FAMILY LAW COUNCIL REPORT TO THE ATTORNEY-GENERAL ON

Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems:

INTERIM REPORT — JUNE 2015
(Terms 1 & 2)
Family Law Council terms of reference (revised)

Many families seeking to resolve their parenting disputes have complex needs, including emotional, sexual and physical abuse, family violence, substance abuse, neglect and mental health issues. These disputes may be able to be better addressed with the assistance of relationship support services and/or court processes that can cut across the child care & protection and family law systems.

I request that the Family Law Council consider the following matters in relation to the needs of these families:

1. The possibilities for transferring proceedings between the family law and state and territory courts exercising care and protection jurisdiction within current jurisdictional frameworks (including any legal or practical obstacles to greater inter-jurisdictional co-operation).

2. The possible benefits of enabling the family courts to exercise the powers of the relevant state and territory courts including children’s courts, and vice versa, and any changes that would be required to implement this approach, including jurisdictional and legislative changes.

3. The opportunities for enhancing collaboration and information sharing within the family law system, such as between the family courts and family relationship services.

4. The opportunities for enhancing collaboration and information sharing between the family law system and other relevant support services such as child protection, mental health, family violence, drug and alcohol, Aboriginal and Torres Strait Islander and migrant settlement services.

5. Any limitations in the data currently available to inform these terms of reference.

I request that the Family Law Council provide an interim report to me by 30 June 2015, focusing on the first and second matters and that a final report be provided to me by 30 June 2016 on all matters.

In conducting its work, the Council should have regard to the role of the family courts and family relationship services in ensuring the protection of children.

The Family Law Council should consult key stakeholders and examine work being undertaken in Western Australia around the intersection of the family law and child protection jurisdictions. The Council should also have regard to relevant reports and reviews in this area, including the two reports by Professor Richard Chisholm AM:

- *Information-Sharing in Family Law and Child Protection: Enhancing Collaboration*
- *The sharing of experts' reports between the child protection system and the family law system.*
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A note on terminology

Central to the issues in Council’s terms of reference is the confusion of different terms for similar concepts across the various federal and state and territory jurisdictions. This was also an issue that affected the writing of Council’s report. In order to minimise confusion and maximise clarity and consistency, Council has adopted certain generic terms to refer to particular institutions and legal concepts that have different names in different systems or locations in Australia.

Throughout this report, we use the term children's courts to refer to the various state and territory courts that exercise care and protection jurisdiction in Australia, including South Australia’s Youth Court. We use the term child protection department to refer to what might otherwise be known as a child welfare authority. The term magistrates courts has been used to refer to state and territory local courts and magistrates courts.

The term family courts is used to refer collectively to the Family Court of Australia, the Family Court of Western Australia and the Federal Circuit Court, and the term federal family courts is used to refer to the Family Court of Australia and the Federal Circuit Court.

We have also adopted the term family violence protection orders to refer to what are known variously as Domestic Violence Orders (DVO), Apprehended Domestic Violence Orders (ADVO), Violence Restraining Orders (VRO), Domestic Violence Restraining Orders (DVRO), Family Violence Intervention Orders (FVIO), and Family Violence Orders (FVO) in different parts of Australia.
CHAPTER 1. INTRODUCTION

The Family Law Council’s reference is a response to the growing concerns in Australia about the separation of the federal family law and state and territory child protection and family violence systems, and the risks to children’s safety associated with this situation. Concern about this issue has been raised by a number of recent reports, including the Queensland Special Taskforce on Domestic and Family Violence report, *Not Now, Not Ever* (2015), the report from the Centre for Innovative Justice, *Opportunities for Early Intervention: Bringing perpetrators of family violence into view* (March 2015), the Interim Report of the Senate Finance and Public Administration Committee, *Domestic Violence in Australia* (March 2015), the *National Framework for Protecting Australia’s Children* 2009-2020, and the National Plan to Reduce Violence against Women and their Children 2010-2022. It was also the subject of extensive recommendations by the Australian and New South Wales Law Reform Commissions in their 2010 report, *Family Violence—A National Legal Response*.

Council has previously examined the intersection of the family law and child protection systems in its 2002 report, *Family Law and Child Protection*. At that time Council recommended the adoption of a ‘one court principle’.

As formulated in Council’s previous report, this recommendation proposed the family courts and children's courts each undertake an early assessment of the most appropriate forum for the resolution of matters before them and take steps to ensure the case proceeds to finalisation in the chosen forum.

Thirteen years on, much has changed. This includes the introduction of shared parenting amendments to the *Family Law Act* in 2006, and subsequent family violence amendments in 2012, alongside a growing demand for family violence protection orders and child protection services around Australia. This report reconsiders the ‘one court principle’ and how such a concept might be implemented in the context of the increasing numbers of families presenting to each system with multiple and complex needs, including families affected by violence, serious mental health concerns and issues of drug and alcohol dependency. In conducting this work, Council has sought to build on the recommendations of the Australian and New South Wales Law Reform Commissions’ 2010 report, with a focus on improving the relationships between the different federal, state and territory systems that affect children. This includes ways of creating a more streamlined, coherent and integrated approach to meeting the safety needs of children and families across the family law, child protection and family violence jurisdictions.

Given Council’s role as a family law advisory body, and in light of the diversity of practice and pace of reform across Australia’s eight child protection systems and magistrates courts, Council aimed to consult as widely as possible with these sectors within the timeframe available, with the aim of gathering multiple viewpoints on the issues raised by its terms of reference. This included consultations with state and territory judicial officers, policy
officers and legal and departmental practitioners. Council also invited submissions from relevant organisations, including the courts, child protection departments, commissions for children and young people, domestic violence services, practitioner associations, legal aid commissions and state law societies. In addition, Council was assisted in its consideration of the intersection issues through meetings with a Working Group of child protection system professionals drawn from four jurisdictions: Queensland, South Australia, Victoria and New South Wales. Council’s meetings also benefited from presentations by stakeholders and experts from the ACT, Western Australia and the Family Court of New Zealand, and by the appointment to Council of an Observer from the South Australia Department of Education and Child Development. A list of the submissions, consultations and Working Group members is provided in the Appendices to this report.

At the outset, Council notes the significant commitment to improving the interface between the family law, child protection and family violence systems across the organisations, services and individuals who contributed to this reference. Council also notes the complexities of this endeavour and that some stakeholders supported a measured approach to creating a more integrated system for children and families. At the same time, Council is aware of the urgency of the task, and that many of those who assisted Council in its work on this report regard this matter as an issue that should be given priority by all governments in Australia. Council also notes the concern that any reforms should be adequately resourced.

The remainder of this chapter provides an overview of the empirical and practice context for the issues discussed in this report. This includes a description of recent developments affecting the family law system (at 1.1), followed by descriptions of the law and practice governing children’s courts and child protection matters in Australia (at 1.2) and the law and practice governing parenting matters in the family law system (at 1.3). The final section of this chapter describes a recent reform proposal in Western Australia to enhance collaboration between the child protection and family law systems in that state (at 1.4).

Chapter 2 focuses on question 1 of the terms of reference, which asks Council to report on the legal and practical obstacles to greater co-operation between the family law and child protection systems. This chapter draws on the submissions and consultations to describe the key areas of intersection and gaps between these systems, and the difficulties experienced by families and services associated with these circumstances. This chapter also examines the capacity for transferring proceedings between the federal family courts and state and territory children's courts and the legal and practical limitations of this approach as a solution to the problems described by stakeholders.

Chapters 3 and 4 focus on the second question of Council’s terms of reference about the capacity for providing the children's courts and family courts with a measure of co-extensive jurisdiction, and the benefits and challenges of doing so.

Chapter 5 draws on the submissions and consultations to explore the possibilities for creating specialist multi-jurisdiction family violence courts based on the principle of ‘one family, one
judge’. This chapter also provides a description of the practice and policy context governing the making of family violence protection orders by state and territory magistrates courts, which are often the first point of contact with the legal system for families with complex needs.

Chapter 6 draws on the submissions and consultations to canvass ways in which the working relationships between the child protection and family law systems might be improved within current jurisdictional frameworks. This chapter explores areas of effective and promising practice and ideas for enhancing the integration of services across the different systems.

Chapter 7 sets out Council’s views and preliminary recommendations about these issues.

1.1 The shifting patterns of the family law system’s parenting order workload

Decision-making in parenting cases is governed by Part VII of the *Family Law Act*. This part empowers the family courts, and in some circumstances state and territory courts of summary jurisdiction, to make orders about who a child will live with, how much time the child should spend with other people, and how often and in what ways a child and parent should communicate with one another. They do not empower these courts to make orders placing children in the care of a person who is not a party to the proceedings, and there is no general ‘child protection’ power in Part VII. Such powers are the domain of the state and territory children's courts, which are described below (at 1.2).

