendations in relation to particular topics.

Online forum

The second use of internet communication tools is the 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 online forum was conducted amongst a closed group from the women's legal services community to facilitate frank and open discussion in a secure online environment between a specific group of stakeholders spread across Australia, about issues relevant to the concerns and experiences of that stakeholder group.

Advisory groups

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.

Structure of the Consultation Paper and Summary

Part A of the Consultation Paper comprises two chapters: an introductory chapter and a chapter focused on the constitutional and international settings for the Inquiry.

Parts B and C arise principally from 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 interactions from the perspective of child protection.

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

Part E focuses on existing and potential responses to the range of interaction and impact issues considered throughout the Consultation Paper, in particular, specialist courts and other agencies, integrated responses and best practice solutions.

This Consultation Paper Summary reflects this general structure. 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. If you require further background information on any particular question or proposal, you should consult the full Consultation Paper available free online at www.alrc.gov.au.

2. Constitutional and International Settings

Chapter 2 of the Consultation Paper describes the constitutional context for family law in Australia—including a discussion of the Commonwealth's constitutional powers in this area and the referral of powers from the states—as well as relevant international instruments that provide a backdrop for Australian family law today. The chapter also considers the range of different courts—both state and federal—that are involved in adjudicating on family violence and related matters.

Chapter 2 is intended to provide general background information and does not contain any questions or proposals.

3. Purposes of Laws Relevant to Family Violence

Chapter 3 of the Consultation Paper 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 discussed because of their particular interaction with the criminal law. 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 in *Time for Action*.

This analysis reveals that in some cases different statutory regimes share common aims. The discussion is a 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.

The discussion 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 of Part B of the Consultation Paper.

Chapter 3 is intended to provide general background information and does not contain any questions or proposals.

4. Family Violence: A Common Interpretative Framework?

Introduction

Chapter 4 explores what constitutes family violence—or domestic violence or domestic abuse, as it is referred to in some jurisdictions. Definitions of family violence vary widely across family violence legislation, the *Family Law Act 1975* (Cth), the criminal law, and other types of legislation such as victims' compensation legislation and migration regulations. The 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. The chapter also considers addressing key differences in family violence legislation across the jurisdictions—for example by model provisions which contain best practice approaches.

Definition of family violence or acts constituting family violence

Family violence legislation

Although the family violence legislation of states and territories does not appear to be substantially different in respect of crucial matters such as the types of conduct that may constitute domestic violence, 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.[1] 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.

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.

The Commissions agree with the recommendation made by the United Nations Department of Economic and Social Affairs Division for the Advancement of Women that legislation should include a comprehensive definition of domestic violence, including physical, sexual, psychological and economic violence.[2]

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.[3]

Need for a definition of family violence in NSW family violence legislation

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 NSWLRC, that there should be a separate definition of 'domestic violence' in the NSW family violence legislation which should include reference to psychological harm.[4] 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.

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1 Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999), s 3, 18–23.

2 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].

3 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), Rec 14; *Family Violence Protection Act 2008* (Vic) s 5(1)(vi).

4 See New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report No 103 (2003), [4.14]–[4.22].

Sexual assault

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.

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.

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

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. Economic abuse is a particular form of violence identified as being used against older women.

The Commissions propose that the NSW Government amend 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—to ensure that its underlying philosophy and language are appropriate in a modern context. 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

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.

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.

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. 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'.[5]

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;

- threatening to disclose a person's sexual orientation against the person's wishes—relevant to those from the gay, lesbian, bisexual and transgender community.

The Commissions are interested in hearing whether, in practice, legislative examples of certain types of family violence conduct are being treated as exhaustive. In any event, family violence legislation should make it clear that such examples are not intended to be exhaustive.

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.

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5 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), Rec 11.

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.

Kidnapping or deprivation of liberty

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

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 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.

Injury to animals

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.

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'.

- 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.

- 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'. 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.

Exposure of children to violence

Time for Action 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.[6]

The Commissions are of the preliminary view that family violence legislation ought to acknowledge the detrimental impact of family violence on children. 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 own right—as is the case in Victoria—or enable the making of orders to protect children from such exposure. 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.

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

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6 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).

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.[7] 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.

The Commissions are interested, however, 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.

Linkage to criminal law

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.

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.

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7 *Family Violence Protection Act 2008* (Vic) s 5.

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'.

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

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

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. 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).

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. There is merit in a jurisdiction's family violence legislation and criminal legislation adopting a common understanding of the types of conduct that constitute family violence irrespective of whether the criminal legislation limits the availability of defences to homicide in a family violence context to cases involving 'serious' family violence.

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.

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. 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 Queensland criminal legislation, which provides one model for reform. It appears appropriate that the degree of severity 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.

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.

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 which recognise family violence as relevant to a defence to homicide.

The fact that the Victorian criminal legislation has a narrower definition in its family violence legislation is more accidental rather than 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.

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.

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

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).[8] 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).[9]

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.

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). 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. The Commissions are interested in hearing about practical interactions between the stalking provisions in the Northern Territory's criminal and family violence laws.

8 *Family Violence Protection Act 2008* (Vic) s 4.
9 *Restraining Orders Act 1997* (WA) s 6.

'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.

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?

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.

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.[10]

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)'.[11] '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'.

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,[12] causing harm,[13] acts endangering life or creating risk of serious harm.[14]

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?

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.

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.

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10 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8(3).
11 *Criminal Law Consolidation Act 1935* (SA) s 21.
12 Ibid s 23.
13 Ibid s 24.
14 Ibid s 29.

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.

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.

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

The *Family Law Act* defines family violence 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.[15]

This definition of 'family violence' requires reasonableness (objective element) but also requires the decision-maker to place themselves in the position of the potential victim (subjective element). The definition is 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.'[16] What may seem benign to an outsider may be conduct that causes a victim to fear for his or her safety.

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

15 *Family Law Act 1975* (Cth) s 4(1).

16 B Fehlberg and J Behrens, *Australian Family Law—The Contemporary Context* (2008), 215.

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.[17]

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. 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.

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,[18] which may extend to a consideration of violence falling outside the parameters of the definition of family violence in the *Family Law Act*.

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.

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

17 Family Court of Australia, *Family Violence Strategy* (2004–2005), 3 (citation omitted).

18 *Family Law Act 1975* (Cth) s 60CC(3)(m).

(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*?

Expanding definition

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.

The Commissions note that this suggested approach is consistent with that taken by the Family Law Council in its December 2009 advice. 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, noting that this approach would remove the objective element contained in the definition. The Commissions note, however, that the Chisholm Review took a different stance on the 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'.[19]

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'.[20]

19 R Chisholm, *Family Courts Violence Review* (2009), 147.

20 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.

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.

Migration legislation

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.[21]

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*.

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.[22]

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

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21 *Migration Regulations 1994* (Cth) reg 1.21(1). The purpose of these regulations is discussed in Ch 3.

22 *Helmsesi* [2002] MRTA 5231; *Malik v Minister for Immigration and Multicultural Affairs* (Unreported, FCA, Wilcox J, 19 April 2000); P Eastel, 'Violence Against Women in the Home: Kaleidoscopes on a Collision Course?' (2003) 3(2) *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 well-being.

citizens and residents, who are particularly vulnerable to abuse due to the threat of deportation—are important voices in this Inquiry.

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.

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.*

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?

Persons protected

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.

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.

The Commissions are interested in hearing whether this issue arises in other jurisdictions.

The disproportionately high level of family violence suffered by Indigenous women is a major issue. 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.

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. However, the Commissions are interested in hearing whether the expansion of the definition to include such relationships poses any issues, including challenge in implementation.

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?

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.

Guiding principles and a human rights framework

Principles

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. In the Commissions' preliminary view the family violence legislation of each state and territory should contain guiding principles that 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.

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 fear.

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

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.

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.

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. 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.

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:

- 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;[23]

- 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;

- the features of elder abuse—that it commonly consists of economic abuse, as well as the withholding of medication, involuntary social isolation, and neglect;[24]

- 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;[25] and

- the problems faced by 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.[26]

The Commissions are interested in hearing views from stakeholders in this regard.

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.

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23 P Memmott, R Stacy, C Chambers and C Keys, *Violence in Indigenous Communities* (2001) Crime Prevention Branch of the Attorney-General's Department, 1.

24 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.

25 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.

26 Inner City Legal Centre—Safe Relationships Project, *Submission FV 17,* 13 January 2010.

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.[27]

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.

Objects

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 of the preliminary view that the *Restraining Orders Act 1997* (WA) should be amended to include an objects clause.

27 R Chisholm, *Family Courts Violence Review* (2009), Rec 3.6.

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.

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, or promoting the accountability of those who use family violence for their actions; and

- reducing or preventing family violence and the exposure of children to the effects of family violence.

There should be flexibility for states and territories to articulate purposes in addition to core ones. 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.

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.

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?

Grounds for obtaining a protection order

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 and Queensland.

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 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.[28] The Northern Territory legislation only requires an objective standard of fear.[29]

28 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 16.
29 *Domestic and Family Violence Act 2007* (NT) s 18.

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.[30]

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.[31] 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.[32]

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.[33]

In all jurisdictions the court has discretion not to make a protection order even if the grounds for the order have been met.

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.

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.

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.

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30 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 6.
31 *Restraining Orders Act 1997* (WA) s 11A.
32 Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999), s 14(1).
33 *Domestic Violence and Protection Orders Act 2008* (ACT) s 46(1).

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.

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;
- 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.

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

Interactions with federal criminal law

The Commissions have been asked to consider the interaction between family violence laws and federal criminal law. 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;[1]
- using a carriage service to menace, harass or cause offence;[2]
- using a postal or similar service to make a threat;[3] or
- using a postal or similar service to menace, harass or cause offence.[4]

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

1 *Criminal Code* (Cth) s 474.15.
2 Ibid s 474.17.
3 Ibid s 471.11.
4 Ibid s 471.12.

a family member to claim a social security payment is recognised as economic abuse amounting to family violence in some jurisdictions.[5] 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.

The Commissions are interested in ascertaining the frequency with which family violence laws intersect with offences in federal criminal law. The Commissions consider that 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.[6]

The Commissions are also interested in hearing how, in practice, matters are dealt with that 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.

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.

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?

5 See, eg, *Family Violence Protection Act 2008* (Vic) s 6.
6 *Criminal Code* (Cth) ch 8 div 270.

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?

Legislation

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. One area where this could arise, for example, is in relation to the federal offence of sexual servitude.

Education and statistics

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.

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.

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

Choice of proceedings

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.

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

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. Tasmania is the only jurisdiction which criminalises economic abuse in the context of family violence.

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 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.

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 whose family violence legislation recognises such forms of behaviour as family violence) would, in any event, be criminal.

