

Review of the Family Law System Discussion Paper 86

Joint response of the Magistrates' Court of
Victoria and Children's Court of Victoria

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Introduction

The Magistrates' Court of Victoria (MCV) and Children's Court of Victoria (CCV) welcomes this opportunity to comment on Discussion Paper 86 as part of the Australian Law Reform Commission's Review of the Family Law System.

In recent decades, a range of operational and resourcing factors have led to a decrease in MCV's exercise of its family law jurisdiction, with limited numbers of family law matters now predominantly being heard in regional court locations. MCV deals primarily with consent property and parenting matters and some applications for interim parenting, location and recovery orders.

It is timely to re-examine the areas where MCV is best suited to meeting the current needs of separating families for a family law response and where it is better dealt with in the federal family law system. The outcome should be to deliver the right combination of specialist skills and experience, which promote the best interests of families in a simpler, less costly and more accessible court environment.

While MCV is project planning its roll-out of the multi-jurisdictional specialist family violence courts (SFVCs) and Demonstration Project as an adjunct to the SFVCs, there are a number of challenges and opportunities from an operational and resourcing perspective currently being explored as MCV begins critical work on these initiatives. This work will likely inform broader roll-out over the coming years. This submission will highlight some of those learnings and considerations to-date.

Other than family law responses for families with complex needs, including those experiencing family violence, MCV also recognizes that significant reform should be considered in relation to property proceedings. In particular, there is a significant case for cheaper, simplified procedures where the major assets are confined to a modest matrimonial home and superannuation, or where there are small claims. There is also a case for an improved financial outcome being available for a more vulnerable party in cases where they ultimately bear responsibility for debts or other liabilities incurred inappropriately by the other party and over which they exercised little, if any, control.

The role of state courts in the federal/state jurisdictional divide should be given careful consideration.

CCV

The CCV supports the exercise of family law jurisdiction by CCV Magistrates in appropriate cases, in order to reduce the complexity of the legal process for vulnerable families. However, due to the significant resourcing implications, the Court takes a cautious approach to the development of this jurisdiction. This is consistent with the previous CCV submission to the Family Law Council.

The *Family Law Amendment (Family Violence and Other Measures) Act 2018* amendments to the *Family Law Act 1975* enable:

- the prescription of state and territory children's courts in Commonwealth regulations as having the same jurisdiction in family law parenting matters as that held by state and territory courts of summary jurisdiction under Part VII of the Family Law Act; and
- the prescription of classes of proceedings in regulations, in which the prescribed court will have Part VII jurisdiction.

In particular, at this point, the CCV only endorses a trial of the exercise of family law jurisdiction in cases where:

- the matter originated in the Family Division of the CCV as a child protection application;
- the parties consent to the jurisdiction of the Court to make orders, and;
- the parties consent to the orders; or
- an interim order is necessary to promote the best interests of the child and the judicial officer has capacity to hear the matter.

To undertake a trial will also be dependent on the CCV securing adequate funding to support the development of the processes and infrastructure which will be necessary for the trial. To date, the Commonwealth has declined to fully fund a pilot in the CCV to determine demand and future modelling.

3. Simpler and clearer legislation

The MCV supports the proposal to simplify and clarify the Family Law Act and its subordinate legislation (Proposal 3-1). The MCV agrees that the complexity of the Family Law Act affects the capacity for state courts to exercise summary law jurisdiction. A simplification of the relevant legislation would not only assist self-represented litigants to navigate proceedings, it would also assist MCV registrars to more efficiently apply the provisions of the Act and subordinate legislation, given the lack of formal training court registrars receive in relation to the administration of family law matters.

A simplified Family Law Act would also mean that family law training and professional development for judicial and non-judicial staff would be less complex, and therefore easier to deliver and maintain. It would therefore contribute to a skilled and supported workforce.

In addition to simplified legislation and regulations, the MCV would benefit from its own rule-making power in family law matters. The MCV is currently required to use the *Family Law Rules 2004*, made in accordance with section 123 of the Family Law Act. Using the 2004 Rules is problematic, due to inconsistencies and gaps between them and with the MCV's standard procedure and practice.

The provision of a rule-making power for the MCV for family law matters would ensure that such matters run more efficiently for the benefit of families, particularly where family violence is involved, through the identification and triage of family violence matters in proceedings for both parenting and property matters, and simplification of procedures where possible.

The MCV supports the creation of an online system to facilitate the usability of court forms. In addition to simplifying procedure for court users, this would additionally assist registrars to help in-person litigants with their applications and could be of particular benefit in urgent applications.