However, many of the parenting matters that are appearing in the family courts involve multiple and complex risk factors, and raise serious concerns about the safety and wellbeing of the children. Although this dynamic has been observed for some time now, the immediate background to Council’s current terms of reference centres on the impact of reforms to the *Family Law Act* made in 2006 on the patterns of dispute resolution within the family law system. Those reforms, embodied in the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) (the *Shared Parental Responsibility Act*), encouraged, and in some cases required, parents to make a genuine effort to resolve their conflict through a family dispute resolution process before seeking court orders. In order to support this requirement, the Australian Government established a network of community-based Family Relationship Centres to provide these dispute resolution services and to help parents settle arrangements for their children’s care.

Recent empirical studies conducted by the Australian Institute of Family Studies (AIFS) indicate that these reforms have generated a shift in the caseload of the family courts to the family dispute resolution sector. While court filings in children’s matters as of the 2012-13 financial year reflected a 25% reduction on the pre-2006 level, increasing increments of parents have reported using family dispute resolution as their main pathway for settling parenting arrangements.
At the same time, this research suggests that the proportion of contested cases involving families with complex needs – including matters involving family violence, substance addiction issues and serious mental health problems – has increased. As described in more detail at 1.3 below, families are exempted from the requirement to attempt family dispute resolution before seeking court orders where there is a history or risk of family violence or child abuse.\(^\text{15}\) From the perspective of the operation of the family courts, this means that by definition, many matters heard by the courts will involve concerns about family violence and/or child safety.

It is important to note these data reveal that the kinds of complex matters that are coming before the family courts are also presenting to family dispute resolution services. Two recent AIFS studies show that it is the families at the more complex end of the spectrum that tend to engage with services in the family law system, including the family courts, family dispute resolution services, and family lawyers.\(^\text{16}\) The most recent available report from the AIFS on the use of family law system services, the 2012 Survey of Recently Separated Parents, shows that families with a history of family violence were much more likely than families without family violence concerns to report using formal services such as these.\(^\text{17}\)

It is also important to note that cases involving allegations of family violence and child abuse comprised the majority of parenting matters that came before the family courts even before the 2006 amendments,\(^\text{18}\) reflecting the prevalence of domestic and family violence and safety concerns\(^\text{19}\) in the population of separated parents.\(^\text{20}\) Two studies by AIFS show consistent levels of these issues among two annual cohorts of separated parents, suggesting pre-separation violence is experienced by just over 60% of parents.\(^\text{21}\) In both of these surveys, close to 20% of parents reported safety concerns for themselves and/or their child as a result of ongoing contact with the other parent.\(^\text{22}\)

Another important contextual feature of the family law system’s modern workload concerns the extent to which contested cases involve a co-occurrence of risk factors, including a combination of family violence and drug and alcohol addiction and/or serious mental illness. A national survey of Family Reports conducted by the Family Court of Australia’s Child Dispute Services in February 2014 found that 31% of the surveyed cases involved three risk factors and 26% involved 4 risk factors. An AIFS analysis of matters involving risk-related and other complex issues has demonstrated that complex families are represented in the case-loads of family dispute resolution services, lawyers and courts, with courts having a higher concentration of these families as clients. Parents with four or more problems (family violence, safety concerns, substance misuse, problematic social media or pornography use, gambling) were most likely to use courts (42%).\(^\text{23}\) In comparison, 23% of the group who used family dispute resolution and 29% of group who used lawyers had four or more problems. The mean number of problems among court users was 3.1, compared with 2.5 for lawyers and 2.2 for family dispute resolution.

More significantly for the design of the family law system’s services, the recent AIFS research has shown that these complex risk dynamics are often associated with lengthy time-
frames for the resolution of parenting arrangements, including recurrent use of family law services over the five-year period covered by the research. The analysis of one data set showed that parents with one or more of these dynamics – a history of family violence, negative inter-parental relationships, safety concerns – are significantly more likely to report re-use of family dispute resolution over the five years and are also more likely to report that the negative dynamics are sustained over time. These patterns were particularly evident for parents with two or more of these dynamics. This characteristic also means that the proportion of cases in the family law system involving families with complex needs is growing each year, and that some children are spending significant periods of their childhood involved in legal disputes about their care and protection.

From its inception, the family law system in Australia has been premised on the notion that it deals with private law, that is, its task is to adjudicate between the proposals of separating individuals. In contrast, questions of serious risk to children have historically been seen as issues that the state should play a role in, and therefore have been viewed as matters of public law, addressed through the respective state and territory child protection legal regimes. However, in light of the data discussed above, it is clear that the family courts are increasingly called upon to manage risk to children in families with complex needs, who may be experiencing multiple forms of disadvantage. These data therefore challenge the foundational assumption of a clear distinction between the work of the family law and child protection systems in Australia.

1.2 Australia’s children's courts and child protection systems

This part of the report outlines some of the key features of Australia’s eight state and territory legal systems for child protection matters. This section does not provide a comprehensive description of these systems but rather highlights aspects that are most relevant to the jurisdictional issues covered by this report. While each state and territory has its own separate child protection system and legislation, the overall philosophy and principles of these systems are similar. In contrast to the family law system, child protection systems are designed to protect children from abuse and neglect, and to support vulnerable families, rather than mediate parental disputes. However, both the child protection and family law systems are able to regulate parental responsibility and contact between parents and children.

A family’s involvement with the child protection system is usually triggered by a report or notification to the relevant state or territory child protection department. These may emanate from family members or neighbours or from professionals who work with children, who have concerns about the safety or welfare of the child or children in the family. Family members and neighbours are the most common group of notifiers of suspected child abuse to child protection departments in Australia. However, some professionals who work with children are required by legislation to report any suspicions of serious child abuse or neglect to the child protection department in their state or territory.
All states and territories have a mandatory reporting system of this kind. Mandatory reporting systems vary in the professions included, the types of abuse and neglect covered and the level of harm required. For example, in Queensland, mandatory reporters include doctors, nurses, teacher, police officers and child advocates.27 In South Australia there are an additional ten professions that are mandated to report suspected child abuse, including dentists, psychologists and ministers of religion.28 In the Northern Territory every adult has mandatory reporting obligations.29 Most legislation specifies that except in the case of suspicion of child sexual abuse, only a suspicion of ‘significant’ abuse and neglect must be reported.30

Notifications of suspected child abuse have increased dramatically in some states in recent years. In Victoria, for example, 82,075 reports were made to the child protection department in 2013-14, an increase of 92 per cent since 2008-09.31

Departmental responses to reports of child abuse or neglect vary across the different state and territory child protection systems. Generally, there is an intake stage when the department decides whether to conduct an investigation, refer the family to support services or take no action.32 If an investigation is conducted, the department then determines whether the report is ‘substantiated’, meaning that there is sufficient reason to believe that the child has been or is likely to be abused, neglected or otherwise harmed.33 Council’s consultations with its child protection Working Group members suggest that notifications from family members are more likely than a mandated notification to result in the suspicion of abuse being substantiated.

Once a report of abuse has been substantiated, the child protection department may apply to the state or territory children’s court for a care and protection order. This is usually considered an option of last resort. For example, for cases where risks of actual child abuse and neglect are lower, family support services can be arranged to provide general support to the family.34 However, while there has been an increasing focus in recent years on early intervention services to help prevent families entering the child protection system, recent reports suggest these services do not always provide adequate protection for vulnerable children,35 and the number of children removed from their families into out of home care has continued to increase.36 The Australian Institute of Health and Welfare reports that in the most recent five years of reported data, the rate of children on care and protection orders has increased from 7 to 8.2 per 100,000 children. These figures reflect the substantial growth in family violence-related child abuse reports since family violence was included in mandatory reporting obligations in several states.37 This has led to a substantial increase in the number of children being removed from Aboriginal and Torres Strait Islander families,38 where family violence is the leading driver of child protection intervention.39

Due partly to large increases in demand, child protection systems have been subject to various reviews and legislative and policy changes in recent years.40 This section outlines the current state of the law, while noting that legislative changes are underway or being considered in various jurisdictions.41
Children’s courts

All states and territories have a court-based system to determine applications brought by the child protection department where the department has removed a child, is applying to remove a child from a parent’s care, or seeks another form of child protection order. Most jurisdictions have a specialised children's court that deals with both care and protection and youth justice matters, which is sometimes part of the magistrates’ court. In South Australia this court is called the Youth Court. In the Northern Territory and Tasmania there is no specialist children's court and child protection matters are heard in the Family Matters Court of the Local Court and the Magistrates Court of Tasmania respectively, where child protection matters are heard by generalist magistrates who work across a range of areas of criminal and civil jurisdiction.