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

Police-issued protection orders

In some state and territory jurisdictions, police are able to issue protection orders or 'police safety notices' on persons who have used family violence. 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. 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. In Tasmania, such orders may last for 12 months, unless revoked, varied or extended sooner.

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.

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.

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 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.

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

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. 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. ACT police are empowered to apply for emergency orders, and are required in certain circumstances to make a written record of reasons for not applying for emergency orders.

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.

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. 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.

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

(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

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.[7]

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.[8]

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.

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 deal with protection orders under family violence legislation, and that they are normally handled by police prosecutors.

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?

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7 *Director of Public Prosecutions Act 1986* (NSW) s 20A.

8 Ibid s 20A(3).

Interaction with criminal law procedures

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.

Police powers of entry, search and seizure

In most Australian jurisdictions, the police have specific legislative powers to enter premises without warrants in cases of family violence. The family violence Acts of Victoria, Western Australia, Tasmania and the Northern Territory each confer powers of entry on police. 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.[9]

In most jurisdictions, family violence legislation, or other legislation governing criminal procedure, confers on police powers to:

- search premises;
- search for and seize firearms either with or without warrant;
- 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; or
- search and seize other articles used, or that may be used, to commit family violence.

Police powers of arrest and detention

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. 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. These powers may be conferred either by family violence legislation or by other legislation governing criminal procedure.

Arrest

For example, 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. In Victoria, a magistrate or registrar may issue a

9 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 37.

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.

Detention

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.

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 person there until a provisional protection order is made and served. There is no maximum limit on the time of this detention.

The maximum time limit of these 'holding' powers varies, with Tasmania providing no limit; South Australia limiting the time of detention after arrest at two hours, with an extension allowing an aggregate of eight hours by court order; Queensland, the ACT and the Northern Territory allowing four hours; 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.

Failure to identify primary aggressor

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.

Commissions' views

Police powers

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.

The Commissions note the concerns expressed about the practical implications of the provisions in 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.[10] There may be serious implications for a victim's safety and wellbeing, 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, can 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.

The Commissions are also interested in stakeholder views about whether there is some 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. In such cases, however, the period of detention must be as short as reasonably practicable to allow the objective of safeguarding victim safety to be fulfilled.

Failure to identify primary aggressor

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;

10 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 89.

(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

Presumption against bail

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. In response, special bail laws have been enacted, 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 affect adversely the safety, wellbeing and interests of an affected person or affected child.

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 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

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.

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

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.

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

Concurrent proceedings under family violence laws and the criminal law

Liability and use of evidence issues

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. There are a few exceptions to this. 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.[1]

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. The Western Australian family violence legislation is an instructive model, however, the Commissions consider that

1 *Restraining Orders Act 1997* (WA) s 63C(2).

such provisions should also extend to the revocation and refusal to vary or revoke a protection order.

Use of evidence

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.

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 about protection orders in criminal proceedings. The need to avoid prejudicing criminal proceedings is also an important factor. Witnesses can be cross-examined on prior inconsistent statements—both in jurisdictions in which the uniform Evidence Acts apply as well as jurisdictions, such as Queensland, which have their own evidence legislation.

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 s 18 of the *Evidence Act 1977* (Qld) 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; and
- in proceedings for breach of protection orders, where clearly the making of protection orders is a relevant fact to be established.

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 offences 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.

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.

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 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.

Court-initiated protection orders in criminal proceedings

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 family violence. These important provisions may circumvent the need for a victim to make a separate application for a protection order.

Making of protection order

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 having 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.

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'.[2] In the Commissions' preliminary view, however, a court should be able to

2 Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999), 67.

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.

An alternative approach is to limit courts to make interim protection orders in such circumstances.

As a preliminary matter, 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.

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 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.

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.

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

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.

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

Types of conditions

The types of conditions that are authorised by family violence legislation to be imposed typically include any that the court considers necessary: to protect the victim and any child from family violence;[3] or to encourage the person to accept responsibility for the violence committed against the victim, or to change his or her behaviour.[4]

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

3 For example, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 35(1).
4 For example, *Domestic and Family Violence Act 2007* (NT) s 21(1)(b).

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.

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.[5] 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.[6] The Commissions are interested in hearing whether this experience is common to other jurisdictions and, in particular, the extent to which protection order conditions are tailored to the circumstances of particular cases across the jurisdictions.

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. 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.

The Commissions consider that in making protection orders it is particularly important that judicial officers are able to impose conditions that proscribe conduct that is not otherwise 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.

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 conditions to be considered by the court.

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5 Rosemary Hunter, *Domestic Violence Law Reform and Women's Experience in Court* (2008), 81.
6 Ibid, 98.

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.

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

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 the premises, notwithstanding any ownership rights in relation to such premises.

In some jurisdictions, including Victoria, Queensland, and NSW, courts are directed to consider specific requirements before making an exclusion order. These requirements are in addition to those considered in making a protection order. In other jurisdictions, the factors a court is to consider in making a protection order are the same regardless of whether the protection order includes an exclusion order. 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 combined effect of these two options for reform is to require courts to actively consider whether to make an exclusion order and may increase the likelihood of judicial officers making exclusion orders in appropriate circumstances. 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.

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. 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*.[7] The Commissions are interested in hearing views about whether police who make exclusion orders should also be required to take reasonable steps to secure temporary accommodation for the excluded person, as is the case in Victoria.

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.[8] 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'.[9] 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.

The Commissions are interested to hear:

- how the presumption in the Northern Territory family violence legislation is working in practice;
- whether the family violence legislation of other states and territories should include a similar presumption.

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7 Australian Law Reform Commission, *Domestic Violence*, ALRC 30 (1986), [100], Rec 14.

8 *Domestic and Family Violence Act 2007* (NT) s 20.

9 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 17 October 2007, 4846 (S Stirling—Attorney-General), 4848.

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

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.

The Commissions tend to the view that it is important for family violence legislation to expressly allow 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. 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.

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.[10] 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.

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—such as NSW and Queensland—in fact, impose such conditions as part of their general power to impose any orders that they consider to be necessary or desirable.

In certain jurisdictions, rehabilitation orders may be made as part of the criminal process in the pre-sentencing phase or on sentencing where offenders have committed family-violence related offences. The Commissions are interested in hearing whether, in practice, 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.

10 Magistrates' Court of Victoria, *Information for Application for an Intervention Order* (2009) <www.magistratescourt.vic.gov.au> at 2 February 2010.

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?

Other interactions between protection orders and sentencing

Taking protection order conditions into account in sentencing

The Commissions are interested in hearing whether, in practice, courts sentencing offenders for family-violence related offences are made aware of and take into account any existing protection order conditions to which the offender to be sentenced is or has been subject.

In the Commissions' view it is appropriate for courts to consider any protection order conditions to which an offender 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.

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.

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.

Place restriction orders

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. 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.[11]

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.

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.

11 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17A(2).

Breach of protection orders

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.

Aid and abet provisions

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. The VLRC recommended that if the police believe that a victim has consented to a breach, they should explain the 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.[12] 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.[13] 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.[14]

In the Commissions' view, it is inappropriate for victims to be charged 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 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.

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.

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12 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), Rec 33.

13 Western Australia Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008), 33.

14 Ibid, Rec 6.

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

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 pervert the course of justice for conduct engaged in by them to reduce the culpability of the offender—such as withdrawing their statements. The Commissions have grave concerns about this practice and are interested in hearing of any circumstances where this has occurred.

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'.[15]

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.

15 H Douglas, 'The Criminal Law's Response to Domestic Violence: What's Going On?' (2008) 30 *Sydney Law Review* 439, 454 (citation omitted).

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

There is no defence of consent to breach of a protection order in any Australian state or territory. 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. The WA review recommended that consent be removed as a mitigating factor in sentencing on conviction for breach of a protection order.[16]

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.[17]

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?

16 Western Australia Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008), Rec 4.

17 The Commissions further discuss sentencing factors in Ch 7.

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?

Charging for breach of protection order rather than underlying offence

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.

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 about 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?

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*. 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.

Penalties and sentencing for breach of protection orders

The maximum penalties for breach of a protection order vary significantly across state and territory jurisdictions. 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.[18]

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.[19] 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.

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. Where the court determines not to impose a sentence of imprisonment it must give its reasons for doing so.[20]

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;
- 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

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18 Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999), s 64.

19 Western Australia Department of the Attorney General, *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008), 23.

20 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14.

- 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.

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?

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

Introduction

Chapter 7 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.

Family violence as an offence

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.

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'.[1] 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 frameworks

1 D Tuerkheimer, 'Recognizing and Remedying the Harm to Battering: A Call to Criminalize Domestic Violence' (2003) 94 *Journal of Criminal Law & Criminology* 959, 972.

that depend on the criminal law, such as victims' compensation, with the effect that family violence victims are also typically under-compensated.

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.

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?

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

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 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.[2]

2 *Criminal Law Consolidation Act 1935* (SA) s 5AA(1)(g).

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.

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.

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. 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. Evidence of the latter 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.

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.

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

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'.[3]

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).[4] 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.[5] 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.[6]

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

3 *Crimes (Sentencing) Act 2005* (ACT) s 33.
4 *Crimes Act 1914* (Cth) s 16A sets out factors a court must take into account in the sentencing of federal offenders.
5 *Weininger v The Queen* (2003) 212 CLR 629, 647.
6 Ibid, 665.

s 16A(2)(c), and the ALRC recommended that the section be redrafted to provide greater clarity.[7]

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.

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.

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. 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.

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

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7 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), [6.61], [6.65]–[6.66], Rec 6–1.

- 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.

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?

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. 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.

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.[8] 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.

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
- any person with a mental illness who commits an act of violence against a family member.

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.

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8 *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).

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.[9] 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

Another option for reform is the use of specific guidance on sentencing in the context of family violence. 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. The Commissions support 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. 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.

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.

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

Family violence as a defence

This section 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.

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).

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.

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.

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 that 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.

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

The Terms of Reference direct the Commissions to consider the interaction in practice of state and territory family violence laws with the *Family Law Act 1975* (Cth). 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, including parenting orders. 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). 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 including:

- any family violence involving the child or a member of the child's family;[1] and

1 *Family Law Act 1975* (Cth) s 60CC(3)(j).

- 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.[2]

The principal legislative mechanism for dealing with inconsistent family violence orders and certain orders, including parenting orders, made under the *Family Law Act* is set out in pt VII div 11 of the Act. A substantially identical scheme is set out in pt 5 div 10 of the *Family Court Act 1997* (WA).

The purpose of pt VII div 11 of the *Family Law Act* is set out in s 68N:

> (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.

Awareness of pre-existing orders

Parenting proceedings under the *Family Law Act*

'Friendly parent' provision

Concerns have been raised that certain provisions of the *Family Law Act* may impede the extent to which family courts are informed about any history or risk of family violence. In particular, concerns have been raised about:

- s 60CC(3)(c)—which requires the court to consider 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, 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.