Clarification of legislation- transferring parenting order applications from State to Federal Courts

The jurisdiction of a court of summary jurisdiction to make parenting orders is set out in Division 12 of Part VII of the Act. The provisions of Division 12 are somewhat difficult to interpret and navigate.

An analysis of Division 12 of Part VII of the Act suggests there is uncertainty about:

- a) the jurisdiction of state courts to make final parenting orders in unopposed applications;
- b) the power of state courts to transfer to the federal courts different types of consent order applications; and
- c) the factors, if any, that a state court needs to consider in determining whether to exercise its discretion to transfer proceedings to a federal court.

The Act does not specify criteria that a state court needs to consider when exercising its discretion to transfer proceedings on its own motion to a federal family court. There is likely to be a good argument that a state court has a wide discretion to transfer proceedings, for reasons including resourcing or expertise limitations of the court.

Given the uncertain interpretation of some provisions in Division 12 of Part VII of the Act, legislative amendments may assist to clarify the jurisdiction of state courts to hear family law applications, and the circumstances in which proceedings may be transferred to a federal family court. Such amendments would likely align with the proposal to comprehensively redraft the Act to make it simpler and clearer.

CCV

The *Family Law Amendment (Family Violence and Other Measures) Act 2018* aims to clarify the jurisdiction of children's courts to hear family law matters. A new section 69GA of the Act provides for state and territory courts to be prescribed in regulations as having the same jurisdiction as courts of summary jurisdiction to make orders under Part VII of the Act.¹

The new provisions provide that a court may be prescribed in relation to proceedings generally, or for specified classes of proceedings.² For example, the regulations may prescribe that a children's court will only exercise family law jurisdiction when an existing state matter is already before the court.³ Regulations may also prescribe court rules to apply to such proceedings⁴, allowing a children's court to use its own rules when the court is exercising its family law jurisdiction. The CCV reiterates its comments in the introductory section above in relation to the CCV's endorsed scope for any family law trial in its jurisdiction.

When the CCV is in a position to trial the making of parenting orders, the CCV anticipates that the court processes around family law proceedings would as far as possible replicate the processes used in the hearing of child protection applications. This is in keeping with the observations of the Victorian Royal Commission into Family Violence, that parties experience difficulty navigating different court processes, and that courts of summary jurisdiction should aim to dispose of the different legal issues affecting families in the same proceeding where possible.⁵

¹ The *Family Law Amendment (Family Violence and Other Measures) Act 2018* inserts new subsection 69GA(2) which provides that Subdivision C of Division 12 of Part VII of the Act, about jurisdiction of courts, applies to proceedings referred to as 'section 69GA proceedings' in the same way as the subdivision would apply if the proceedings were heard in a court of summary jurisdiction. Section 69GA proceedings are those that are heard in a court prescribed in the regulations for the purposes of new subsection 69GA(1), and that fall within a specified class of proceedings, if a class of proceedings is prescribed in the regulations in relation to that court.

² *Family Law Act 1975*, s69GA(1).

³ Explanatory Memorandum to the *Family Law Amendment (Family Violence and Other Measures) Act 2018*.

⁴ *Family Law Act 1975*, s69GA(3).

⁵ Royal Commission into Family Violence, Report and Recommendations, Volume 3, page 211, March 2016.

4. Getting advice and support

Families Hubs

The MCV supports the goal of providing joined-up service delivery by way of Families Hubs (Hubs). In accordance with Recommendation 37 of the Royal Commission into Family Violence (RCFV), Victoria has begun to roll out Support and Safety Hubs across the state now called the Orange Door. The goal of the Orange Door is to make access to coordinated support from the community, health and justice services easier and safer for women, children and young people experiencing family violence and families in need of support with the care and development of children and young people. Four hubs began operations in early 2018 in Bayside Peninsula, Barwon, Mallee and North Eastern Melbourne. Another Hub will open in Inner Gippsland by the end of 2018. Further Hubs will soon operate in Central Highlands, Loddon and Goulburn regions, with new physical locations to open in Ballarat, Bendigo and Shepparton.

MCV has an important role in supporting the development of the Orange Door. As outlined in the 2017 'Support and Safety Hubs: Statewide Concept'⁶, there is opportunity to enable SFVCs and the Hubs to play a critical role in wraparound support for victim-survivors and end-to-end safety planning, risk assessment and risk management. The Support and Safety Hubs: Statewide Concept notes that "the ultimate aim of the reform agenda across courts and Hubs is that the experience of accessing the justice system will be as seamless as possible for the court user". Examples of this include opportunities for case management, system navigation, video conferencing capabilities and out-posted Hub workers. The Statewide Concept also notes the Hubs will work with the federal courts to build better connections between the state family violence system and the federal family law system. Hubs will be able to further build on the need to link these legal systems together by connecting people into appropriate services to help them navigate the legal system.