Some children's courts provide specialised problem-solving courts. For example, in New South Wales, Aboriginal Care Circles operate as a form of ADR for Aboriginal children. In Victoria, the Family Drug Treatment Court provides a family reunification program for parents with substance abuse issues whose children are living in out of home care.

Guiding principles

All state and territory child protection legislation includes principles to guide those making protective decisions. The paramount consideration for decisions under child protection legislation is variously described as the child’s best interests, the safety, welfare and well-being of the child, or the safety, wellbeing and best interests of the child.

In addition to this paramount consideration, legislation generally includes other principles to guide decision-making. In particular, all jurisdictions include the Aboriginal Child Placement Principle in their legislation. This principle requires that an Aboriginal and Torres Strait Islander child be placed in order of preference with (a) a member of his or her family; (b) a member of his or her community who has a relationship of responsibility for the child; (c) a member of the child’s community; (d) a person with the same Aboriginal cultural background as the child; or (e) a non-Aboriginal person who is able to ensure that the child maintains significant contact with her or his family, community or communities.

Examples of other guiding principles in legislation include:

- children should be able to participate in decision making and provide their views, taking into account the child’s age and maturity
- action taken should be the least intrusive intervention possible and removal from the family is considered a measure of last resort
- the need to preserve the child’s sense of racial, ethnic, religious, spiritual and cultural identity
- the desirability of siblings being placed together in out of home care
where a child has been removed from their family, contact with their parents and significant others is to be encouraged if appropriate.\textsuperscript{56}

- where reunification with parents is not possible, more permanent and stable care options should be put in place.\textsuperscript{57}

**Statutory risk thresholds**

In order for an allegation of abuse or neglect to be substantiated, the child’s situation must meet a statutory test. While terminology varies across the eight child protection systems, the threshold for statutory intervention is generally considered similar across Australia.\textsuperscript{58} Most jurisdictions provide a definition of a ‘child in need of protection’\textsuperscript{59} or a child ‘at risk’.\textsuperscript{60} A child is usually only considered to be in need of protection if there is no parent able and willing to protect the child.\textsuperscript{61}

Types of abuse or neglect that are included in most definitions of a child in need of protection include where the child has suffered or is likely to suffer:

- physical injury
- sexual abuse
- emotional or psychological harm
- neglect, such as a lack of basic care, including medical care.\textsuperscript{62}

Recent data indicate that substantiations of emotional abuse - which may include the witnessing of family violence\textsuperscript{63} - have been higher than child physical abuse or sexual abuse in Australia.\textsuperscript{64}

Some jurisdictions require the harm to be ‘significant’ or ‘serious’.\textsuperscript{65} Some jurisdictions include other reasons for a child being in need of protection, such as where the parents have died or abandoned the child and there is no suitable carer, where the child has been persistently absent from school, or where the child has no fixed address or is not under anyone’s control and is engaged in harmful behaviour.\textsuperscript{66}

Across all eight jurisdictions Aboriginal and Torres Strait Islander children are significantly more likely than non-Indigenous children to be the subject of a child protection notification and substantiation. Nationally, Aboriginal children are ten times more likely than non-Aboriginal children to be the subject of care and protection orders.\textsuperscript{67}
Where a child protection department has found that a child is in need of care and protection, there is a range of measures the department can take to protect the child. This will involve the provision of family support services. However, where the department seeks a protective order via the court system, this will commonly involve some form of alternative dispute resolution process (ADR).68

The types of ADR process used vary across the different child protection systems.69 Descriptions of these processes variously refer to mediation conferences,70 pre-hearing conferences,71 dispute resolution conferences,72 family group meetings,73 family care meetings,74 and conciliation conferences.75 In some jurisdictions ADR is linked to the court process with court oversight of the outcome.76 In others, ADR is conducted by the child protection department prior to any court involvement to try and achieve a voluntary agreement by the family.77 Some jurisdictions provide for both conferencing prior to court involvement as well as court-ordered ADR.78

Nature of proceedings

An important issue when considering the scope for vesting the children's courts and family court with co-extensive jurisdiction is the extent of similarity and difference in the nature of the proceedings in these courts. One area of similarity between the legislative frameworks governing the conduct of child protection and child-related family law proceedings is an emphasis on informality,79 coupled with a relaxation of the rules of evidence.80 However, as discussed in Chapters 2 and 3, these statutory similarities belie a significant difference in practice, with many stakeholders noting the greater formality and slower pace of proceedings in the family courts.

There are a number of other important differences between the two court systems. Some key areas of difference include:

- Whereas applications for parenting orders are initiated by family members, only the child protection department can initiate proceedings in the children's court.
- Legal representation for children is funded in different ways and is based on a different model of representation between the two systems. In most children’s courts, children’s lawyers are engaged to act on instructions where the child is sufficiently mature to provide instructions and to act in the child’s best interests where the child cannot provide instructions.81 In contrast, in family law proceedings independent children’s lawyers must always act in the child’s best interests.82
- Some children’s courts are courts of record,83 while others are not.84 Those that are courts of record do not necessarily provide transcripts of all proceedings, but may report significant judgments only.85 In contrast, the family courts are courts of record,
and this can be seen as a significant advantage for families affected by an order, as the reasons for decision are transparent.

- Connected to the greater role written judgments play in family courts, argument and decision-making in these courts is much more reliant on case law compared with children's courts.  

Other practice and procedural differences that were raised in the submissions to this reference are discussed in Chapter 2.

**Types of orders made by children's courts**

While the overall philosophy of Australia’s eight children’s courts is similar, there is a large variation in the types of orders that can be made by these courts. For the purpose of gathering national statistics on child protection, the Australian Institute of Health and Welfare categorises the types of orders that can be made in the following way:

- **Administrative arrangements**: these are usually voluntary agreements between the child protection department and the parents and can transfer custody or guardianship without going to court. These types of orders made up 4% of all orders made in 2012-2013.

- **Interim and temporary orders**: a limited period of supervision or placement of a child in out of home care. Parental responsibility may remain with the parents or may be given to the child protection department. These types of orders made up 44% of all orders made in 2012-2013.

- **Finalised supervisory orders**: the department supervises or directs the level and types of care to be provided to the child. Parent/s usually retain guardianship and parental responsibility for the child. These types of orders made up 12% of all orders made in 2012-2013.

- **Finalised third-party parental responsibility orders**: orders transferring all parental responsibilities to a person considered appropriate by the court. This may be an individual such as a relative or the child protection department. These types of orders made up 3% of all orders made in 2012-2013.

- **Finalised guardianship or custody orders**: Custody orders generally refer to orders that place the child in the custody of the child protection department, while the parent retains legal guardianship. Guardianship orders involve the transfer of legal guardianship to the child protection department or non-government agency. These types of orders made up 37% of all orders made in 2012-2013.
Not all jurisdictions provide for all of these types of orders. For example, only New South Wales and the Australian Capital Territory can make an order allocating parental responsibility to one of the child’s parents. This type of order is discussed further in Chapter 6.

To illustrate the range of orders and terminology used, three examples are provided here:

- In New South Wales, a court can make an emergency care and protection order, an interim care order, an order for supervision, an order allocating parental responsibility or an allocation of parental responsibility by guardianship order.\(^88\)

- In Victoria, the court can make seven kinds of protection order (supervision order, custody to third party order, supervised custody order, custody to Secretary order, guardianship to Secretary order, long-term guardianship to Secretary order and an interim protection order) and can also make permanent care orders.\(^89\)

- In Western Australia, the court can make an interim order, a protection order (supervision), a protection order (time limited), a protection order (until 18) or a protection order (special guardianship).\(^90\)

In addition to the types of orders outlined above, most jurisdictions also provide for other types of orders that do not transfer parental responsibility or guardianship of a child. For example, in Victoria a therapeutic treatment order can be made where a child age 10-15 years is showing sexually abusive behaviours.\(^91\) In New South Wales the court can make a parent capacity order requiring a parent to participate in a program or engage in therapy or treatment.\(^92\)

### Decisions about contact with parent/s when a child is removed

Approaches to decision-making about out of home care placements for children vary across the different child protection systems in Australia. In some jurisdictions, arrangements for contact between parents and children in out of home care are determined by the children's court and outlined in the child protection order. For example, in New South Wales the children's court can make a contact order that provides the minimum amount of contact between a child and a parent and whether contact is to be supervised, and can also prohibit contact.\(^93\) Guidelines for children's court magistrates in New South Wales outline various matters to be taken into account when deciding arrangements.\(^94\)

In other jurisdictions, contact arrangements are determined by the child protection department. For example, in Queensland contact arrangements are included in the case plan developed by the department.\(^95\) These decisions are reviewable by the Queensland Civil and Administrative Tribunal.\(^96\) In Western Australia contact arrangements are included in the care plan that is developed by the child protection department and can be modified at any time. A parent or child may apply to an independent case review panel to have a case plan altered.\(^97\)
Enforcement of contact conditions in protection orders

Unlike the family courts, children’s courts do not have any enforcement powers in relation to contact conditions that may be included in a child protection order.