Extensive reforms to these provisions have been recommended in the Chisholm Review and the Family Law Council advice. The Commissions endorse the recommendations for reform of the 'friendly parent' provision and costs orders requirement set out in these reports.

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2 Ibid s 60CC(3)(k).

However, in the event that the recommendations of the Chisholm Review and the Family Law Council are not adopted, 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 child protection order to provide written advice to this effect. This will help to ensure that family courts do not construe the parent's action as 'unfriendly' for the purposes of s 60CC(3)(c).

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).

Form 4—Notice of Child Abuse or Family Violence

A Form 4—*Notice of Child Abuse or Family Violence* may be filed by parties raising allegations of family violence, or a risk of family violence, in proceedings in the family courts. The Family Law Council recommended that the federal family courts consider revising Form 4, including making it more user-friendly. 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, a targeted identification and risk assessment process.

The Commissions consider that there is scope for improving Form 4, which 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, the form should be amended in this way. If retained as a component of proceedings in federal family courts, Form 4—*Notice of Child Abuse or Family Violence*—should be amended to include a designated space for parties to note information about current protection orders obtained under state and territory family violence legislation or applications for such orders.

Initiating Application (Family Law)

The Commissions are also 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 separately ask 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.

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

Making state and territory courts aware of family law orders

With the exception of the ACT, the family violence legislation in each of the states and territories includes provisions to ensure that courts gain access to information about parenting orders. This information is central to ensuring that proceedings for protection orders are conducted on an informed basis.

The most common approach is to impose a legally enforceable obligation on parties to inform the court about pre-existing orders. However, this mechanism may not always be effective—for example, where parties are unrepresented, or where orders have been made *ex parte*. Particular difficulties may also arise where applicants are from culturally and linguistically diverse backgrounds or other vulnerable groups, such as persons with a disability.

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.[3]

The Commissions are interested in stakeholder views on extending the Victorian model to other states and territories. This requirement could either replace, or operate in addition to, any obligation on parties to inform the court about protection orders of which they are aware.

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:

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

(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.

Police-issued protection orders

A separate issue arises in relation to police-issued protection orders. 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.[4] If asked by an officer, a person must inform the officer about any such parenting orders or applications.

Elsewhere the Commissions propose that police-issued protection orders should only apply for a limited period of time.[5] If such orders operate for a short length of time the need for police who issue them to ascertain whether any parenting orders are in existence, or whether proceedings for such orders are pending, is not as great. However, if state and territory governments retain police-issued protection orders that operate for significantly longer time periods, then these should be accompanied by safeguards for obtaining information about parenting orders.

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?

Application forms

In the Commissions' view, application forms for protection orders should clearly and specifically ask about the existence of family court orders or pending proceedings for such orders. For example, the Queensland *Protection Order Application* 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

4 *Domestic and Family Violence Act 2007* (NT) s 90(2)(a)(i), (ii).
5 Proposal 5–4.

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 8–4 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.

Consideration of pre-existing orders

Parenting proceedings under the *Family Law Act*

An ongoing challenge in the interaction between family violence protection orders and conditions for contact under parenting orders is the evidentiary weight to 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. In the Commissions' preliminary view, the distinction between considering final and contested protection orders on the one hand, and interim and uncontested orders on the other, should be removed.

The Commissions have considered two options for implementing such a reform. First, that the requirement to consider protection orders should be removed altogether and, instead, reliance placed on a general requirement to consider the need to protect the child from family violence or, as recommended in the Chisholm Review, a child's safety and wellbeing. A potential downside of this option, however, may be to decrease the visibility of family violence as a factor in making parenting orders.

An alternative approach would be to include a requirement to consider 'any family violence, including as indicated by the existence of any protection order', which removes the distinction in law between final and contested orders, and interim and consent orders. This approach is intended to highlight the probative value of the full range of protection orders in making parenting 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.

Consent orders under the *Family Law Act*

Parenting orders that are inconsistent with protection orders can be made by family courts on the basis of the consent of the parties. Community lawyers and family violence workers have reported instances where women felt pressured into agreeing to consent-based parenting orders that were inconsistent with protection orders and that, as a result, exposed them to the risk of violence.

Rule 10.15A of the *Family Law Rules* imposes requirements on parties seeking to make consent orders in the Family Court where there are allegations of child abuse. 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. 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.

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 will not make the orders unless parenting proceedings are instituted. The Kit also advises parties to seek legal advice in this situation.

Issues also arise in relation to interim parenting proceedings because there is insufficient opportunity for the court to properly consider issues of family violence. 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

The 1998 Kearney McKenzie Report considered the legislation passed by states and territories to make it possible for judicial officers to consider any relevant parenting orders in proceedings for a protection order. Most submissions to that 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 impact adversely on the protective role of proceedings under family violence legislation. For example, protection orders may be framed in order to be consistent with parenting orders but may provide a lower standard of protection, or may not be made at all because they would be inconsistent with existing parenting orders. The Commissions are interested in stakeholder views on whether this issue is arising in practice.

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.

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 between existing orders

Obligations on federal family courts to specify and explain any inconsistency

Section 68P of the *Family Law Act* applies if a parenting order requires or authorises a person to spend time with a child, and the order is inconsistent with an existing family violence order. The court must specify in the order that it is inconsistent with an existing family violence order; and explain to the parties the court's reasons for making an inconsistent order. The Commissions are interested in stakeholder views about the operation, in practice, of this requirement. In particular, is it overly burdensome on family courts or overly complex for persons affected by inconsistent orders?

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?

Section 68Q provides that where a parenting order is inconsistent with a family violence order, the family violence order is invalid. Parties may apply to the court for a declaration of inconsistency. These declarations are a potentially valuable mechanism for ensuring that persons affected by the orders, and police charged with enforcing them, are confident about which order applies.

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?

Powers of state and territory courts to resolve inconsistency

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 made under the *Family Law Act*. The Commissions have heard extensive anecdotal evidence about the reluctance of state and territory courts to use this power. The Commissions are seeking further views of stakeholders on whether state and territory courts remain hesitant to use the s 68R power and, if so, what factors are contributing to this reluctance.

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?

The family violence legislation in Victoria and South Australia makes express reference 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 that:

> 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).

This provision serves to bring the Commonwealth law to the attention of judicial officers but does not change the effect of that law. Section 90 of the *Family Violence Protection Act 2008* (Vic) goes further, by requiring 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.

At this stage, the Commissions are of the view that the approach adopted in the South Australian legislation is sufficient, but are interested in stakeholder views on whether courts should be *required* to make use of the full extent of their powers to revive, vary, discharge or suspend *Family Law Act* orders.

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.

Without more, 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.

The Commissions are interested in whether there is a need for any systematic 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 hears matters including parenting and protection orders. The use of specialist courts could overcome some of the current concerns about the unwillingness of state and territory judicial officers to intervene in family law issues. However,

potential disadvantages may include delays, depending on the length of time that applicants must wait for proceedings to commence in a specialist court. Specialist courts are discussed in Chapter 20.

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?

In the Commissions' view, 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 magistrates court vary, suspend, or discharge a parenting order. The Commissions anticipate that such a reform would be especially useful to a self-represented party, who may otherwise not be aware that such an option is available.

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.

Legal practitioners may also be reluctant to advocate the use of s 68R. The Commissions have heard anecdotal evidence that legal practitioners may be unwilling to invest time in seeking a variation of parenting orders because of the potential 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.

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?

Western Australia

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). 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*. 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 Principal Registrar of the Family Court of Western Australia has queried the effect of this Proclamation on WA magistrates seeking to adjust parenting orders made under the *Family Law Act*. Principal Registrar 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 the s 68R power. Secondly, it may mean that magistrates sitting in the Perth metropolitan region other than at the Magistrates Court of Western Australia, retain the s 68R power 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 having no s 68R power.

The consequences of this jurisdictional issue are exacerbated 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.

The *Jurisdiction of Courts of Summary Jurisdiction (Children) Proclamation* may be discouraging WA magistrates from using their s 68R power in protection order proceedings. In the Commissions view, the Proclamation should be reviewed to clarify its intended application.

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

Section 60CG of the *Family Law Act* 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. This requirement is not, however, repeated in pt VII, div 11 of the Act in relation to state and territory courts reviving, varying, discharging or suspending parenting orders.

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. 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, but that Division 11 deals with situations in which contact orders are being

considered where family violence orders are in existence or are about to be made. The Family Law Council was of the view that in this situation, while the court must have regard to the best interests of the child, such interests are not the paramount consideration and must give way to the right of other family members to be protected from threat of violence.

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 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.

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.

The Commissions are interested in stakeholder views on whether any further reforms are desirable or necessary 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 to make parenting orders?

In 2006 the *Family Law Act* was amended to repeal the power of state and territory judicial officers to *make* parenting orders, on the basis of recommendations of 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 family violence protection orders

Where a state or territory court making an *interim* family violence protection order revives, varies or suspends a parenting order, s 68T of the *Family Law Act* provides that the variation ceases to have effect when the interim order ends or after 21 days, whichever is earlier. 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.

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 parenting order when making an interim protection order—a court would be unlikely to find that a parenting order has been breached, where a parent withholds contact beyond the 21 day period, while an application to vary or discharge the parenting order is awaiting hearing.

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, that it should be a defence to a 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

In Tasmania, a protocol has been negotiated between the police, the Tasmanian Magistrates Court and the Tasmanian Registry of the Family Court in response to police concerns about victim safety where protection orders operate alongside family court orders. Under the protocol, if a family court contact order poses a risk to the safety of a victim of family violence, the police prosecutor alerts the magistrate of this concern. The magistrate can suspend the order for a period of days and make the protection order. The Magistrates Court file with the grounds for suspension is transferred to the Family Court for review of the contact order within the period of suspension. A review of the *Family Violence Act 2004* (Tas) by Urbis recommended that the effectiveness of this protocol be evaluated over time.[6]

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?

Protection orders subject to parenting orders

The Family Law Council has noted that, as a matter of practice, state and territory judicial officers often avoid inconsistency between state and territory protection orders and parenting orders by making contact ordered under the *Family Law Act* an exception to the prohibitions contained in the protection order. This may expose women and their children to violence at the time of access or at access handover.

The Kearney McKenzie Report noted that the effect of this is that local courts are handing over the responsibility for ensuring contact does not expose women and children to violence to the Family Court. They also noted, however, that 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, leaving a gap in protection.

In Tasmania, applications for protection orders provide 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

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

named above as agreed or as ordered by a court of competent jurisdiction'. In Victoria, applicants can tick a box requesting that a *Family Law Act* order be revived, varied or suspended.

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

Concerns have been raised about the potential for the existence of 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 supervised contact 'covered the situation'. … The magistrate went on to comment that, in any event, he 'couldn't overrule the Family Court'.[7]

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. In the Commissions' view, the most effective initiative is likely to involve judicial education and training.