The MCV is already working towards collaborating with the Orange Door in a number of ways, including by developing remote witness facilities in partnership with the court to allow witnesses to appear from Orange Door locations. The MCV therefore supports an approach to the roll-out of Families Hubs that dovetails or integrates the Orange Door to limit duplication and instances where victims of family violence who also have family law needs are expected to approach the Orange Door and Families Hubs separately. The plan for development of Families Hubs would need to take into account appropriate funding and support to allow courts to develop family law initiatives in collaboration with the Orange Door. This work will assist in the implementation of RCFV Recommendation 71, which requires the amendment of the *Family Violence Protection Act 2008* and the *Criminal Procedure Act 2009* to allow family violence victims to give evidence from a place other than the courtroom by means of remote technology. The method of interface between MCV and Orange Door is not yet settled, however discussions have involved the possibility of completing and lodging court paperwork, as well as virtual hearings in a safe and supported environment given attendance at court can compromise safety and privacy in regional locations.

MCV is also supportive of the expansion of the Family Advocacy and Support Services (FASS) model, and supports the proposed provision of FASS to regional and remote locations. In addition, MCV would welcome a pilot of the FASS at MCV locations, to support both the Federal Circuit Court (FCC) on circuit and family law jurisdiction in the MCV as it is

⁶ Victorian State Government, Support and Safety Hubs: Statewide Concept, July 2017.

rolled out. This co-location would need to be accompanied by appropriate training for judicial and registry staff on the role of FASS, and a consideration of the demand on physical court resources at sites where the FCC sits, including the need for additional duty lawyers and support services.

CSV assets notes that 'Assuming that the term 'community based' means a physical asset and not just a digital portal for services, this may mean safe, accessible office and consulting spaces to provide a 'visible entry point' for legal and support services. These may be co-located adjacent to current legal eco-systems, and/or court precincts.'

5. Dispute resolution

Family dispute resolution

MCV agrees that there is a need for safe and supportive models of family dispute resolution (FDR) for parenting and property in family violence matters. Currently in Victoria, Victoria Legal Aid (VLA) provides a free Family Dispute Resolution Service (FDRS) for clients who are eligible for a grant of legal aid. Participation in FDRS requires both parties to be legally represented, which ensures an appropriate level of support for participants and strengthens outcomes. Availability of alternative FDR is particularly important for family law property matters that fall outside of the eligibility requirements for that service.

The passage of the *Family Law Amendment (Family Violence and Other Measures) Act 2018* (the Act) has introduced a number of measures that affect the exercise of family law jurisdiction in courts of summary jurisdiction. In particular, it has introduced provisions that allow courts of summary jurisdiction to adjudicate contested family law property matters up to a monetary limit to be prescribed. Whilst the MCV already has the jurisdiction to adjudicate contested property matters up to a limit of \$20,000, in practice it does not currently exercise the jurisdiction. The effect of the Act will be to increase property law jurisdiction in the MCV. MCV registrars will need training about pre-action procedures relating to FDR, especially in the event that the Family Law Act is amended to require parties to attempt FDR prior to applying for property orders. In addition, the MCV is not currently equipped to provide conciliation conferences and other mediation services on site. Significant training and investment would be required to do so.

The MCV hears a high volume of family violence intervention order matters across the state. Currently there is no clear pathway to FDR for parties engaged in family violence proceedings. MCV would benefit from a partnership approach with a FDR provider to capture matters with potential parenting issues at an early stage of proceedings. As part of the MCV's Family Law Demonstration, the MCV is currently investigating incorporating FDR within the Magistrates' Court, however additional resources are required to support the initiative.

6. Reshaping the adjudication landscape

VLA's legally assisted FDR process is crucial for families with inter-related family violence and family law issues, where there may be scope to resolve matters without recourse to the courts. MCV supports the proposal to establish a triage process to ensure that matters are directed to appropriate alternative dispute resolution processes and specialist pathways within the court as needed (Proposal 6-1). MCV also supports the proposed specialist court pathways (simplified small property claims process, specialist family violence list and an

indigenous list (Proposal 6-3). MCV could have a role to play in identifying high risk family violence matters for a specialist family violence list in the federal courts.