Where contact arrangements are included in a child protection order, a parent may register this order with the family courts as a parenting order. The enforcement provisions of the *Family Law Act* are then available as if the order were a parenting order. For example, if a grandparent has guardianship of a child under a child protection order and a parent does not comply with the contact conditions included on the order, the grandparent may take enforcement action in the family courts if the child protection order has been registered.

Where a child protection order has not been registered, a carer may still bring proceedings for a recovery order in the family courts (for example, where a parent does not return a child at the end of a scheduled contact visit). However there is generally no enforcement mechanism available through the child protection system.

Even where a child protection order is registered in the family courts, enforcement of contact conditions may not be possible where the conditions are too broad. While family court parenting orders are precise about times, length and conditions of contact, child protection orders may include very broad contact conditions such as ‘regular contact’.

In many instances there will be no contact conditions included on a child protection order. Where contact conditions are included in a department care plan or case plan rather than a court order, there is also no enforcement mechanism available.

Resources

While the eight children’s courts differ in structure and composition, a common theme of recent reviews of child protection systems is under-resourcing of both children’s courts and child protection departments. In relation to child protection departments, various inquiries have found significant problems with ‘high caseloads, poor training and supervision, burnout and high turnover of child protection workers, leading to relatively junior, inexperienced staff conducting investigations.’ This can be seen as a result of increasing numbers of notifications to child protection departments, as well as under-investment in the service system. Under resourcing of child protection departments and the broader welfare system impacts directly on the children’s courts’ abilities to fulfil their functions. In relation to children’s courts, excessive workloads and delays in court hearings have been identified as problems.
Independent reports in the children’s courts

As an example of the issues of resourcing and specialisation, only some of Australia’s children’s courts have access to independent reports when making decisions. In Victoria and New South Wales a dedicated Children’s Court Clinic exists to provide independent reports on a child’s family situation. The clinics conduct psychological and psychiatric assessments of children and their families and provide reports to the court. The Queensland Commission of Inquiry has recently recommended a similar expert assistance pilot project for its Children’s Court and the Queensland government has accepted this recommendation.104

Representation of children in the children’s courts

Unlike the ‘best interests’ model that applies to independent children’s lawyers in the family courts, lawyers acting for children in the children’s courts generally act on the child’s instructions. A qualification to this principle is that it applies where the child is sufficiently mature to provide instructions. Lawyers representing children in children’s courts act in the child’s best interests where the child does not have sufficient capacity to provide instructions. However, in some jurisdictions a children’s lawyer is not appointed when the court is satisfied that the child has made an informed and independent decision not to be represented.105

The appointment of children’s lawyers in children’s court matters is often at the discretion of a court. In practice in New South Wales, the ACT and South Australia they are appointed in almost all matters, whether based on instructions or best interests. Other jurisdictions place limitations on the appointment of children’s lawyers. For example, Queensland courts must consider it to be in the best interests of a child to be separately represented.106 In Victoria, the court can order legal representation only when the child is determined mature enough to give instructions, or if the court determines that it is in the best interests of a child who is not mature enough to give instructions.107

Children’s courts deal not only with child protection matters but also with prosecutions of children for criminal offences. This dual function may explain why a direct instructions model of child representation operates within these courts. When established, children’s courts in Australia sought to combine elements of welfare tribunals and criminal courts, and a combination of features from each of these models may be seen as continuing to operate within these courts.108 However, across Australia during 1970s and 1980s these courts consciously sought to align themselves more closely with criminal justice system processes.109 Accordingly, these courts moved towards an emphasis on principles such as due process, procedural fairness, proportionate sentencing and ensuring the rights of the individual; that is, with the rights of children appearing as accused persons.110 From a criminal justice perspective, the role of defence counsel in ensuring procedural fairness and safeguarding the rights of the accused is seen as critical. Within this context, the direct
instructions model of child representation mirrors that of the traditional lawyer/client relationship in adult criminal jurisdictions.

1.3 Parenting disputes and the family law system

This section provides an outline of the law and practice governing the resolution of parenting disputes within the family law system, with a focus on the relationship between the family courts and state and territory child protection systems, and the powers of the family courts to deal with child protection concerns. It begins by setting out the basic framework for decision-making in contested cases and the processes used by the courts and other family law system services to assess and manage risk to children when protective concerns arise.

Parenting orders

Part VII of the Family Law Act empowers courts with jurisdiction under this Part to make orders dealing with the following matters:

(a) the person or persons with whom a child is to live;
(b) the time a child is to spend with another person or other persons;
(c) the allocation of parental responsibility for a child;
(d) if 2 or more persons are to share parental responsibility for a child - the form of consultations those persons are to have with one another about decisions to be made in the exercise of that responsibility;
(e) the communication a child is to have with another person or other persons;
(f) maintenance of a child;
(g) the steps to be taken before an application is made to a court for a variation of the order to take account of the changing needs or circumstances of:
   (i) a child to whom the order relates; or
   (ii) the parties to the proceedings in which the order is made;
(h) the process to be used for resolving disputes about the terms or operation of the order;
(i) any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.111

A parenting order in relation to a child may be applied for by either or both of the child's parents, the child, a grandparent of the child, or ‘any other person concerned with the care, welfare or development of the child’.112 Many applications for parenting orders are brought by extended family members, for example, where one or both parents are unable to care for the child.113

Decision-making in parenting cases

In common with child protection legislation, the paramount consideration for the family courts when making parenting orders is ‘the best interests of the child’.114 Underpinning this
principle is a legislative concern to achieve two objectives, which are set out in the Explanatory Memorandum to the Shared Parental Responsibility Act. These are ‘ensuring that children live in an environment where they are safe from violence or abuse’ and ‘ensuring that children have a right to have a meaningful relationship with both their parents’.115

These objectives inform the key decision-making provisions in Part VII of the Family Law Act. This includes the two ‘primary considerations’ in the legislative list of ‘best interests’ factors, which require the court to consider ‘the benefit to the child of having a meaningful relationship with each parent’116 and ‘the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence’.117 Where these objectives are in conflict, the courts must give greater weight to protecting children from harm.118

In addition to the two ‘primary considerations’ noted above, the checklist of best interests factors in Part VII sets out a list of 14 further considerations which the court must have regard to. These include:

- The child’s views and any factors such as the child’s level of maturity or understanding that the court thinks are relevant to the weight it should give to those views (s 60CC(3)(a));
- The nature of the child’s relationship with each parent and other persons of significance to the child including any grandparent or other relative of the child (s 60CC(3)(b));
- The extent to which each of the parents has taken or failed to take the opportunity to participate in making decisions about the child’s life and to spend time with and communicate with the child (s 60CC(3)(c));
- The extent to which each of the parents has fulfilled, or failed to fulfil their obligations to maintain the child;
- The likely effect on the child of any changes in the child’s circumstances including separation from a parent or other person with whom they have been living (s 60CC(3)(d));
- The practical difficulty and expense of a child spending time and communicating with a parent (s 60CC(3)(e));
- The capacity of the parents and other persons to provide for the child’s needs including emotional and intellectual needs (s 60CC(3)(f));
- The maturity, sex, lifestyle and background of the child (s 60CC(3)(g));
- If the child is an Aboriginal or a Torres Strait Islander child, that child’s right to enjoy his or her culture and the likely impact any proposed order would have on that right (s 60CC(3)(h));
- The parents’ attitudes to the responsibilities of parenthood (s 60CC(3)(i));
- Any family violence involving the child or a member of the child’s family (s 60CC(3)(j));
• Any relevant inferences that can be drawn from the current or prior existence of a
  family violence order (s 60CC(3)(k)); and
• Whether it would be preferable to make an order that would be least likely to lead to
  the institution of further proceedings in relation to the child (s 60CC(3)(l)); and
• Any other relevant fact or circumstance (s 60CC(3)(m)).