No existing parenting order

Imposition of parenting orders by state and territory magistrates

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. 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. A key reason for repealing the power of state and

7 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.

territory courts to make new parenting orders was the limited time and expertise of magistrates courts to perform this role.

However, pursuant to s 68N of that Act, courts of summary jurisdiction can make parenting orders with the consent of the parties. Contact orders made on this basis by state and territory courts in the context of a protection order can be a useful stop-gap measure. The Commissions propose a role for further training and development programs in this area.

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).

Other possible inconsistencies

Protection orders may be inconsistent with responsibilities imposed under the *Family Law Act* other than by 'an order, injunction or undertaking', for example, the parental responsibility obligation. Each parent of a child who is under 18 has parental responsibility for the child. There is no legislative provision for parental responsibility to be displaced by a protection order in a state or territory court.

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. In the case of *Dunne v P* [2004] WASCA 239, the Supreme Court of Western Australia 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*. Pursuant to 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 authority from *P v P* (1994) 181 CLR 583 at 602 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.

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*. McClure J issued a concurring order. Special leave to appeal to the High Court was refused.

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 scope of potential inconsistencies?

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. Any such amendment could also clarify which requirements should take precedence where protective bail conditions conflict with parenting orders.

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

Chapter 9 considers a number of issues that arise from the interaction between protection orders and orders that may be made under the *Family Law Act* other than parenting orders. First, the 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

Injunctions available under the *Family Law Act*

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; 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.

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. 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.

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'.

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.[1] Sections 68C and 114AA provide an automatic power of arrest where a person breaches an injunction for personal protection. 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.[2]

Breach of a protection order under state or territory family violence legislation is a criminal offence. In addition, 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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1 *Family Law Rules 2004* (Cth) r 21.02.

2 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].

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.

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.

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.

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.

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

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. 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, 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.

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'.[3]

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.[4]

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.

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 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?

3 R Alexander, *Domestic Violence in Australia: The Legal Response* (3rd ed, 2002), 63.
4 *Family Law Act 1975* (Cth) s 114AB(2).

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?

Section 68R of the *Family Law Act* allows a state or territory court that is dealing with a protection order to revive, vary, discharge or suspend an injunction granted under ss 68B or 114, to the extent to which it expressly or impliedly requires or authorises a person to spend time with a child. The Commissions consider that the mechanism in s 68R 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 to revive, vary, discharge or suspend a *Family Law Act* injunction for the personal protection of a party to a marriage or other person.

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

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'. 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.

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.

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

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. Section 79 provides the court discretion to alter property rights to effect a just distribution between the parties. Generally, the court considers the contributions and future needs of the parties in making this assessment.

In the Marriage of Kennon[5] (*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*. 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'.

5 *In the Marriage of CK and IW Kennon* (1997) 22 Fam LR 1.

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. 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. 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.

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.[6] The Commissions express their support for this recommendation.

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. 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.

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.

6 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, ALRC 69 (1994), Rec 9.6.

Property conditions in protection orders

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. 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. For the purpose of the following discussion, these will be referred to as 'personal property directions'.

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.[7]

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

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

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7 New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report No 103 (2003), [7.95].

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).

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

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 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.

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.

Future federal family court proceedings

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

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. 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.

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.

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 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.

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[8]—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.

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.

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

Many relocation disputes are associated with unilateral moves after separation but prior to court proceedings. 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).

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

8 Family Court of Australia, *Best Practice Principles for Use in Parenting Disputes When Family Violence or Abuse is Alleged* (2009).

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. 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.[9]

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.

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?

9 *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).

10. Improving Evidence and Information Sharing

Introduction

Chapter 10 considers two key issues related to improving the information available to courts dealing with family violence. First, the chapter examines the use of evidence and other information 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.

Secondly, the 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

As discussed in Chapter 8, a federal family court must have regard to a number of considerations when making a parenting order including the need to protect children from physical or psychological harm as a result of being subjected to, or exposed to, family violence.[1] 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)).

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'.[2]

All state and territory family violence acts include provisions that allow a court to make a final protection order by consent or 'by consent without admission of liability'. The making of such an order 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.

During consultations, a number of stakeholders raised concerns that, in family law proceedings, courts did not give sufficient weight to the fact that one party had obtained a protection order against the other. In particular, some stakeholders expressed the view that courts should be able to consider interim protection orders, and protection orders made by consent, as well as final and contested orders.

However, where a protection order is made by consent without admission of liability, 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.

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1 *Family Law Act 1975* (Cth) s 60CC(2).

2 Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth), [67]–[68].

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 charges for related conduct and does not want to prejudice that trial. 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'.

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.

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.

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

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. 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, 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.

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.

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.

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.

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

Written evidence

Information provided in application forms

A person seeking a protection order under state or territory family violence legislation may apply for an order by completing an application form. 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. 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.

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 less visible, such psychological or emotional abuse. 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.

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

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 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 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'. In other jurisdictions, there is no requirement that an application be supported by an affidavit.

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.

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.

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.

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 it would be desirable to have a standard form of affidavit that could be used in protection order proceedings under state and 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

Closed or open court proceedings

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. 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'.

Where open court proceedings inhibit victims of family violence or other witnesses 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.

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.

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 open or close courts in certain circumstances. 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?

Cross-examination by a person who has allegedly used violence

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.

The Victorian Law Reform Commission (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.[3] This recommendation was implemented in s 70 of the *Family Violence Protection Act 2008* (Vic). 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. 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.[4]

In the Commissions' preliminary view, state and territory family violence legislation should prohibit a person, who has allegedly used family violence, from personally

3 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), Rec 143.
4 *Family Violence Protection Act 2008* (Vic) s 71.

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.[5] 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.

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

False or misleading evidence about family violence

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'.[6] There is no specific provision in the *Family Law Act* to deal with false denials of family violence.

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.[7] The Chisholm Review recommended that the costs order provision in s 117AB of the *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.[8] This kind of provision would cover both false allegations and false denials of family violence. 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

5 See Ch 18.
6 Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth), 41.
7 R Chisholm, *Family Courts Violence Review* (2009), 118.
8 Ibid, 108–120, Rec 3.2.

and recommended that the Attorney-General give consideration to clarifying the intention of s 117AB, either through legislative amendment or public education.[9]

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.

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

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.

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 pressured to consent to a protection order, or do so in order to avoid repeated appearances in court.

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

9 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.

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

The Commissions are also 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. The Commissions note that cross applications can be made for legitimate reasons—for example, where both parties have engaged in violent conduct. 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.

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

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. 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

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. *Time for Action* 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.[10]

Federal family court proceedings

Access to records

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*. The *Family Law Rules 2004* (Cth) specify a 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.

The Family Law Council made a submission to the ALRC's 2008 inquiry into Australian privacy laws (ALRC 108),[11] 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

10 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), Rec 6.2.1.

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

> 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.[12]

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.

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 may indicate a need for formalised information-sharing practices—for example, through information-sharing protocols.

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.

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

Section 121 of the *Family Law Act* makes it an offence to publish an 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. 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.[13]

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

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

The Commissions are interested in stakeholder views about whether s 121 of the *Family Law Act* unduly restricts the sharing of information for the purpose of protection order proceedings under state and territory family violence legislation, including with police who enforce such orders.

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.

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

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).

Stakeholders have noted the benefit of s 60I certificates in signalling that a proceeding under pt VII of the *Family Law Act* involves family violence concerns.[14] 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.

The Commissions consider 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.

14 Federal Magistrates Court, *Consultation*, Sydney, 3 February 2010.

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, for example, 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.

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

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.

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.

Previous reviews have suggested the need to relax the confidentiality provisions in ss 10D and 10H of the *Family Law Act*. 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.[15]

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.[16]

The Commissions seek further information about whether, in practice, ss 10D and 10H of the *Family Law Act* operate to inappropriately restrict the release of information relating to the risks of family violence to courts—including state and territory courts exercising jurisdiction under family violence legislation.

The Commissions' preliminary view 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.

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'.

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'.[17]

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15 R Chisholm, *Family Courts Violence Review* (2009), Rec 2.5.

16 C Nader, 'Family Court Wants Access to Mediation', *Sydney Morning Herald* (Online), 25 February 2010, <www.smh.com.au>.

17 L Laing, *Risk Assessment in Domestic Violence* (2004) Australian Domestic & Family Violence Clearinghouse, 1.

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.

The Commissions are also interested in stakeholder views on 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

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.

In its 2009 report, the Family Law Council recommended amending s 10E of the Act to include an exception allowing disclosure where an adult or child discloses that a child has been exposed to family violence'.[18]

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.

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.

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18 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 8.2.2.

Another issue is whether the general prohibition on admission of communications to family counsellors and FDR practitioners as evidence, in ss 10E and 10J, should be amended to expressly apply to state and territory courts when they are not exercising family law jurisdiction. 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.[19]

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.

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.

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.

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.

19 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.

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

Non-publication provisions in family violence legislation

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. However, jurisdictions differ as to whether non-publication is the default position or is triggered by a court order, 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.

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 greater than in the context of proceedings under the *Family Law Act*. 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*.

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 this issue arises in practice.

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 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.

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.

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.

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?

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

Information held by federal, 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. 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.

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; and
- *Family Law Act* proceedings in federal family courts, to the extent that these give rise to family violence concerns.

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.

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.

In a 2008 report, the ALRC recommended substantial reforms in the privacy area including a uniform set of privacy principles to apply across private sector organisations and federal, state and territory government agencies.[20] Implementation of these recommendations would address many of the barriers currently raised by privacy laws. In particular the ALRC recommended that the use and disclosure of personal information should be possible where someone 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.

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.

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 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.

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

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

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 single serious incidents that are the focus of the relevant privacy exception.

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.

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

Many of the barriers to exchanging information are administrative and cultural, rather than legislative, in nature.

Information-sharing protocols

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. However, the 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.

Information-sharing 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, they 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

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 commitment to work with states and territory governments to establish a national registration system for protection orders.[21]

21 Australian Government, *The National Plan to Reduce Violence against Women—Immediate Government Actions* (2009), 4.3.1.

A national protection order database would have at its core 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.

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 on a 'need to know' basis. Current safeguards used 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

(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

Introduction

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. Chapter 11 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.

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.

Family dispute resolution and family violence

Family dispute resolution (FDR) is defined broadly in s 10F of 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.

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, while providing exceptions in cases of family violence and child abuse. 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.

Appropriateness of FDR in cases of family violence

While there are a range of views on the appropriateness of FDR in family violence contexts, there appears to be a degree of consensus 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.

With some exceptions, s 60I of the *Family Law Act* requires that parties with a dispute about children must go to family dispute resolution before they can go to court, and must make a genuine effort to resolve their dispute through FDR. The exceptions to the requirement to attend FDR include where the parties agree and are applying to court only for a consent order. 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, or where there are circumstances of urgency.