The discussion paper notes, at 6.13, that legislative changes to provide for an increase in property jurisdiction in state and territory courts will assist to build capacity for the family law system to resolve small property and financial matters affordably. MCV notes that the legislative change alone will not be enough to increase the use of family law property jurisdiction in state courts. MCV will need training for judicial and non-judicial staff as well as appropriate funding before it is in a position to properly exercise the jurisdiction. MCV notes that the issues raised at 6.20 regarding the potential complexity of small property pools apply in the same way to state and territory courts exercising property jurisdiction as they would to a potential 'small claims property list' in the federal family court. Magistrates may be faced with relatively complex 'small claims' matters which require the apportionment of debt, and where stakes are high due to the vulnerability of the parties and the need for adequate resources to move forward. MCV supports the recommendation of the Women's Legal Service of Victoria in its report 'Small Claims, Large Battles Research Report 2018'⁷, that eligibility for a small claims process should be based on a party's potential share of the asset pool as opposed to the total size of the pool. Eligibility requirements might also take into account the party's financial vulnerability, the particular issues in dispute and the nature and value of assets.

MCV also supports the establishment of a case management process, available upon application to the Court, with simplified procedural and evidentiary requirements would improve vulnerable women's access to fair, expedited and cost-effective property settlements, thereby reducing their risk of post-separation financial hardship. A small claims process should additionally include rules or guidelines for determining when a property settlement can occur, despite parenting issues remaining unresolved.⁸

Early fact finding

While the MCV is supportive of an approach which would allow findings of fact in relation to family violence to be made early on in family law proceedings, for a court of high volume such as the MCV, additional resources would be required. The MCV's family violence jurisdiction as an example, allows for alleged perpetrators of family violence to consent without admission of the allegations to the making of intervention orders. Many matters are able to resolve on this basis. If findings of fact were to be adopted in the MCV's exercise of family law jurisdiction, it is highly probable that most matters would proceed to contested hearings, which are both time and resource intensive.

Co-location of family law registries in local courts

MCV supports the proposal to co-locate family law registries and judicial officers in local courts, as a measure to address fragmentation of the family law and family violence systems (Proposal 6-8). This proposal is linked with Proposal 6-12, which is that all family court premises, including circuit locations and state and territory court buildings that are used for family law matters, are safe for attendees, which includes ensuring there are safe waiting areas, multiple entrances and exits, child-friendly spaces and more. MCV notes that, given that a number of state court locations do not currently include these features, the budget for

⁷ Women's Legal Service Victoria, Small Claims, Large Battles – Achieving economic equality in the family law system, March 2018.

⁸ Ibid.

this infrastructure project would be significant. MCV notes that circuit sitting days in MCV locations are not adequately resourced currently and have unsafe elements. The roll-out of co-location would therefore involve demand pressures on state courts. The level of family violence risk for individuals is typically unknown to MCV registry and security staff, thus increasing safety concerns. In addition, there is often a high volume of matters, which increases the difficulty of maintaining a safe environment.

Increased circuiting of FCC judicial officers and registry staff

MCV is very supportive of the recommendation of the Family Law Council in its 2016 to increase the circuiting of FCC judicial officers and registry staff in state and territory courts, however notes that it will have to be carefully managed with state and territory courts. Accommodation of circuit court sitting days in MCV court locations must be adequately supported with funding and improved coordination with MCV staff, including both registry and security staff.

Legislative amendments to reduce fragmentation

The discussion paper notes that legislative amendments have been passed to support families to obtain all the family law orders they need in state and territory courts. Victoria has led work to trial the expanded exercise of the Court's existing family law jurisdiction in parenting and property matters. In the 2017/18 Victorian Budget, MCV received \$1.5 million to:

- undertake a statewide review of the exercise of the existing family law Jurisdiction; and
- conduct 12 month Demonstration Projects to better understand the current operation of the jurisdiction and to inform potential expansion in cases involving allegations of family violence.

The Demonstration Project will trial the expansion of MCV's existing family law jurisdiction within the SFVC model (RCFV Recommendation 60) at a metropolitan and regional location to address the barriers encountered by families affected by violence in relation to navigating the current fragmented state family violence and federal family law systems.

The scope of the Demonstration Project will encompass the exercise of MCV's existing family law jurisdiction in the context of family violence, that is, where the parties have or have had related family violence matters in MCV, or where Family Law Act parenting orders are made for parties who have also appeared in the Children's Court with family violence related child protection matters. This will ensure that MCV does not become the main forum in which general family law disputes are heard and determined and instead focusses on capitalising on the SFVCs and the information available within it to also assist families experiencing violence with parenting and property disputes.

As part of the Demonstration Project, a review is underway of existing family law administrative procedures and registry processes with a view to effecting improvements where possible. It will also examine the components needed for a new recording system to manage family law matters in MCV, and to improve information sharing between state and federal courts, child protection and family violence services in line with RCFV Recommendation 136.