The Family Law Act also contains a presumption that it is in the best interests of the child for
his or her parents to have ‘equal shared parental responsibility’ for the child’s care (s 61DA).
This presumption does not apply in cases of where there are reasonable grounds to believe
that a parent or a person living with a parent has engaged in child abuse or family violence,119
and is rebuttable on the basis of evidence that its application would not be in a child’s best
interests.120 Where the presumption applies, the court must consider whether the child
spending equal time with each of the parents would be in that child’s best interests and
reasonably practicable.121 If, in the circumstances, the court does not make an equal time
order, it must then consider whether the child spending ‘substantial and significant time’ with
each parent would be in the best interests of the child and reasonably practicable.122 The court
is not required to, but may, consider these provisions if the parties invite the court to make
orders by consent.123

The process of making orders in contested matters requires judicial officers to follow a
particular decision-making ‘pathway’, which is applicable to both interim and final hearings
for parenting orders.124 As set out by the Full Court in the case of Goode & Goode in 2006,
the pathway involves the following 11 steps:
(a) identifying the competing proposals of the parties;
(b) identifying the issues in dispute in the interim hearing
(c) identifying any agreed or uncontested relevant facts;
(d) considering the matters in s 60CC that are relevant and, if possible, making findings
  about them (in interim proceedings there may be little uncontested evidence to enable
  more than a limited consideration of these matters to take place);
(e) deciding whether the presumption in s 61DA that equal shared parental responsibility
  is in the best interests of the child applies or does not apply because there are
  reasonable grounds to believe there has been abuse of the child or family violence or,
  in an interim matter, the Court does not consider it appropriate to apply the
  presumption;
(f) if the presumption does apply, deciding whether it is rebutted because application of it
  would not be in the child’s best interests;
(g) if the presumption applies and is not rebutted, considering making an order that the
  child spend equal time with the parents unless it is contrary to the child’s best
  interests as a result of consideration of one or more of the matters in s 60CC, or
  impracticable;
(h) if equal time is found not to be in the child’s best interests, considering making an
  order that the child spend substantial and significant time as defined in s 65DAA(3)
with the parents, unless contrary to the child’s best interests as a result of consideration of one or more of the matters in s 60CC, or impracticable;

(i) if neither equal time nor substantial and significant time is considered to be in the best interests of the child, then making such orders in the discretion of the Court that are in the best interests of the child, as a result of consideration of one or more of the matters in s 60CC;

(j) if the presumption is not applied or is rebutted, then making such order as is in the best interests of the child, as a result of consideration of one or more of the matters in s 60CC; and

(k) even then the Court may need to consider equal time or substantial and significant time, especially if one of the parties has sought it or, even if neither has sought it, if the Court considers after affording procedural fairness to the parties it to be in the best interests of the child.125

If the court is invited by all of the parties to the proceedings to make orders by consent, the court may, but is not required to, consider all of the matters in the best interests checklist.126 The court must still have regard to the best interests of the child as the paramount consideration however.127

**Which courts can make parenting orders?**

The Federal Circuit Court of Australia, the Family Court of Australia and the Family Court of Western Australia (the family courts) are generally the courts that exercise jurisdiction in relation to parenting cases. The vast majority of parenting matters (around 86% of cases in 2013-14 financial year) are heard in the Federal Circuit Court,128 with parenting applications comprising around 55% of its family law workload.129 Property matters now dominate the work of the Family Court of Australia, which hears around 14% of parenting matters.130 Nationally, the proportion of filings for orders in child-related matters made in the Family Court of Western Australia, a state court,131 has remained constant at approximately 10% per year during the period of 2004-05 to 2012-13.132

State courts of summary jurisdiction also have power to make consent parenting orders under Part VII of the *Family Law Act* and may hear contested matters with the consent of the parties.133 However, they must transfer the proceedings to a family court where the parties do not consent to the matter being heard in the state court.134

**Family dispute resolution and consent orders**

Before a court can hear an application for parenting orders the applicant must file a certificate – known as a section 60I certificate – showing attendance at a family dispute resolution service unless one of the exceptions set out in s 60I(9) applies (such as: where the application relates to consent orders; there are allegations of child abuse or family violence; or if the application is made in urgent circumstances).
A family dispute resolution provider is required to conduct an intake assessment and be satisfied that family dispute resolution is appropriate before proceeding to provide a service. This includes a requirement to be satisfied that neither party’s ability to negotiate freely is affected by a history of family violence or the likely safety of the parties. If, after considering these matters, the family dispute resolution provider is not satisfied that a party has the capacity to negotiate, they must not proceed to provide family dispute resolution. Many services use a child-inclusive model of dispute resolution, which incorporate the views of the children into the dispute resolution process. However, the child inclusive approach is applied in only a minority of cases: a child-focused approach is more commonly used.

Section 65F of the Family Law Act also mandates that a court is not to make a parenting order unless satisfied the parties have attended family counselling to discuss the matter to which the proceedings relate. There are exceptions to this requirement in cases of orders sought to be made: by consent; by way of interim orders; in urgent circumstances; or when the court is satisfied there is some other special circumstance such as family violence.

When parties have reached agreement between themselves or with the assistance of a family dispute resolution practitioner they may enter into a parenting plan or apply to the court for the making of consent orders. A parenting plan is a written agreement made between the parents of a child, signed by them and dated and deals with one or more of the following matters:

(a) the person or persons with whom a child is to live;
(b) the time a child is to spend with another person or other persons;
(c) the allocation of parental responsibility for a child;
(d) if 2 or more persons are to share parental responsibility for a child - the form of consultations those persons are to have with one another about decisions to be made in the exercise of that responsibility;
(e) the communication a child is to have with another person or other persons;
(f) maintenance of a child;
(g) the process to be used for resolving disputes about the terms or operation of the plan;
(h) the process to be changing the plan to take account of the changing needs or circumstances of the child or the parties to the plan;
(i) any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child.

If the parties prefer to have court orders made by consent they may file an Application for Consent Orders in the Family Court of Australia, which must be accompanied by an Annexure addressing the issues of the risk of abuse, neglect or family violence that might apply to a child of or a party to the proceedings. If proceedings have already commenced in the Family Court and the dispute is resolved prior to a judicial determination, a similar form addressing the risk of harm issues must accompany the minute of orders sought to be made. If the application is made orally the parties must advise the court as to any of these risk issues. Formally, the Family Court of Western Australia requires draft consent orders to be
accompanied by a similar Annexure setting out the allegations of abuse although in practice the Court does not enforce strict compliance with this Rule.\textsuperscript{142}

The Federal Circuit Court has a different process. In that court a party must first file an Initiating Application for Parenting Orders accompanied by a Notice of Risk and an affidavit setting out the evidence in support of the Application. The party may then file, or hand up to the judge on the first return date, draft orders sought to be made by consent. If the orders are sought to be made in Chambers they must be accompanied by an Application – Draft Consent Parenting Orders and allegations of abuse or family violence. Otherwise the parties will be asked about these issues by the judge before orders are made.

**Procedural issues in parenting proceedings**

The principles that underlie the way in which child related proceedings are to be conducted are set out in Part VII, Division 12A of the *Family Law Act*. These principles require child related proceedings to be conducted with ‘as little formality and legal technicality’ as possible and exhort judges to ‘actively direct, control and manage’ the hearing process.\textsuperscript{143} This includes a relaxation of certain evidentiary rules.\textsuperscript{144} The judicial officer will thus determine the issues to be decided, the evidence to be called and the manner in which the hearing is to be conducted, and may engage in direct conversations with the litigants, unmediated by counsel.\textsuperscript{145}

Supporting this problem-solving approach is the active involvement of a Family Consultant,\textsuperscript{146} a social science expert who meets with the parties prior to the hearing and is present in court to assist the judge and the parties to reach a workable child-focused solution to their dispute.\textsuperscript{147}

**Children’s views and reports about the child’s welfare**

The family courts are often assisted in determining parenting matters by admitting into evidence reports from professionals. These may include Family Reports\textsuperscript{148} prepared by court-based family consultants\textsuperscript{149} or external report writers,\textsuperscript{150} and expert reports prepared by private psychologists, psychiatrists, paediatricians, speech and occupational therapists and educational experts. The requirement that the court must have regard to the child’s views\textsuperscript{151} is often satisfied by a report from a family consultant or court expert who has interviewed the child for this purpose.\textsuperscript{152} The court however cannot require the child to express his or her views,\textsuperscript{153} and the family consultant or report writer is not required to ascertain the child’s views where this would be inappropriate given the child’s age or maturity.\textsuperscript{154}

Many cases also have the benefit of an Independent Children’s Lawyer. In contrast to the role played by child representatives in children's courts proceedings, an Independent Children's Lawyer is not the child’s legal representative and is not obliged to act on the child’s instructions.\textsuperscript{155} As Council noted in its 2004 report on the issue of child representation in the
family courts, the role of the child’s representative in family law proceedings may be understood as comprising two distinct features: assistance to the court to make a decision in the best interests of the child, and providing a voice for the child in proceedings affecting them. Providing a voice for the child does not necessarily correlate with advocating for an outcome consistent with the child’s views. Rather, the Independent Children’s Lawyer must act in relation to the proceedings on what he or she believes to be in the best interests of the child, having formed that view based on the evidence available to him or her. However, the Independent Children's Lawyer must ensure that any views expressed by the child in relation to the matters in the proceedings are fully put before the court, although they are not under obligation and cannot be required to disclose to the court any information that the child or young person communicates to them, save for the obligation to notify a prescribed child welfare authority where they have reasonable grounds for suspecting child abuse or risk of child abuse (described below). A recent AIFS study revealed that there is a diversity of practice amongst Independent Children’s Lawyers regarding meeting with children. Some lawyers doing this work were seen to regularly meet with and interview children. Others do not adopt this practice, preferring to rely only on sources of information such as expert reports. As Council has previously noted, the role of the legal representative for children in family law proceedings has evolved over time, and whilst a need for this role has been consistently affirmed, its precise nature has been the subject of multiple reviews and some criticism.