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. 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.

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 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. The *FDR Regulations* also require that an FDR practitioner must be satisfied of the appropriateness of FDR in each case before providing FDR. 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.

The framework in s 60I 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.

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. Screening and risk assessment are important for any agency handling family disputes, but it appears that FDR agencies 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.

Family dispute resolution practitioners have also 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 system conducted by AIFS showed that 50% of parents, post-2006, reported they had contacted or used a counselling, mediation or dispute resolution service.

Importantly for this Inquiry, 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 Family Relationship Centres (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.

Importantly, the AIFS survey also revealed that clients who clearly fall within the exception to FDR in the family law legislation 'are not infrequently referred to the FRCs by lawyers (and to a lesser extent by courts)'. AIFS concluded it was likely that the rate of issuing of certificates had increased, and this was 'in part connected with an absence of triage by lawyers and other professionals'. AIFS 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'.

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.

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.

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.

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.

In order to achieve this, family lawyers need training on how to identify and manage family violence. Preferably, this training should be conducted in conjunction with FDR practitioners, in order to improve 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.

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. 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.

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.

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

The level of cooperation and collaboration between FDR practitioners and lawyers was raised as an issue by both the AIFS evaluation and the 2009 report of the Family Law Council. 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.[1]

In its 2009 report, the Family Law Council suggested a number of strategies 'to develop and enrich inter-disciplinary cooperation and collaboration, particularly between family dispute resolution practitioners and family lawyers'. 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

1 H Rhoades, H Astor, A Sanson and M O'Connor, *Enhancing Inter-Professional Relationships in a Changing Family Law System: Final Report* (2008), iv.

- family violence training for both professions.

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.

FDR practitioners and lawyers are likely to be required to work together more extensively as FDR develops. Although some lawyers and FDR practitioners have 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 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

Definition of family violence

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 the Consultation Paper. The 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* and in the Family Court of Australia's *Family Violence Strategy*.

A KPMG evaluation of FDR practices in the legal aid sector found that screening questions tended to focus on physical forms of abuse, and recommended enhanced screening for non-physical forms of violence.[2]

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?

2 KPMG, *Family Dispute Resolution Services in Legal Aid Commissions: Evaluation Report* (2008) Australian Government Attorney-General's Department, 36.

Protection orders in FDR processes

Another potential issue is the use of protection orders in FDR processes. 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'.[3]

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, 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 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 family dispute resolution.

The Commissions are interested to hear from stakeholders whether, in practice, protection orders are identified and used in risk assessment and management in family dispute resolution processes and whether any reforms are necessary to improve such identification and use.

> **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

Another issue that may arise is that 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, family dispute resolution. 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. 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.

The Commissions' preliminary view is that 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

3 Ibid, 32.

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.

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 the use of FDR to comply with s 60I of the *Family Law Act*. 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.

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

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. The key exception is in the ACT, where a registrar may refer a protection order proceeding to mediation.[4] The Explanatory Statement for the relevant bill explains 'the importance of alternative dispute mechanisms in preventing further violence by facilitating discussions between the parties to an order'.[5] The ACT Magistrates Court also has express power under s 89 of 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.

In NSW, there is legislative power to refer matters to mediation only in relation to Apprehended Personal Violence Orders (APVOs),[6] but not in relation to Apprehended Domestic Violence Orders (ADVOs). This reflects the recommendations of the NSWLRC in its 2003 report on *Apprehended Violence Orders*, in which it expressed the view that 'the fear and imbalance of power typically characterising domestic violence makes mediation in ADVO matters unsuitable, unproductive and unsafe'.[7]

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,

4 *Domestic Violence and Protection Orders Act 2008* (ACT) s 25.
5 Explanatory Statement, Domestic Violence and Protection Orders Amendment Bill 2005 (ACT).
6 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 21.
7 New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report No 103 (2003), [5.50].

personal violence, or conduct amounting to serious harassment,[8] and this view is reflected in the legislation.[9]

The Commissions endorse the concerns expressed by the NSWLRC about the use of alternative dispute resolution where family violence is a factor. Only the ACT specifically mandates referral of matters to mediation in protection order proceedings involving family violence. 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.

The Commissions are, therefore, interested in hearing from stakeholders whether alternative dispute resolution 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

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.

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; and ADR processes developed for Indigenous families, such as Care Circles.

The ALRC and the (then) Human Rights and Equal Opportunity Commission examined the use of family group conferencing and pre-hearing conferences in the report, *Seen and Heard: Priority for Children in the Legal Process* (*Seen and Heard*).[10] The report discussed the benefits of such procedures and noted a number of

8 Ibid, [5.51].
9 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 21(2).
10 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84 (1997).

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'. It recommended further research into effective conferencing practices, and the setting down of procedures in child protection legislation based on this research. These recommendations have not yet been implemented.

As stated in *Seen and Heard*, 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'. 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.

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. 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

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'.[11] 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. Restorative justice initiatives may be employed at any stage in the criminal justice process, including the sentencing

11 T Marshall, *Restorative Justice: An Overview* (1996) Home Office—United Kingdom, 5.

stage. 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.

There are a number of restorative justice practices, with the three most common being victim-offender mediation, conferencing, and circle and forum sentencing.

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. In addition, a large number of 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.

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.[12] However, these provisions are part of the 'second phase' of the restorative justice program, and to date have not been brought into effect. The Restorative Justice Unit of the ACT Department of Justice and Community Safety is currently consulting and planning for this second phase. The 'first phase' of the program applies to 'less serious offences' committed by young offenders. 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.

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 a restorative justice model in relation to family violence depends on the development of appropriate models based on rigorous research.[13]

Time for Action concluded that the 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. The National Council recommended that trials should be undertaken and evaluated,

12 *Crimes (Restorative Justice) Act 2004* (ACT) ss 16(1), (2).
13 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), 84.

'with necessary caution … to explore the utility and suitability of restorative justice for cases of domestic and family violence and sexual assault'.[14]

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.

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.

The Commissions agree with the recommendations of the VLRC that appropriate models need to be 'based on rigorous research'. Further research was recommended by the VLRC and the Victorian Parliament Law Reform Committee. 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, in light of these current and proposed developments it is premature to make proposals in this area. This issue should be revisited at a later stage.

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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14 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), Rec 4.5.2.

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?

12. Child Protection—Introduction

Chapter 12 of the Consultation Paper provides an introduction to the extent of the problem of child abuse in Australia, as well as a discussion of terminology. The chapter also provides a brief history of child protection, as well as an overview of the child protection system as it operates today. The chapter also includes a discussion of particular aspects of the constitutional framework for dealing with child protection issues in the Australian federal system and a consideration of the 'best interests of the child' principle.

Chapter 12 is intended to provide general background information and does not contain any questions or proposals.

13. Child Protection and the Criminal Law

Grounds for bringing criminal proceedings

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.

The crimes 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 crimes and child protection legislation.

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.

In the past, child neglect offences outlined in child protection statutes could be distinguished from those outlined in the general 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 child. These requirements placed an onerous burden on prosecuting authorities, which often proved too difficult to discharge.

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.

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 child's best interests. This may be an argument for including offence provisions in the child protection statutes.

On the other hand, locating offence provisions in child protection statutes may place greater responsibility on child protection agencies. 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.

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 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.

The Commissions are interested to hear views about the appropriateness of current offence provisions, what problems arise from the way in which they are 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

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 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.

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. 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.[1]

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.[2] 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.

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

2 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

A policy requiring child protection notification every time police respond to an incident of family violence may 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. Therefore, a police directive to make automatic reports to child protection authorities—even though well-intentioned—could be counter-productive.

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

Mandatory reporting laws are a valuable mechanism for ensuring that cases of child abuse and neglect are notified, so that protective responses by both the child protective agency and the police are activated. 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 what matters are covered by their duties.

The Commissions note that reforms have increased the mandatory 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

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.

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.

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.

The Commissions accept that protecting the confidentiality of reporters is fundamental to encourage the disclosure of suspicions of abuse and neglect to the 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.

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 necessary for a proper investigation and subsequent prosecution of offences against children.

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. 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, as well as 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

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.[3] The two are not aligned, although there is some support for aligning both thresholds.

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.

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. 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.

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

3 L Bromfield and D Higgins, 'National Comparison of Child Protection Systems' (2005) 22 *Child Abuse Prevention Issues* 1, 7.

report immediately to the police where the report contains allegations of harm that may involve a criminal offence.[4]

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 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.

The Commissions have heard in consultations that, even though there are cooperative arrangements in place between agencies for dealing with these matters, 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, for example, raised in family law proceedings.

The Commissions are interested in hearing whether the current inter-agency protocols and memorandums of understanding 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.

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?

Consulting with child protection agency

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. In Queensland and Tasmania, the police are statutorily required to consult with the child protection agency

4 See, eg, *Child Protection Act 1999* (Qld) s 14(2).

before investigating an offence against a child who is suspected to be in need of care and protection, or before initiating proceedings.[5]

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.

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.

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?

Information sharing

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.

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.[6] 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.[7]

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:

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5 Ibid s 248B; *Children, Young Persons and Their Families Act 1997* (Tas) s 91(2).

6 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC 108 (2008), [69.103].

7 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.

- 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.

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.

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

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. However, 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.

There is no question that a child who is exposed to family violence may be at risk of serious physical or psychological harm. Allowing a children's court to make a protection order in favour of a 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?

Children and young people at risk and juvenile justice

Release on bail

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.[8] 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.[9] However, the special problems that many young people face when applying for bail tend to undermine these principles.

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

8 M Dumbach, 'Homes for Homeless Children' (2007) 32(3) *Alternative Law Journal* 170.

9 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.

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.

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.[10] Residential bail programs have also been suggested by advocacy bodies and service providers.[11] Some of these services and programs already exist in other 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

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.[12]

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. 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.

Under s 350 of the *Children, Youth and Families Act 2005* (Vic), the child protection agency is obliged to investigate any 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.[13] 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.

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

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

11 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.

12 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].

13 *Children, Youth and Families Act 2005* (Vic) s 350(1).

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.

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. 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.

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.

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*

Introduction

Chapter 14 considers the interaction 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 system and the family courts; the participation of child protection agencies in family law matters; and the potential for children to fall into the gaps between the two systems.

Jurisdictional intersections

Section 69J of the *Family Law Act* provides that each state and territory court of summary jurisdiction can exercise federal family law jurisdiction. 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. 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 Federal Magistrates Court (FMC), as the case requires.

On the other hand, while federal family courts are not charged with responsibility for investigating allegations of child maltreatment, issues of family violence and child abuse may be relevant to decisions about what is in the best interests of the child in parenting decisions. Child protection agencies generally do not join these proceedings unless they are advised of the family law proceedings and judge the alleged issues of child maltreatment to be serious enough to warrant intervention.