Less adversarial decision making processes

The discussion paper considers ‘less adversarial’ decision making processes which ‘facilitate a team approach and encourage close collaboration between agencies involved in the justice process’, such as drug and alcohol treatment agencies, community based corrections and family violence services. MCV notes that Victoria is utilising such problem-solving approaches in family violence matters, particularly in the establishment of the SFVCs. The SFVC are designed to link families with specialist family violence service providers, specialist applicant and respondent workers as well as Magistrates and registrars with specialist family violence knowledge. Magistrates have the power to make counselling orders for parties under Part 5 of the *Family Violence Protection Act 2008* (Vic).

Specialist problem solving approaches

MCV has also, in addition to high volume disposition of proceedings, developed specialist problem solving approaches to particular areas of jurisprudence such as the Family Violence Court Division (FVCD), Koori Courts, Drug Courts, Sex Offence Lists and the Assessment and Referral Court.

Since the FVCD was established over a decade ago, MCV has recognised the need for family law matters to be heard alongside related civil and criminal family violence matters because of the benefits to families of determining related matters in the one court, where possible. There are also significant benefits to families in regional non-SFVC locations, accessing family law assistance locally in MCV as opposed to filing in Melbourne or waiting for the visiting FCC to the country region.

The SFVC will incorporate facilities and processes that meet victims needs and provide effective justice interventions to prevent family violence, together with comprehensive legal and non-legal support for victims at court and in the community. The experience of every victim is unique and on that basis, the model has been developed to safeguard victim engagement and visibility within the system.

The Court Integrated Services Program (CISP) is a distinct program that focusses on problem solving and therapeutic jurisprudence and will be used by Magistrates to complement the services attached to the SFVC. CISP provides short-term assistance for accused persons prior to sentencing to address the causes of offending behaviour through individual case management support. In addition to issues of family violence, accused persons often present with a range of complex issues, including disability, mental illness, drug and alcohol addiction, long term unemployment, homelessness and social and cultural isolation. The program works within a risk mitigation framework and aims to reduce the risk of future violence including the development of risk management plans. CISP usually involves a higher rate of contact with the accused and more frequent reports to the Magistrate responsible for the matter. His Honour Judge Gray in his coronial report on the death of Luke Geoffrey Batty and the Family Law Council Report observed that this program has proven to be effective as a measure to hold perpetrators of family violence to account while addressing underlying causes of offending.

A safe and accessible court environment

MCV is supportive of Proposal 6-12, which seeks to ensure the safety and accessibility of all family court premises, including state and territory court buildings. MCV strives to ensure that all courts are safe and accessible. Recommendation 70 of the RCFV requires the

Victorian Government to provide safe waiting areas and rooms for co-located service provides at all Victorian headquarter courts, in addition to accessibility measures for people with disabilities, separate entry and exit points for applicants and respondents, and remote witness facilities. In that context, MCV notes that investigation would be required to determine whether the extensive changes required by Proposal 6-12 would coincide with the works already taking place as part of RCFV projects.

7. Children in the family law system

A large portion of family violence matters heard in the MCV involve children, and the MCV is often the first of all courts in time to engage with families when issues of risks to children require addressing. Whilst the Children's Court has jurisdiction to deal with matters relating to child protection, a family violence matter at MCV will often be the first time a child at risk has come to the attention of the court system. The *Family Violence Protection Act 2008 (Vic)* recognises the vulnerability of these children by specifically requiring the court, before making a final family violence intervention order, to consider whether there are any children who are family members of the affected family member or respondent who have been subjected to family violence committed by the respondent. The court may then, in the absence of any application, include the child as a protected person or make a separate final order for the child as a protected person.

Chapter 7 of the discussion paper makes proposals aimed at embedding children's participation across the family law system, and making the family law system more child centred. MCV is supportive of improvements to information and support services (including counselling and peer support programs) for children, however urges caution with respect to the proposals aimed at realising children's right to be heard.

Section 67 of the *Family Violence Protection Act 2008 (Vic)* provides that a child, other than a child who is an applicant for a family violence intervention order or a respondent, must not give evidence for the purposes of a proceeding under this Act unless the court grants leave for the child to do so. In addition, section 69 requires that alternative arrangements be made for the giving of evidence by a child, unless the court considers it is not appropriate to do so, with regard to a number of factors including the wishes, age and maturity of the child. MCV has concerns that proposals aimed at increasing the participation of children in family law processes by giving them the opportunity to express their views in court proceedings and FDR processes (in particular Proposal 7-3 that the Family Law Act should provide that an affected child must be given an opportunity (so far as practicable) to express their views) might lead to an increasing culture of involving vulnerable children in court processes, which may be damaging.