**Parenting arrangements and child safety**

As originally enacted, in 1975, Part VII of the *Family Law Act* contained no express reference to child safety or family violence. To a large extent this was a function of the lack of public discourse about domestic and family violence at the time, and the then nascent nature of empirical research of this issue. It also reflected a view that such concerns were more appropriately a matter for state and territory child welfare authorities, and that the role of the family law system was to assist divorcing couples to separate amicably.

This view and the framework for decision-making in Part VII have changed over time. Amendments to the *Family Law Act* in 1991 added a requirement to consider ‘the need to protect the child from abuse, ill treatment, or exposure or subjection to behaviour which psychologically harms the child’, and in 1995 references to family violence and family violence orders were added. More recently, the accumulation of research evidence on risks to children’s development and a growing policy recognition of the prevalence of family violence in family law matters led to the passage of the *Family Law Legislation Amendment (Family Violence & Other Measures) Act 2011* (Cth), which came into effect in 2012 (‘the family violence amendments’). This legislation was designed to ensure the ‘safety of children’ is prioritised in parenting matters.

Among the measures introduced by the family violence amendments were new, broader, definitions of family violence and child abuse. These gave effect to recommendations by the Australian and New South Wales Law Reform Commissions in their 2010 *Family Violence –
Family violence is now defined in the *Family Law Act* as ‘violent, threatening or other behaviour by a person that coerces or controls a member of the person's family or causes the family member to be fearful’. The definition includes a list of examples of behaviour that may constitute family violence. They include:

(a) an assault; or  
(b) a sexual assault or other sexually abusive behaviour; or  
(c) stalking; or  
(d) repeated derogatory taunts; or  
(e) intentionally damaging or destroying property; or  
(f) intentionally causing death or injury to an animal; or  
(g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or  
(h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or  
(i) preventing the family member from making or keeping connections with his or her family, friends or culture; or  
(j) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.

The definition of family violence also provides that, for the purposes of the *Family Law Act*, a child is ‘exposed to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence’. This may be constituted by the child:

- overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family; or
- seeing or hearing an assault of a member of the child's family by another member of the child's family; or
- comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family; or
- cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family; or
- being present when police or ambulance officers attend an incident involving the assault of a member of the child's family by another member of the child's family.

The *Family Law Act* definition of ‘abuse’ in relation to a child means:

(a) an assault, including a sexual assault, of the child; or  
(b) a person (the *first person*) involving the child in a sexual activity with the first person or another person in which the child is used, directly or indirectly, as a sexual object by the first person or the other person, and where there is unequal
power in the relationship between the child and the first person; or
(c) causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence; or
(d) serious neglect of the child.\textsuperscript{170}

The 2012 family violence amendments also inserted a requirement that the court ask each party to the proceedings ‘whether the party considers that the child concerned has been, or is at risk of being, subjected to, or exposed to, abuse, neglect or family violence’ and ‘whether the party considers that he or she, or another party to the proceedings, has been, or is at risk of being, subjected to family violence’.\textsuperscript{171}

A new section added to the best interests checklist of factors in 2012 also provides that ‘the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence’ must be given greater weight than ‘the benefit to the child of having a meaningful relationship with both’ parents where these objectives are in conflict in a particular case.\textsuperscript{172} Another provision, section 60CG, directs the court to consider how to ensure the child and other family members are protected from an unacceptable risk of family violence.\textsuperscript{173}

\textbf{Section 60CG - Court to consider risk of family violence}

(1) In considering what order to make, the court must, to the extent that it is possible to do so consistently with the child’s best interests being the paramount consideration, ensure that the order:
   (a) is consistent with any family violence order; and
   (b) does not expose a person to an unacceptable risk of family violence.

(2) For the purposes of paragraph (1)(b), the court may include in the order any safeguards that it considers necessary for the safety of those affected by the order.

Other provisions in Part VII that are directed to enhancing the child’s safety in parenting matters include:

- A requirement that a party inform the court if they are aware that there has been a notification of child abuse to a state or territory child protection authority (s 60CI);

- A provision in the Part VII, Division 12A principles, which provides that proceedings are to be conducted in a way that will safeguard the child ‘from being subjected to, or exposed to, abuse, neglect or family violence; and the parties to the proceedings against family violence’ (s 69ZN); and

- A provision that enables a state or territory court that has jurisdiction to make orders under Part VII of the \textit{Family Law Act}, when exercising jurisdiction under its relevant family violence legislation to make or vary a family violence order, may revive, vary,
discharge or suspend a parenting order or other order under the *Family Law Act* that makes provision for a person to spend time with a child (s 68R(1)). This provision also extends to registered parenting plans, undertakings and recognisances.

**Notifications to child protection departments and the Magellan program**

In addition to these provisions, there are a number of other sections in Part VII that are designed to bring child safety concerns to the attention of the child protection department. This includes provisions that require a party who alleges a child has been abused or exposed to family violence or is at risk of abuse to file a notice of risk of child abuse with the court (a child risk notice).174 When such a child risk notice is filed, the registry manager of the court is required to notify the relevant state or territory child protection department (a family court notification). A similar obligation to notify the child welfare authority applies to members of the court personnel who have reasonable grounds for suspecting a child has been abused or is at risk of abuse.175

In recent years, particularly since the introduction of the 2012 family violence amendments to the *Family Law Act*, there has been a steep increase in the number of family court notifications being sent to child protection departments. The annual reports of all three family courts – the Family Court of Australia, the Federal Circuit Court of Australia and the Family Court of Western Australia – demonstrate that the number of these notices filed has increased in the past several years, reflecting the widened definitions of family violence and child abuse and the increased emphasis on identifying these issues associated with the 2012 amendments.176 It is important to note that past research has shown that child risk notices have been under utilised, so even the increased numbers of notices identified here may not reflect the reality of the extent to which risks are present in the family courts’ parenting matter caseloads.177

However, owing to the higher threshold for intervention applied in child protection systems (described at 1.2),178 the vast majority of family court notifications do not become the subject of protective proceedings in a children's court. This issue is discussed further in Chapter 2.

Where a child protection department investigates but decides not to initiate protective proceedings in the children's court, the family court may request the intervention in the family law proceedings of an officer from the child protection department.179 The family court cannot compel the child protection department to intervene.180 Where the department has conducted an investigation, or has had previous involvement with the family, the family court may make an order under s 69ZW of the *Family Law Act* requiring the child protection department to provide the court with documents or information relating to that investigation or involvement. This does not extend to information that would disclose the identity of a person who notified the department about suspected abuse.181 A lawyer for one of the parties may also issue a subpoena for the child protection department’s file.
A more particular model of collaboration between the family law and child protection systems to safeguard children from harm is the Family Court of Australia’s Magellan program. This program operates as a dedicated pathway within the Family Court for cases of serious harm. Introduced to the Melbourne and Dandenong registries in 1999, the program’s main aim is to provide a co-ordinated multi-agency approach by the Family Court, the state child protection department and Legal Aid to the resolution of parenting disputes involving allegations of serious physical or sexual abuse of children. Cases are identified at their initial point of contact, with a notification of child abuse sent to the child protection department, which investigates the abuse allegations and reports back to the parents and the court within a fixed time period. Parenting cases dealt with in the Magellan list are intensively case managed, with cases overseen by a team consisting of a registrar, a judge and a family consultant. The program involves support from child protection departments through the provision of a Magellan report assessing questions of risk and abuse and legal aid commissions through the provision of an Independent Children's Lawyer. Cases in this list adhere, at every stage, to strict timelines.

Along with Notices of Risk, the number of Magellan matters increased following the 2012 family violence amendments to the *Family Law Act*.182 In 2011-12, 160 Magellan cases were started, compared with 177 in 2013-14. It is important to note that the Magellan list is not currently available in the Federal Circuit Court, where the vast majority of parenting disputes are now heard.