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.[1] In its 2009 advice, the Family Law Council also recommended a referral of power to the Commonwealth Parliament to allow federal family courts to have concurrent jurisdiction with the state courts to deal with all matters in relation to children including family violence, child protection and parenting orders.[2]

An alternative to 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 of the powers of the Children's Court in addition to the powers conferred by the *Family Court Act*.

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 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.[3]

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.

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.

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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1 Family Law Council, *Family Law and Child Protection—Final Report* (2002), Rec 13.

2 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.

3 Family Law Council, *Family Law and Child Protection—Final Report* (2002), 85–86. See Rec 12.

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

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. 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.

Notification of child maltreatment in Family Courts

The Initiating Application for proceedings in the Family 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.[4] The purpose of the form is to capture information about procedural, interim or final orders from a federal family court. It 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.

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

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 relevant to whether the court should grant or refuse the application (Rule 2.04A of the Family Law Rules 2004).[5]

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 some amendments to Form 4 to make it more user-friendly.[6] The Chisholm Review preferred a general screening of all cases for family violence and child abuse issues.[7]

The Commissions consider that there is scope for improvement to the existing application forms. 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.

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.

Part F of the *Initiating Application (Family Law)* should be amended to encourage parties to identify whether there are or have been child protection concerns as early as possible in proceedings. The Commissions are interested in hearing about the practical

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

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), Rec 10.

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

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)?

Risk assessment

The Commissions understand that the Australian Government is currently considering options for implementing a family violence screening framework. Screening frameworks are routinely used by family dispute resolution practitioners and by other agencies in the family law system. 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 opportunity for participants in both systems to better understand their respective roles and responsibilities.

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.[8]

8 Victorian Department of Human Services, *Family Violence Risk Assessment and Risk Management Framework* (2007).

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

Information flow

Information from the family law system to child protection system

The *Family Law Act* contains two provisions requiring family courts to notify child protection agencies in certain circumstances. First, where a Form 4 is filed, s 67Z(3) requires the Registry Manager of the court to notify a prescribed child welfare authority. 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, s 67ZA(2) requires them to notify a prescribed child welfare authority.

Section 67ZA(3) 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.

Whether the relevant child protection agency takes action depends on the threshold for taking action and the particular focus in the relevant jurisdiction. 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. 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 to determine whether the child is currently at risk of harm.

Information from the child protection system to the family law system

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 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

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.[9] 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). A majority of the court held that the subpoena issued by the Family Court could not defeat state and territory confidentiality provisions.

Orders to produce documents or information

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. The order under s 69ZW overrides any inconsistent state and territory law, 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.[10]

Once information is provided in response to the order, the court must admit into evidence any such information on which it intends to rely.[11] 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'.[12]

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.

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 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* 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.

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

10 *Family Law Act 1975* (Cth) s 69ZW(3).

11 Ibid s 69ZW(5).

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

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

A child protection agency may be involved in family law proceedings in three principal ways: the 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

Under s 92A of the *Family Law Act*, 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.

It appears that requests for intervention are regularly declined. The Wood Inquiry identified four reasons why child protection agencies may decide not to intervene in family law proceedings:

- 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.[13]

Clearly, the best outcome for a child at significant risk of harm is for: the judge to be made aware of 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.

The worst outcome for the child is one in which 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, and neither parent is a viable carer. In that instance, the judge may determine that it is

13 J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), 548–49.

not in the child's best interests to make a parenting order in favour of either parent. That leaves the problem of who should have parental responsibility for that child, especially where a child protection agency, having been previously notified of the safety concern, decides not to intervene in the parenting proceedings. One option may be to empower a family court to join parties to parenting proceedings where the parents are found not to be viable carers for a child.

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.

The Commissions' preliminary view is that the Australian Government should encourage the development of protocols and memorandums of understanding (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

What happens if the child protection agency declines to intervene? 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*,[14] 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. 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. This decision is currently being appealed.

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

14 *Ray v Males* [2009] FamCA 219.

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.

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 about any amendments necessary to the *Family Law Act* in consequence—for example, whether the Act should be amended to 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?

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

One mechanism for bridging the gap between the child protection and family law systems is ss 70C and 70D of the *Family Law Act* for the registration of 'state child orders'—orders dealing with matters concerning residence and contact. Section 70E provides that once an order is registered in a court, it has the same force and effect as if it were an order made by that court. The effect of the registration is to invoke the enforcement mechanisms of the *Family Law Act.*

The Chisholm Review suggested—in relation to s 67ZK of the *Family Law Act*—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. The Review noted that there may be an absence of delegated power to provide the necessary consent as part of the registration process.[15]

15 R Chisholm, *Protecting Children—The Family Law Interface* (2009), 35.

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.

As the giving of consent by a child welfare officer requires specific written authority, 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*?

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.

This section reveals some serious deficiencies in the system of protection that are directly relevant to the Terms of Reference. The Commissions have formed the preliminary view that to protect children in both jurisdictions, judicial officers exercising family law jurisdiction should be empowered to provide material filed and findings made to the relevant agency where there are child protection concerns, to assist the relevant agency to understand those concerns, and to encourage them to take appropriate action.

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

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. This section considers the administrative arrangements in place to facilitate communication and coordination between the systems.

Protocols and memorandums of understanding

Some state and territory child protection agencies have protocols or MOUs with the Family Court and the FMC. These govern the handling of child protection matters and are designed to assist cooperation, clarify procedures and improve decision-making. The purpose of the majority of the MOUs is 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'.

Stakeholders have told the Commissions that these arrangements work well where they are in place. They shape the parties' expectations as to what each will do, and in what circumstances. It appears to be appropriate and desirable that there be nationally uniform or consistent approaches to information sharing between child protection agencies and federal family courts.

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 basic rules for dealing with cases where family law proceedings require 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.

The Commissions are interested in hearing 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

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. The project involves special management of cases in which 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.[16] 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. Formal protocols for information sharing between child protection agencies and federal family courts apply.

The FMC has no current involvement with the Magellan project as it is a Family Court initiative. 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. The FMC has argued that, with the introduction of the common registry, the Magellan project should be extended to include that court.

The Commissions' preliminary view is that the Magellan project should be extended to all qualifying cases, whether in the Family Court, FMC or a other federal court structure for family cases.

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. Other options for ensuring an effective response in child protection cases in the family law system have been proposed. The Family Law Council recommended the establishment of a national child protection service to investigate allegations of child maltreatment that emerge from family law proceedings, because child protection agencies are insufficiently resourced to do that work.

A further option is for an early decision to be made about which court can best handle a particular case. Family court parenting orders can 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',[17] and was endorsed by the Wood Inquiry.[18]

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16 D Higgins, *Co-operation and Coordination—An Evaluation of the Family Court of Australia's Magellan Case Management Model* (2007), 21.

17 Family Law Council, *Family Law and Child Protection—Final Report* (2002).

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

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?

15. Sexual Assault and Family Violence

Part D 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.

Chapter 15 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.

The chapter then introduces the response of the criminal justice system to the unique features of sexual assault, 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. Key myths and misconceptions (frequently inter-related) include that:

- women and children are inherently unreliable and lie about sexual assault;
- the accusation of rape is easily made, but difficult to challenge;
- sexual assault is most likely to be committed by a stranger;
- women cannot be sexually assaulted by their spouse;
- some sexual assaults are more serious and damaging than others;
- non-consent is verbally articulated, evidenced by struggle and results in physical injuries; and
- a ‘true’ or ‘genuine’ victim of sexual assault does not delay in reporting.

The unique features of sexual offences 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).

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.

Other areas of the law that also respond to sexual assault, including protection orders, family law, crimes compensation schemes and the law of torts are briefly discussed. 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.

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. It highlights the likely continued disjunction between the purpose and intention of legislation and its application in practice without extensive cultural change.

Chapter 15 is intended to provide general background information critical to a proper understanding of the criminal justice system's response to sexual assault in the family violence context and does not contain any questions or proposals.

16. Sexual Offences

Introduction

Chapter 16 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. 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.

Overview of sexual offences

Legislative framework

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.

'Rape': the penetrative sexual offence

Chapter 16 includes a brief overview of federal, state and territory law in relation to penetrative sexual offences, aggravated sexual assaults, indecent assault, acts of indecency and assaults with intent to commit sexual acts. The chapter notes the various statutory extensions and modifications to the common law crime of rape in each jurisdiction and the differences in the language and scope of the 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?

Sexual offences against children and young people

Each jurisdiction provides a range of offences concerning sexual conduct with children. For example: sexual intercourse; attempts to have sexual intercourse; acts of indecency; procuring or grooming a child for 'unlawful sexual activity'; and abducting a child with the intention of engaging in unlawful sexual activity. Absence of consent is generally not an element of these offences. Offences against children are commonly articulated in terms of the age of the victim. 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.

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.

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'. 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?

Persistent sexual abuse of a child

All jurisdictions have introduced offences in relation to the 'persistent sexual abuse of a child', 'maintaining a sexual relationship with a young person', or the 'persistent sexual exploitation of a child'. Generally these offences capture a number of unlawful sexual acts—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'. Instead, reasonable particularity for the period during which the offence(s) 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'.

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?

Consent

Liability for sexual offences against adults generally requires that the victim did not consent. 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.

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.

Statutory definition of consent

With the exception of the ACT, every Australian jurisdiction has a statutory definition of consent based on one of the following three approaches:

- free agreement;
- free and voluntary agreement; or
- consent freely and voluntarily given.

The Commissions support the adoption of a statutory definition of consent across all Australian jurisdictions. 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 that including the term 'agreement' reinforces positive and communicative understandings of consent and suggests mutuality.

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

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. 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; others go beyond the common law position—rectifying anomalies, deficiencies or gaps.

The Commissions consider that it is desirable that such lists be non-exhaustive, as is the case in all Australian jurisdictions. 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 long standing 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 be considered to vitiate consent?

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?

The mental element

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.

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 was reckless as to that consent.

In the remaining jurisdictions, the mental state for rape is satisfied by a mere intention to have intercourse. 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.

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.[1] However, in the Code jurisdictions, and in NSW (a common law jurisdiction) this belief must be both honest *and* reasonable.

The law's treatment of honest and mistaken belief remains an issue of continuing controversy. 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.

The Commissions' preliminary view is that the issues are best addressed by adopting the current NSW formulation of honest and reasonable belief. 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, United Kingdom and Canada.

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 long standing 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 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.

1 *DPP v Morgan* [1976] AC 182.

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

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.[2] 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.

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;

2 N Taylor, *Juror Attitudes and Biases in Sexual Assault Cases* (2007), 3–5.

(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

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. 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.

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.

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 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 less effectively.

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

Introduction

Chapter 17 maps 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.

Attrition in sexual assault cases

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.