The MCV is acutely aware of issues surrounding secondary victimisation and trauma and considerations in relation to children's involvement must have regard to the notion of 'doing no more harm' over and above competing public policy interests. The issue is fundamentally about what is in the best interests of the child/children and any approach would need to be properly nuanced and supported, and accompanied by appropriate training and specialisation, requiring resourcing.

CCV

Separate legal representative

In relation to the participation of children who are the subject of protection applications, all

children over the age of ten are provided with separate legal representation who act on a model of 'direct representation' or 'instructions' model. Children who are under the age of ten, or children who are unable to give instructions, may be represented by an Independent Children's Lawyer (ICL) on a 'best interests' basis where a Magistrate determines that exceptional circumstances exist.⁹ The CCV would not support a new model for facilitating children's participation in family law proceedings if it departs significantly from the processes that apply to the participation of children in other CCV proceedings.

If the CCV were to implement a pilot and exercise limited family law jurisdiction, it will be important to ensure consistent legal representation for children irrespective of jurisdiction. This will require the appropriate funding for the provision of training/education to enable multi-jurisdictional advice, support and advocacy to be provided by legal practitioners and child protection practitioners if a pilot commenced in the CCV.

Children's advocate

While the CCV broadly supports the proposal regarding the appointment of a 'children's advocate' to facilitate the participation of children in family law proceedings, the CCV notes that careful consideration needs to be given to the inter-relationship of that role and that of lawyers/ICLs and how they interact with the model for the representation of children in the CCV.

Further, consideration needs to be given to how a person such as a children's advocate relates to the types of matters within the scope of any future CCV pilot, as outlined in the introduction to this submission: namely, parenting orders by consent, or interim orders where necessary to promote the best interests of the child and where the judicial officer has the capacity to hear the matter. For instance, while the ALRC proposes that children's advocates be available in contested proceedings, is it envisaged that this would potentially encompass interim contested proceedings?

8. Reducing harm

The MCV notes that many of these issues were raised and responded to in the 2010 ALRC Inquiry and submits that those responses still apply today.

The MCV is supportive of unmeritorious proceedings being provided for in the Family Law Act and notes that the misuse of systems is somewhat mirrored in the MCV's family violence jurisdiction.

The MCV is supportive of aligning the Victorian definition of family violence with the Commonwealth definition of family violence as previously raised in the 2010 enquiry.

The MCV notes that legislative reforms which are intended to improve the experiences of victims of violence and keep them safe should be progressed with caution, so as to reduce any unintended consequences brought about by implementation. Victoria's new Family Violence Information Sharing Scheme, as an example, will require close monitoring and continuous investment in training and specialisation to limit situations where victims of violence may be misidentified as a perpetrator and therefore, their sensitive information/records can be shared without their consent.

⁹ *Children, Youth and Families Act 2005 (Vic)*, s524(4).

10. A skilled and supported workforce

MCV supports the ALRC's proposed measures to improve workforce capability within the family law system. A proper appreciation and understanding of the nature and dynamics of family violence, and the overlapping legal frameworks is fundamental to ensuring the safety of victim survivors and their families.

There are currently a very small number of Magistrates with family law expertise across Victoria. Out of this diminishing pool of Magistrates with relevant expertise, currently those who are inclined to hear a family law matter have more often than not developed that knowledge from practicing as a family law practitioner. Accordingly, there is considerable capability building required for Magistrates to be able to confidently exercise family law jurisdiction.

The MCV notes that workforce capability has also been compromised by difficulties in recruiting and retaining judicial and non-judicial staff in regional locations. This issue has recently been brought to light, during the recruitment of registry staff for the Family Law Demonstration Project at the Shepparton Magistrates' Court.

The RCFV noted that increases in the demand on the courts have led to chronic infrastructure deficiencies and unsustainable demand on court professionals and services. Over time, the number of cases which commence in MCV has increased dramatically.

The size of Magistrates' caseloads, resourcing restraints and Magistrates' continuous exposure to vicarious trauma have had an effect on the wellbeing of the magistracy. The justice system in Victoria faces significant challenges at this point in time. These challenges highlight the need to work innovatively rather than relying on traditional practices. In addition to other legislative reforms, such as bail and sentencing, family violence is a key contributor of this change.