1.4 The Western Australian ‘joint partial concurrency’ proposal

The Family Court of Western Australia is Australia’s only state family court. It is able to exercise both federal family law jurisdiction and a range of non-federal jurisdiction.184 The latter includes jurisdiction under the *Children and Community Services Act 2004* (WA) to exercise ‘all the powers of the Children's Court’.185 These powers are triggered whenever the Family Court of Western Australia requests the Chief Executive Officer of the child protection department to intervene in parenting proceedings.186 The Family Court of Western Australia’s child protection powers are also triggered where the court has sent a notification to the child protection department and the Chief Executive Officer of the department decides to intervene in the family law proceedings.187

Despite this jurisdictional capacity, the Family Court of Western Australia has not generally exercised its child protection powers. Instead, the Western Australia child protection department, the Department for Child Protection and Family Support, initiates applications for protective orders in the Children's Court of Western Australia. However, the ability of the Family Court of Western Australia to exercise the powers of the children's court provides Western Australia with a unique opportunity to develop an integrated approach to cases that involve both family law and child protection issues.
In response to this challenge, and in recognition of the impact on families of having to move between different courts, an Integrated Services Reference Committee was established in 2010 to explore ways of developing an integrated approach to the management of such cases. The members of the Committee are the Family Court of Western Australia, the Children's Court of Western Australia, the Department for Child Protection and Family Support, the Commonwealth and State Attorney-General's Departments and Legal Aid WA.

The work of this committee has been informed by a 2011 report by Julie Jackson, *Bridging the Gaps between Family Law and Child Protection: Is a unified family court the key to improving services in the family law system?*,\(^{188}\) and by a subsequent consultation report with key stakeholders that identified potential models of integration for Western Australia ("the WA Consultation Report").\(^{189}\) The latter report proposed the establishment of a "joint partial concurrency model" for Western Australia.\(^{190}\) If implemented, this proposal would require the child protection department in that state to bring any protective applications in the Family Court of Western Australia where there are already family law proceedings on foot.\(^{191}\) The proposal would also allow the Children's Court of Western Australia to make family law parenting orders with the consent of the parties.
CHAPTER 2: SEPARATE SYSTEMS AND THE PROBLEMS FOR FAMILIES

The first question in the terms of reference asks Council to examine:

   The possibilities for transferring proceedings between the family law and state and territory courts exercising care and protection jurisdiction within current jurisdictional frameworks, including any legal or practical obstacles to greater inter-jurisdictional co-operation.

In order to better understand the difficulties affecting families with multiple legal needs, Council sought submissions from relevant services and organisations about the experiences of client families who engage with more than one jurisdiction, and about their own experiences of assisting clients in these circumstances. Council received 52 submissions in response to this request. Council also conducted 28 consultations with organisations and individuals in relation to these issues, in addition to its meetings with members of the child protection Working Group.

Considered together, these contributions reveal a picture of mixed practices and cultures. They highlight examples of successful cross-jurisdictional collaboration and information sharing arrangements between the family law and child protection systems. They also illustrate the extent to which the different systems and courts operate in silos, without knowledge of orders or reports from previous proceedings and, at times, with little assistance to families who are required to negotiate the transition between jurisdictions. The submissions and consultations also demonstrate widespread stakeholder concern about the adverse implications of these dynamics for the safety of children, particularly where client families have complex legal and support needs.

This chapter is in three parts. The first part examines the extent to which families engage with different courts across the federal / state and territory divide. The second draws on the submissions and consultations to describe what, for these organisations and services, are the key areas of overlap and gaps between the different jurisdictions and the impact of these on families and children. In part three we examine the capacity to address these issues by transferring proceedings between the federal family courts and state and territory children's courts.

2.1 How many families are affected?

Several stakeholders who contributed to Council’s reference expressed the view that the number of families that move from the family courts to a children's court proceeding is very small. This observation appears to be supported by data provided to Council through its Working Group and consultations with child protection system professionals. These data showed that fewer than 5% of family court notifications to the child protection departments in Queensland and Western Australia in the past year resulted in proceedings being initiated.
in the children's court. This amounted to 4 family law matters (from 684 notifications) in Western Australia and 7 matters (from 191 notifications) in Queensland.

Previous research suggests that much greater numbers of cases travel from the child protection system to the family law system than in the opposite direction. However, as the WA Consultation report notes, the 'precise degree of crossover' between the family and children's courts is 'not easy to quantify'. This lack of certainty is, in part, a function of different data collection methods and approaches to file identification in the different jurisdictions. As a result, it is difficult to estimate the volume of traffic that flows between these systems. There is also no way of knowing how many of the parents and other family members who are advised by a child protection department to obtain family law orders fail to do so.

While the data supplied to Council suggest a very small number of cases travel from the family courts to the children's courts in response to a notification of risk, the experiences described in the submissions that Council received indicate a greater incidence of sequential proceedings and involvement with services across the different systems. This is supported by a file analysis conducted by Victoria Legal Aid (VLA), which showed that a significant minority of its clients, ‘representing thousands of families’, received legal assistance for both parenting proceedings and a child protection or family violence protection matter within a two year period.

VLA analysed data relating to clients who had received legal aid services for either a parenting dispute, family violence protection order application or a child protection issue over a five year period from 2009-10 to 2013-14. The analysis of these data revealed that, while the majority of VLA clients only received assistance for one type of legal problem in this period (i.e. either for a parenting dispute, family violence protection matter or child protection issue), 12% (11,969 people) received help for at least two types of problems, and a smaller number (915 people) received assistance for all three problems (i.e. they received a grant of legal aid for a parenting dispute, a child protection matter and a family violence matter).

The VLA analysis also showed that around 30% of clients who received assistance with a parenting dispute under a grant of legal aid in 2012-13 also received assistance with a child protection or family violence issue either one year before, or one year after, receiving assistance for the parenting dispute. The most common ‘cluster’ for this type of client was the combination of a parenting dispute and a family violence matter in the year prior to the parenting dispute. The second and third most common clusters were a parenting dispute with a family violence matter in the year after and family violence issues both before and after receiving assistance for the parenting dispute.

Of the VLA clients who received assistance for two or three types of family-related legal issues, one of which was a parenting dispute, the most common second issue was family violence (76%). This compared to 16% of clients whose second issue was child protection,
and 8% of clients who received assistance for all three issues.

On the basis of its analysis, VLA concluded that:

… there is an imperative to consider how the legal system incorporates design elements that maximise the effectiveness of the justice system for children in these families presenting with complex issues. This is particularly so given parenting disputes, family violence intervention order matters and child protection issues are currently addressed through three separate legal jurisdictions.\(^{196}\)

There are several important points to make about these data. First, the number of affected clients in this analysis is clearly an underestimate of the size of the issue. The analysis is confined to one state and to clients who received legal aid assistance. It may well be, for example, that greater numbers of clients were actually engaged in proceedings in two or more jurisdictions but did not receive a grant of legal assistance for each matter. The analysis also excludes crossover data between family law and family violence related criminal proceedings. As the submission from the Magistrates’ Court of Victoria notes, ‘An analysis which includes this data would give a more accurate picture of cross jurisdictional issues in relation to families with complex needs’.\(^{197}\) This observation is supported by a quick search of the reported judgments, which suggests that parenting cases involving recent or pending criminal proceedings are not uncommon.\(^{198}\) In addition, these data do not capture the extent to which family members who are advised to seek parenting orders following children’s courts proceedings fail to initiate a family court application. Previous research suggests that a significant number of ‘protective carers’ may fall into this category.\(^{199}\)

Secondly, the VLA analysis highlights the significantly greater extent to which families with multiple and complex needs travel between the family violence and family law systems than between the child protection and family law systems. The VLA analysis and other recent reports also indicate the significant degree to which child protection matters overlap with family violence concerns. For example, the recent report by the Queensland Special Taskforce on Domestic and Family Violence, \textit{Not Now, Not Ever}, notes a 2009 survey of child protection files which showed that family violence incidents occurred in 35% of Queensland households with substantiated child protection concerns in the previous 12 months.\(^{200}\) Together these data emphasise the centrality of family violence to many of the matters that cross between state and territory courts and the federal family law system.

Thirdly, the VLA data analysis suggests that a common ‘pathway’ through the legal system for families with complex needs is a family violence protection matter in a state magistrates’ court followed by a parenting dispute in a family court, and that an application for family violence protection orders in a magistrates’ court is a common first point of contact with the legal system for families with complex needs.

These data indicate that Council’s work on its terms of reference needs to incorporate a careful consideration of the intersections between the family law and family violence
systems, as well as the overlaps between all three jurisdictions, and not just the interface between the child protection and family law systems.

2.2 How does the separation of systems affect families?

A number of stakeholder organisations pointed out that the families who are most likely to be involved with more than one of these jurisdictions are those with support needs associated with family violence, and that clients in this circumstance are likely to be engaging with these systems at a time of high risk and vulnerability. Within this context, the greatest concern to stakeholders was the risk that a child ‘falls through the cracks’ between the different systems and that none ‘adequately deals with the child protection issues’.