Bodies like the Australian Centre for the Study of Sexual Assault (ACSSA) and the Australian Institute of Criminology (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'.

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.

Reporting to the police

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.

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.

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

Specialised police units also have roles in integrating police responses with those of other government agencies involved in child protection. For example, Victoria Police has a Sexual Offences and Child Abuse (SOCA) 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.

The SOCITs are staffed by specialist police investigators and specialist sexual assault counsellors. The SOCIT is a victim-centred service delivery and investigative model, 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.

The Commissions have heard that specialised police responses to sexual assault are important for complainants. 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

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 jurisdiction 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 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 victims withdraw in the context of ongoing family violence.

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. The Commissions are interested in what 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.

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. 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.

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

Before an adult charged with an indictable sexual offence can be sent for trial, a committal hearing may be held. 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. 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.

The result of this is that victims may be required to give evidence twice and be subject to cross-examination at both committal and trial. The Commissions are of the view that there is little or no benefit in requiring that complainants give evidence twice. 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.

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

Sexual assault cases—especially those within a family violence context— commonly involve multiple incidents and multiple complainants, for example, a number of siblings may allege that a parent has sexually abused them.

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. 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.

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. Victoria has established a presumption in favour of joint trial in sexual offence cases.

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

The High Court's decision in *Phillips v The Queen*[1] (*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. The issue raised by *Phillips* is whether the evidence of the other complainants was relevant to whether or not the first complainant consented to sexual relations with the defendant.

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. There is some case law[2] 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.

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

Pre-recorded evidence is recorded before the trial but used in court as part of the trial process and is an aspect of vulnerable witness protection. Pre-recorded evidence used in criminal proceedings can be categorised into two distinct forms:

1 *Phillips v The Queen* (2006) 225 CLR 303.
2 *R v Forbes* [2006] ACTSC 47; *MAP* [2006] QCA 220; *Hakeem* [2006] VSC 265.

- the initial interview between police and the witness admitted as evidence-in-chief;

- the entirety of the witness's evidence, including cross-examination.

Commonwealth, state and territory legislation provides for the use of pre-recorded interviews with victims as evidence-in-chief, however, the provisions do not extend 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.

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 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).

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. 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.

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

Introduction

Chapter 18 examines selected issues that arise in the trial of sexual offence 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. 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 a 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.

Evidence issues

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.

Sexual reputation and experience

A number of commentators assert that the experience of testifying at trial may cause complainants almost as much trauma as the actual assault, and the anticipated admission of sexual history evidence may contribute to the reluctance of many women

to report sexual offences to the police. Australian jurisdictions vary in relation to the basis on which sexual history evidence may be admitted and the procedure by which questions of admissibility are determined by the court.

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. Commonwealth provisions apply to child witnesses in sexual offence proceedings.

The exclusionary rules do not, however, 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.

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

Australian legislation regulates the admission and use of evidence in relation to prior sexual history using terms such as sexual reputation, sexual history, disposition of the complainant in sexual matters, sexual experience and sexual activities. Statutory and judicial guidance about the meaning and boundaries of each of these terms and the kinds of evidence covered is limited.

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.

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

Evidence relating to the complainant's sexual reputation is inadmissible in all Australian states and the ACT. 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.[1] 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.[2]

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 Commonwealth, and all states and territories should, in the Commissions' view, ensure legislation provides that the court must not allow any questions as to, or admit any evidence of, the sexual reputation of the complainant.

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

Australian jurisdictions have adopted different approaches in relation to the admission of evidence of the complainant's sexual activity or experience. The most important distinction is between the mandatory model in 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.

In the Commissions' view, a discretionary model ought to apply to determine the admissibility of prior sexual activities evidence. 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

1 *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4.
2 *Crimes Act 1914* (Cth) s 15YB.

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.

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 exclusionary rules

Rules relating to questioning and admitting evidence of the complainant's sexual activities vary and may apply to evidence of the complainant's:

- prior sexual activities with the accused and with other persons; and
- consensual and non-consensual sexual activities.

In the ACT, the restriction applies only to evidence about sexual activity with persons other than the accused. In Victoria, Western Australia 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.

In the Commissions' view, an exclusionary rule of broad application to evidence of a complainant's 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.

For these reasons, the Commissions support the enactment of legislation similar to s 342 of the *Criminal Procedure Act 2009* (Vic).

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

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.

The primary 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. In the Commissions' view, such evidence should only be admissible where, as well as satisfying a general relevance test, 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 in the uniform Evidence Acts in relation to exclusionary rules, including in relation to tendency and coincidence evidence. 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.

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).

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.

Limitations on admissibility for specific purposes

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.

Victorian legislation explicitly addresses these questions of admissibility in respect of 'sexual history evidence'. For example, Sections 343 and 352 of the *Criminal Procedure act 2009* prohibit the admission of sexual history evidence 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. The Commissions are interested to hear views about whether the admission of sexual history evidence or sexual experience evidence ought to be limited according to the Victorian model.

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. 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.

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

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.

In the Commissions' view, the court should be required 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. 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.

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.

Sexual assault communications privilege

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. From the mid-1990s, ongoing reform of sexual assault law and procedure has included the enactment of legislation to limit the disclosure and use of these communications. Every state and territory—except Queensland—now has specific legislation protecting counselling communications.

Implementing some or all of the following measures may assist sexual assault victims to invoke a sexual assault communications privilege:

- 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, 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;
- 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;

- 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.

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

Section 79(2) of the uniform Evidence Acts provides 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)'. Section 108C of the uniform Evidence Acts provides that

the credibility rule does not apply to evidence given by a 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'.

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.

On this basis, the approach to the admissibility of such evidence taken under the uniform Evidence Acts is 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.

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.

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

The following section considers 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'.

Three aspects of the law of evidence concerning the admissibility of tendency and coincidence evidence are problematic in sexual assault cases:

- the 'striking similarities' test;
- the 'no rational view of the evidence' test; and
- excluding 'a reasonable possibility of concoction'.

The 'striking similarities' test

At common law, the cross-admissibility of the evidence of two or more complainants is dependent on the evidence revealing 'striking similarities'.[3] 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'.[4] 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.

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.[5]

The 'no rational view of the evidence' test

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, confirmed by a majority of the High Court in *Pfennig v The Queen*,[6] which 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.

Under s 101(2) of the uniform Evidence Acts, the probative value of tendency or coincidence evidence must substantially outweigh the prejudicial effect.

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3 *Phillips v The Queen* (2006) 225 CLR 303.

4 National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 214.

5 A Cossins, *Striking Similarities between the Common Law and the Uniform Evidence Acts: Protecting Serial Offenders and Putting Children at Risk*, unpublished (2010), 14.

6 *Pfennig v The Queen* (1995) 182 CLR 461, 482–483.

A reasonable possibility of concoction

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, 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. The mere possibility of concoction can mean that evidence is excluded in common law jurisdictions.

Dr Anne Cossins has 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'.[7]

Western Australian reforms

Under s 133 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. 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.

In addition, s 31A of the *Evidence Act 1906* (WA) deals specifically with admitting propensity evidence in a joint trial. It is admissible if it would have significant probative value and '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'. When determining whether the propensity evidence has significant probative value the court cannot take into account that the evidence may be the result of collusion, concoction or suggestion.

Commissions' views

The Commissions' view is that, because the mere possibility of concoction can affect the admissibility of propensity and similar fact evidence in common law 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.

The Commissions propose that federal, state and territory legislation provides that, in sexual offence proceedings, the court should not have regard to the possibility that the

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7 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.

evidence of a witness or witnesses is the result of concoction, collusion or suggestion when determining the admissibility of tendency or coincidence evidence.

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.[8] 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

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 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. Evidence of uncharged acts of sexual misconduct is commonly referred to as 'relationship', 'context', or 'background' evidence and is a type of circumstantial evidence.

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. However, the distinction between relationship evidence and tendency evidence has been described as 'somewhat artificial'[9] since evidence which shows the 'existence of a sexual relationship must surely tend to show that the accused [has a

8 National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 208.

9 Ibid, 252.

tendency] to do the sort of things the subject of the charge'.[10] Nonetheless, many cases have held that evidence of uncharged sexual behaviour between a complainant and an accused is admissible as relationship evidence.[11]

The High Court has 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.[12] 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 there was no rational view of the evidence consistent with the innocence of the accused (the *Pfennig* test).

However, Kiefel J expressed the view that only where relationship evidence is being tendered for its tendency purpose should the *Pfennig* test be applied.[13] 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.

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

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 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.

The common law's approach to recent complaint evidence meant that evidence of delayed complaint was also considered to be relevant to credibility—to undermine the complainant's credibility. Evidence of delayed complaint is commonly used by defence counsel to argue that a complainant has falsely accused the defendant of sexual assault.

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10 *R v Knuth* (Unreported, QCA, J Lee, 23 June 1998), [22].

11 See *Harriman v The Queen* (1989) 167 CLR 590, 630–631; *B v The Queen* (1992) 175 CLR 599; *R v Beserick* (1993) 30 NSWLR 510; *R v Alexander* (Unreported, SASC, 24 April 1996); *Cook v The Queen* (2000) 22 WAR 67; *R v Nieterink* (1999) 76 SASR 56; *R v Vonarx* [1999] 3 VR 618.

12 *HML v The Queen* (2008) 235 CLR 334.

13 Ibid, [503], [505].

Evidence of a complainant's complaint is caught by the exclusionary hearsay rule in 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, and the 'fresh in the memory' test in s 66(2) is satisfied.

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). In that case, 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.[14]

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. Knowledge that children typically delay disclosure of sexual abuse is one reason that evidence of a child's delay in complaint has been held to satisfy the relevance test under the uniform Evidence Acts.[15] One option would be for legislation to provide that the hearsay rule does not apply to evidence of a preliminary complaint, regardless of when the preliminary complaint was made.

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 offence proceedings.

Another factor is that there has not been enough time to establish whether recent amendments to the uniform Evidence Acts, intended to address restrictive interpretations of what is 'fresh in the memory' based on the decision in *Graham*, have had any impact on the admission of evidence of delayed complaint.

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?

14 *Graham v The Queen* (1998) 195 CLR 606, 608.

15 National Child Sexual Assault Reform Committee, *Alternative Models for Prosecuting Child Sex Offences in Australia*, unpublished (2009), 152.

Jury warnings

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'.[16]

Warnings about unreliable evidence and corroboration

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 each as a class of witness are unreliable, the evidence of a particular child or complainant had to be treated with care.[17]

All Australian jurisdictions have enacted legislation abolishing the mandatory requirement to warn the jury that it is dangerous to act on uncorroborated evidence. 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. Further, 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.

In New South Wales, Victoria, the ACT and the Northern Territory a judge is prohibited from warning or suggesting 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.