Judicial education

Currently, there are a limited number of formal training opportunities for Magistrates. During the year, the National Judicial College of Australia (NJCA) ran a two day face-to-face training program called 'Applying Family Law to Parenting and Property', which was attended by the MCV's Lead Family Violence Magistrates and some Magistrates from regional court locations. A range of eLearning modules supporting judicial officer education will soon be piloted with a small group of the Magistrates who attended the training. The general feedback from this program indicated that the training was informative, however two programs were insufficient to adequately train Magistrates in family law.

All Magistrates hearing family law matters require access to professional development programs and up to date, easy to access resources, that provide a foundational level of family law knowledge in relation to parenting and property matters within the jurisdiction of the MCV and an understanding of how to apply this knowledge in practice. Additionally, a mechanism for seeking advice and assistance with cases (such as establishing a community of practice) and for developing resources for continuing family law professional development is also required. This could perhaps take the form of a group of family law experts that would be available to provide guidance to Magistrates in exercising the MCV's family law jurisdiction.

A workforce capability plan for the family law system

Alongside foundational knowledge of family law, it is essential for all judicial officers and court staff to have a proper appreciation and understanding of family violence. Judicial officers presiding over matters involving family violence should be supported through both formal and informal training opportunities to develop the following key capabilities:

- understanding the nature and dynamics of family violence; in particular the impact on victim survivors, children, parenting ability, and the different forms of family violence;
- knowledge of relevant legal frameworks, including the family violence, criminal law, family law and child protection systems;
- knowledge of the intersections between the family law, child protection and family violence legal systems;
- identifying and managing family violence risks through making of appropriate orders and judicial determinations, in accordance with the relevant law;
- understanding the effects of trauma on adult parties, vulnerable witnesses and children;
- effective courtroom management in cases involving family violence, including the use of protections for vulnerable witnesses or parties;
- working with children and young people who are victims of family violence, or who use violence;
- understanding perpetrator behaviour, including the tactics used by perpetrators to avoid accountability relationships with children;
- identifying the primary aggressor in cases involving cross-allegations of family violence;
- cultural competency relating to the intersection of family violence with Aboriginal and Torres Strait Islander people, and people from culturally and linguistically diverse backgrounds.
- an understanding of the relationship between family violence and other issues such as mental illness, drug and alcohol abuse; and
- working appropriately with vulnerable people in relation to family violence, such as parents and children with a disability or mental illness; older and younger people – including in the contexts of elder abuse and adolescents who use violence; pregnant women; and LGBTIQ+ people and families.

Professional well-being

A significant reform agenda coupled with continued increasing demand on the MCV has meant that the preservation of the well-being of the judicial officers is, more than ever, front of mind in any decision MCV makes about operational issues. Any family law demand must be considered in light of the existing and future demand pressures on the MCV and the potential of such demand to compound any wellbeing issues affecting Magistrates.

MCV has established a number of support and welfare measures to preserve the well-being of its judicial officers. These include the Judicial Officers' Assistance Program, which is a free, confidential counselling service that is available exclusively for Victorian judicial officers, both by telephone and in person.

The Judicial College of Victoria also offers a range of well-being courses to Magistrates. These courses focus on topics ranging from personal resilience and well-being, to broader systemic strategies that courts can implement to minimise stress and vicarious trauma. In addition, Magistrates now have access to further leave entitlements, such as four weeks

annual leave, the option to purchase additional leave, and unlimited sick leave at the discretion of the head of jurisdiction.

While court staff have access to the Employee Assistance Program (EAP) and critical incident de-briefing, consideration needs to be given to the cumulative impact of family violence on those non-judicial staff who work in this area and how to manage this on an ongoing basis. The courts note that CSV has commenced a vicarious trauma project, involving representations from across all court jurisdictions and supports its plan to outline to government the additional support required to address the impact of family violence on judicial officers and court staff.

11. Information-sharing

MCV acknowledges the importance of information sharing in identifying unmet need for family law parenting orders in family violence proceedings, and in building thorough risk assessment practices and procedures. Appropriate information sharing tools also enhance the family violence capability of staff by allowing them access to the information necessary to perform their role. MCV would like to see an integrated approach to improved information sharing, risk management and family violence capability to better support parties who are at risk of family violence.

MCV is actively pursuing improvements in information sharing in family law and family violence matters, in particular through the implementation of recommendation 136 of the RCFV. This recommendation is that the MCV and CCV consider pursuing a formal information-sharing arrangement or protocol with the Family Court and the FCC of Australia that is consistent with the new information-sharing regime in the *Family Violence Protection Act 2008* (Vic). In addition, Victoria is represented on the Council of Attorneys-General Family Violence Working Group, which is working to develop an information sharing regime so that family violence, child protection and family law orders, judgements, transcripts and other relevant documentation are accessible to each of the relevant state, territory and commonwealth courts and other agencies as necessary, and developing a technological solution to facilitate the information sharing regime. The Family Violence Working Group will report back to the Council of Attorneys-General by the end of 2019 with a possible draft framework. The MCV will have regard to this as part of its ongoing work on information sharing.

Improved information sharing systems within state and territory courts require appropriate infrastructure to facilitate. At present, much of the family law data recording processes in the MCV are manual, which is time-consuming, prone to administrative error and generally collects less comprehensive data than an electronic system.

Part 5A of the *Family Violence Protection Amendment (Information Sharing) Act 2017* (Vic) established Victoria's new Family Violence Information Sharing Scheme, which aims to create proactive and voluntary information sharing amongst a prescribed set of agencies, about family violence risk in real-time to promote victims' safety. As part of the Family Law Demonstration Project, and as recommended by the RCFV, MCV is in the process of developing an Information Sharing Protocol between MCV, CCV and the Family Court that builds upon this scheme and improves information sharing at these critical junctures.

Currently, MCV does not have a family law case management system. All applications are filed in paper form and court staff at each venue are manually recording family law matters in disparate ledgers or Excel spreadsheets. MCV is developing a new automated case

management system for all of its jurisdictions, however this will not be delivered before 2022. In addition, there is no technical mechanism to facilitate the sharing of information between the different courts and the process of sharing information between jurisdictions in relation to related court orders is a manual one. Any requests for information about a family law matter that may have been heard in MCV rely upon the inspection of a hard copy file. Currently the transfer of family law files from MCV to the Family Courts is in hard copy. These manual processes are onerous, inefficient and prone to error. Insufficient data collection makes it difficult to track jurisdictional overlap and outcomes in complex matters, with legal and specialist family violence services typically knowing more about the relationship between matters than the individual jurisdictions.

Therefore, further work is required to interface with the Family Court system to enhance the way in which the jurisdictions work together to manage safety and to reduce reliance on timely manual processes when court staff have a more meaningful role to play in assisting parties.

Whilst MCV agrees that appropriate information sharing is critical to the proper function of the family law and family violence systems, it is important that any proposed solutions are workable and not subject to onerous protocols and processes. A workable information sharing system will facilitate parties to share appropriate information without overly complicating the process.

Co-location of child protection and family violence support workers at FC/FCC venues


MCV is supportive of the co-location of child protection and family violence support workers at family court venues (Proposal 11-7), and notes that there might be financial implications for state and territory courts if the co-location is to take place in courts of summary jurisdiction or regional courts at which the FCC circuits.

CCV

In relation to Recommendation 136 of the RCFV, the CCV is working with the MCV and Family/FCC courts on the development of an Information Sharing Protocol between the state and federal courts. The type of information sharing proposed between courts under the protocol is broader in scope than the Family Violence Information Sharing Scheme, given the courts will be sharing information in relation to proceedings in other jurisdictions, and the limited application of the Family Violence Information Sharing Scheme to the courts.

The CCV notes that the discussion paper refers to the NSW information sharing regime under Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* (NSW). The CCV notes that the state courts are not currently prescribed as information sharing entities under the Child Information Sharing Scheme (this is subject to ongoing legislative work by the relevant Departments leading the Child Information Sharing reforms in Victoria), however, Child Protection is currently prescribed as an information sharing entity. The Child Information Scheme and Family Violence Information Sharing Scheme in Victoria exclude the sharing of confidential information collected, used or disclosed for the purposes of the courts' judicial and quasi-judicial functions.

The CCV also refers to para [11.23] of the discussion paper and the argument by VLA for the sharing of Children's Court Clinic reports to "enable the child's voice to be heard in family law proceedings without requiring the child to re-tell their story". There are cogent public policy reasons for why the confidentiality provisions regarding Clinic reports were included



in the *Children, Youth and Families Act 2005* (Vic). Clinic reports are ordered by the Court to assist the judicial officer in the performance of a judicial function. Clinic-generated reports should be treated in the utmost confidence in order to ensure the free flow of information between children, young people, their families and the Clinic's forensic clinicians. Any erosion of this relationship of confidence risks impairing the quality of information provided to the Court in determining child protection proceedings in the best interests of children. Clinic reports are excluded from the scope of the Victorian Information Sharing Schemes for policy reasons, as they are obtained and used by the CCV in its judicial functioning. The CCV is of the view that Clinic reports should remain subject to existing confidentiality provisions, and any contrary direction by the CCV.

12. System oversight and reform evaluation

The MCV is supportive of the establishment of a new independent statutory body.