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. One warning that may be given by trial judges pursuant to their common law powers is the *Murray* warning. A *Murray* warning cautions about the danger of convicting on the uncorroborated evidence of a sexual assault complainant—including a child complainant—and is

16 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [7.7] (footnotes omitted).

17 This analysis was put forward by the QLRC in Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report No 55 (Part 2) (2000), 32.

frequently given in sexual assault trials, if requested by the defence. It is a direction 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.[18]

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 giving a *Murray* warning. 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.

There is support for the legislative provisions which prohibit a judge from warning or suggesting to the jury that children as a class are unreliable witnesses.[19] The Commissions' view is that similar prohibitions should also be extended to complainants in sexual assault cases.

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

Delay in complaint is now known to be a typical feature of reporting sexual assault. In response to this, legislation was 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'.[20]

18 *R v Murray* (1987) 11 NSWLR 12, 19.

19 Criminal Justice Sexual Offences Taskforce (NSW Attorney General's Department), *Responding to Sexual Assault: The Way Forward* (2005), 104.

20 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]. See, eg, *Crimes Act 1958* (Vic) s 61(1)(b).

Arguably, these legislative reforms have been subsequently undermined by the High Court decisions of *R v Longman*[21] and *Crofts v The Queen*.[22] The *Longman* warning is 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. The warning advises that because of delay the accused may be unable to adequately test and meet the evidence of the complainant.

Section 165B of the uniform Evidence Acts, developed in response to *Longman,* provides that the judge must be satisfied that the accused has suffered forensic disadvantage because of the delay before giving the jury a warning. Section 165B 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'.

The Commissions are of the view 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.

The Commissions are interested, however, in further comments on the operation in practice of s 165B of the uniform Evidence Acts in sexual offence proceedings—particularly those involving offences perpetrated in a family violence context.

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.

21 *Longman v The Queen* (1989) 168 CLR 79.
22 *Crofts v The Queen* (1996) 186 CLR 427.

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?

In *Kilby v The Queen*,[23] the High Court endorsed a court direction to juries that delay or absence of complaint could be used as a factor in determining a complainant's credibility. 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. Although such provisions were designed to remove stereotypes as to the unreliability of evidence given by sexual assault complainants, their protective effects have arguably been negated by the High Court decision in *Crofts v The Queen*.[24]

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. 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.

The Commissions propose two options for reform. The first option would be for Commonwealth, state and territory governments to enact legislation modelled on the VLRC's recommendation pursuant to their 2004 report *Sexual Offences*.

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'.[25]

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23 *Kilby v The Queen* (1973) 129 CLR 460.
24 *Crofts v The Queen* (1996) 186 CLR 427.
25 See Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), Rec 38.

Legislation modelled on the second option would contain elements of s 4A(4) of the *Criminal Law (Sexual Offences) Act 1978* (Qld), and s 61(1) of the *Crimes Act 1958* (Vic).

Paragraph (a) of the second proposed option—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. 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. 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.

Paragraph (b) of the second option clearly prevents the *Crofts* warning from being given. Paragraphs (c) and (d) of the second proposed option 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:

(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

Cross-examination is a feature of the adversarial process and 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 offence proceedings.

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. In some jurisdictions this protection is only afforded to child complainants and child witnesses. In other jurisdictions it has

application beyond sexual offences, and applies to a broader range of legal proceedings and/or a wider class of witnesses. 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). Where these limits operate, various mechanisms have been put in place to allow cross-examination on behalf of the defendant.

Two issues arise in relation to these provisions:

- whether the 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 defendent.

The Commissions propose that Commonwealth, state and territory governments legislate to prohibit an unrepresented defendant from personally cross-examining any complainant or other witness in any sexual offence proceeding.

In the Commissions' view, it is inappropriate to allow judicial officers to ask questions on behalf of defendants—as is currently the case in the Northern Territory and Western Australia. This places judicial officers in a difficult position in relation to determining the admissibility of the questions, and may raise perceptions of bias.

The Commissions prefer the approach adopted in Victoria and Queensland, where the person who asks the questions must be a legal practitioner representing the interests of the defendant. The Commissions note that the 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 an unrepresented defendant.[26]

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

26 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].

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

Other aspects of giving evidence

Some jurisdictions provide 'alternative' or 'special' arrangements for the giving of evidence by complainants or other witnesses in sexual offence proceedings including: 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. All jurisdictions also permit a complainant in sexual offence proceedings to have a support person present with them while they give evidence.

In most jurisdictions, the giving of evidence by way of alternative or special arrangements 'may' be ordered by the court. In other cases, the arrangements are something to which, subject to exceptions, the complainant is entitled, or are mandatory (especially in the case of evidence given by children).

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; or require evidence of the complainant in sexual offence proceedings to be given in closed court.

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

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. Such provisions may also apply to a recording of a complainant's evidence at trial.

NSW has introduced provisions relating to evidence in re-trials of sexual offence proceedings. The *Criminal Procedure Act 1986* (NSW) provides that if a person is convicted of a prescribed sexual offence and where, on 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. While the original evidence might include any pre-recorded evidence used in the trial, it covers 'all evidence given by the complainant in the proceedings from which the conviction arose', including court transcripts of evidence.

Section 306C of the Act provides that 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.

The problem addressed by the provision was described by the NSW Attorney-General 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.[27]

The Commissions are interested in comment on whether Commonwealth, state and territory governments 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?

27 New South Wales, *Parliamentary Debates*, L Assembly, 3 March 2005, 14649 (B Debus—Attorney General and Minister for the Environment).

19. Integrated Responses and Best Practice

Introduction

Chapter 19 provides an overview of integrated responses and some best practice models in relation to family violence in Australia. '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. The Duluth model features offender programs, community awareness-raising and training, and case management. It works in tandem with, and monitors, criminal justice services.

Integrated responses in Australia

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, liaison arrangements 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.

A number of Australian jurisdictions have 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 the 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 state and territory governments should have, or continue to have, responsibility for fostering such integrated responses.

The Commissions note that there are many ways in which governments may foster the development of integrated responses. These include:

- the development of strategic plans;
- the creation of statewide steering committees;
- the creation of model information sharing protocols and/or amending information sharing legislation;
- the provision of training and education; and
- the funding of locally developed initiatives.

Key features

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: 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.

There is also a role for the federal 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 federal government could facilitate the transfer of this knowledge between 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. A national resource manual for integrated responses could be one way of promoting integrated responses.

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. 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 *Time for Action* or the expert panel and reference group recommended by the Family Law Council.

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.

Maintaining momentum

Integrated responses often depend on the energy, enthusiasm and expertise of the people originally involved, and sustaining them when those people move on is a key challenge.

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, is 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). 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.

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.

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.

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?

Victim support

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 through the system. Victim support workers also can, and do, routinely navigate through the legal, social and health systems on behalf of victims.

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. 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.

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.

Victim support is also 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 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.

Victims' compensation

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. Victims of family violence are likely to 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. In practice, these costs may constitute a significant barrier for victims in accessing the legal system.

An important method of addressing these financial concerns is through victims' compensation. For most victims 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. 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.

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.

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, state and territory legislation should allow a victim to object if claims are to be treated as 'related'.

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.

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).

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.

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.

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.

Finally, the Commissions consider that Australian 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

This section briefly addresses different issues relating to education and training in the context of family violence. Specific training needs are discussed elsewhere in the Consultation Paper. The need for effective training and education is discussed in the context 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.

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 Chapter 17; and in relation to judicial training on issues relating to sexual offences in Chapter 18.

The Commissions endorse the recommendations made by the National Council, the Chisholm Review 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.

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.

In 2009, the Education Centre Against Violence 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.[1]

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

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

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

1 S Stewart (Education Centre Against Violence), *Consultation*, By telephone, 18 February 2010.

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.

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.

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.

Thirdly, the Commissions support the strategy of developing a comprehensive professional development framework for professionals working in family violence, as recommended in *Time for Action*. 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 *Time for Action*) 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.

20. Specialisation

Introduction

Chapter 20 considers specialisation as a method to improve 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.

Specialised police

In a number of jurisdictions, police officers specialise in family violence and sexual assault.[1] 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.

1 The role of specialised police in the context of sexual assault is discussed in Ch 17.

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.

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

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). 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 agencies—the police, the Office of Children and Youth and Family Support, the Domestic Violence Crisis Service and Victims Support ACT.[2]

2 Office of the Director of Public Prosecutions (ACT), *Annual Report 2008–2009* (2009), 15.

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.

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), 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

In Australia, family violence courts now operate in NSW, Victoria, Queensland, Western Australia (WA) and the ACT. Such a court has also been recommended recently for Tasmania. 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.

The first issue that arises for this Inquiry is whether specialised courts should be established more widely in Australia. One key benefit in terms of improving the interaction between legal frameworks is the greater integration and coordination of the management of cases in these courts. The Commissions consider that family violence courts offer many potential benefits, and this is supported by evaluations. In the Commissions' preliminary view, state and territory governments should establish and foster specialised family violence courts in their jurisdictions.

Jurisdiction

Most specialised courts in Australia focus on criminal cases only.[3] Only Victoria employs a 'one stop shop' model, which deals with all related matters within the jurisdiction of the Magistrates' Court. There appear to be considerable benefits, from

3 In South Australia, protection orders are dealt with alongside criminal cases.

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. 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.

The Commissions' preliminary view is that there is much advantage in the multi-jurisdictional model used in Victoria, which includes civil and statutory claims for compensation, as well as child support and family law matters (to the extent to which such jurisdiction is conferred on the state or territory courts). The Commissions 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.

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;

(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

The features of specialised family violence courts vary markedly from jurisdiction to jurisdiction. The Commissions' preliminary view is that, at a minimum, specialised family violence courts should have a number of features.

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.

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.

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.

Family violence courts should also have special arrangements for victim safety at court, such as a separate waiting room for victims, separate entrances and 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.

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.

Best practice in courts generally

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.

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.

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.

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. The Local Court in NSW has also adopted a shorter practice direction, which also sets out a timeframe for certain stages in the process. Similarly, a practice note in the New Zealand family violence courts sets a timetable for family violence prosecutions to minimise delay. The adoption of similar practice directions elsewhere may be one way of ensuring more timely dispositions of family violence cases. Such practice directions should enable courts to provide victims with some guidance as to the usual duration of court proceedings related to family violence.

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.

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.

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;

(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

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. 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.

There are some similarities between the Intake Centers and the Domestic Violence Advocacy Support Central in Perth. This also provides a 'one stop shop' of family violence services, through the co-location of refuge, legal, family support, police and counselling services. A key point of difference, however, is that the Intake Center acts as a service centre for the Domestic Violence Court itself.

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. Such a centre would minimise the burden on victims, and facilitate access to the full range of government and victim services.

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 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

There are several ways for the federal government to support specialised family violence courts. The Australian Government could 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. 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.

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.

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. 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.

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 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.