The submissions and consultations identified a series of ways in which clients with complex needs may be affected by the separation of jurisdictions dealing with family law, family violence and child protection matters. These include:

- Circumstances in which a child protection department brings protective proceedings in the children's court after family law proceedings have been finalised;
- Family law disputes that are adjourned pending an investigation by a child protection department;
- Cases in which a family court judicial officer is faced with no ‘viable or protective carer’ for a child but the matter does not meet the threshold for protective intervention by a child protection department;
- Circumstances in which a child protection department refers a protective carer to the family courts to obtain parenting orders; and
- Circumstances in which families are involved in a series of sequential proceedings in the family violence, family law and child protection jurisdictions.

Stakeholders raised a number of concerns for families associated with these circumstances, including issues of cost and delay, confusion and uncertainty, duplication and inconsistency, and concerns about anti-therapeutic effects, decisions being made without knowledge of previous orders, and disruption to children’s attachment relationships and cultural connections. As the Northern Territory Legal Aid Commission noted in its submission:

"Legal proceedings in either jurisdiction are often confusing for parties, who are already dealing with a number of other pressures related to their proceedings (for example, loss of family support, change of accommodation and mental health issues, such as anxiety and depression). Navigating the concepts, process and paperwork in just one legal matter can be challenging. Navigating the same in two proceedings is overwhelming for vulnerable clients."

The following discussion outlines the main areas in which client families were said to experience the separation of the family law, child protection and family violence systems, and describes stakeholders’ views about the impact of this separation on families and children.
and the services that work with them. Where possible, case studies are used to illustrate these issues.

**Subsequent intervention cases**

Some stakeholders described difficulties for families when protective proceedings are initiated in a children's court after parenting proceedings have been finalised. These submissions suggested that this might occur because a child protection department responds to a notification from the family courts by indicating it will reserve its decision about protective action until the outcome of the family court process. The department may then initiate children's court proceedings following the making of final orders by the family court because it ‘lacks confidence’ that the parenting arrangements will address its protective concerns. The following case study provided by NSW Legal Aid illustrates this issue:

The parents of a 4 year-old child were engaged in proceedings for parenting orders in the Federal Circuit Court in Canberra. The Federal Circuit Court had made a number of recovery orders due to the mother’s non-compliance with family law orders. The mother was refusing to return the children to the father and was making allegations about the father to the ACT child protection department.

The Federal Circuit Court asked the child protection department to intervene and it declined to do so. The solicitor for the mother indicated that workers from the department were in court and they had told her that they would assume the care of the child if the Federal Circuit Court made a recovery order. The court made the recovery order and the departmental officers accompanied the mother to change over where the order required the child to be returned to the father. The departmental officers removed the child when the father attempted to take her in accordance with the recovery order. The department also removed the children of the woman who was the new partner of the father, and who were not involved in the Federal Circuit Court proceedings.

The child protection department then commenced proceedings in the children's court in NSW. Legal Aid NSW provided a new children’s representative in the children's courts proceedings and the Independent Children's Lawyer for the family law proceedings withdrew. Legal Aid NSW also provided a direct legal representative for the children removed from the father and his current partner. Neither child representative came to the matter with any knowledge of the Federal Circuit Court proceedings in the ACT.

The submissions on this issue noted that initiation of proceedings in the children's court after a family law matter has been finalised would, by definition, see the matter of risk re-litigated. This means the child and parents will likely have to repeat information to a range of new professionals, including lawyers, departmental officers and a new report writer. Stakeholders emphasised the added stress for families associated with prolonged involvement with the legal system, including multiple interviews of the children, a move to a different court and decision-maker, and the need for a new assessment report to be prepared. Some stakeholders also noted a risk of families being ‘over-assessed’, and pointed to the
emotional impact of this on children and families who may be ‘worn down by having to tell their story to so many different people’.  

For parents affected by family violence, this move can mean having to recount descriptions of traumatic experiences at a time when they are dealing with the emotional issues of loss, grief and separation, in addition to managing safety concerns for themselves and their children. More generally, a number of submissions noted that this circumstance can leave families feeling confused about which court has ultimate decision-making responsibility in relation to parental responsibility for the child.

A move to the child protection system following family law proceedings will also involve accommodating a number of procedural differences between the two courts, including changes in the level of formality and the types of evidence that are admissible. As described in the case study above, it will likely see the children assigned a different lawyer to act for them in the children's court proceedings, and a different approach to their legal representation. A number of submissions noted that this change can be extremely confusing for children, with potentially negative effects on the child’s relationship with the representative and the benefits of that representation. These negative effects can include increased stress levels for children and a loss of trust in those representing them.

Other submissions pointed to the confusion for families engendered by the use of different language in the different courts – such as the shift from a focus on orders for children to ‘live with’, ‘spend time with’ and ‘communicate with’ parents in the family court proceedings to orders for ‘custody’ and ‘access’ in the children's court – and a different decision-making framework governing arrangements for the children’s care. Several organisations indicated that this confusion can be compounded by the use of the same concepts – such as the concept of the ‘best interests of the child’ – with different meanings in each jurisdiction. The Northern Territory Legal Aid Commission submitted that this dynamic is especially confusing for clients who have English as a later language.

In addition to these difficulties, stakeholders noted that the parties may need to engage a new lawyer for the children's court proceeding. Some submissions suggested that few legal practitioners have a good understanding of both family law and child protection matters, and that lawyers tend not to have sufficient ‘expertise in the other area to optimise the outcome for the child’.

Adjournments for child protection investigations

It appears that only a small proportion of family court notifications to the child protection system become the subject of children's courts proceedings. Nevertheless, several submissions to Council’s reference described a number of difficulties for clients associated with the time required for departmental investigations of family court notifications. The main source of concern here centred on the practice of adjourning the family law proceedings

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while the notification is investigated. This practice is governed by s 69ZK(3) of the *Family Law Act*, which provides a discretion to adjourn parenting proceedings where it appears to the court that a child protection department proposes to take action under a state or territory child welfare law that might result in the child being placed in the department’s care.

Several submissions commented that, in their experience, multiple adjournments are often required when such investigations are conducted because they are rarely finalised within the period of the initial adjournment. The consequent delay in finalizing the child’s care arrangements can create what one submission called ‘complex limbo periods’ that can be highly confusing for children. As described in some submissions, the consequences of this can also include escalation of the conflict between the parties, as well as increased costs associated with each adjournment. VLA also noted the lack of clarity about the meaning of ‘under a child welfare law’ in s 69ZK(3), and the associated variability of judicial responses to the adjournment power in relation to notification investigations.

**Family law cases with ‘no viable or protective carer’**

A further problem that is central to Council’s terms of reference concerns what one submission called the ‘discrepancy’ between the family law and child protection systems ‘concerning the point in which poor parenting behaviour can be regarded as neglect or abuse’. This gap has created significant difficulties for the family courts in cases where the threshold for intervention by the child protection department is not met, but for the purposes of making parenting orders neither party to the family law proceedings has the capacity to support the child’s safety and wellbeing. A number of submissions noted that, in this circumstance, the family court may be ‘left with no alternative but to pick the “least worst” of the adults with whom the children shall live’.

Several submissions referred to the case of *Ray & Males* in this context. This case involved a contested application for parenting orders in relation to two of the parents’ four children. After hearing the evidence, which centred on allegations of drug and alcohol abuse, family violence and child sexual abuse, Justice Benjamin expressed concern that ‘none of the parties’ appeared to be capable of exercising parental responsibility, and that the children were at risk of emotional, physical and sexual abuse in each household. Justice Benjamin issued a request to the Secretary of the relevant child protection department to intervene in the proceedings, but the Secretary declined to do so.

The submissions suggest that whether or not a child protection department decides to intervene in a family law matter in such circumstances may depend on the existence of protocols between the department and the family courts. The NSW Department of Family and Community Services, for example, indicated that it regularly intervenes in family law proceedings to assist decision-making in parenting cases in accordance with a Memorandum of Understanding between the department and the family courts. A similar practice was noted in relation to the ACT. On the other hand, several stakeholders submitted that such intervention is more variable in other jurisdictions.
The family courts have no capacity to compel a child protection department to intervene in a family law case or to investigate the family court’s concerns, and the family law system has no independent investigative body akin to a child protection department that can provide the courts with a forensic assessment of child risk issues. These limitations mean that the risk of harm to children in family law cases is managed by judicial officers within a framework designed for ‘private’ disputes about the child’s care time with each parent, rather than a child protection framework. Although the family courts are not strictly bound by the proposals of the parties, there will rarely be an option available to a judicial officer beyond making a parenting order in favour of the ‘least detrimental’ of the proposals presented to the court.234

This limitation was the subject of examination by the Australian and New South Wales Law Reform Commissions in their 2010 report, which recommended a referral of State powers to ‘enable the Australian Government to make laws allowing family courts to confer parental rights and duties on a child protection agency in cases where there is no other viable and protective carer’.235 The question of a referral of state child protection powers is addressed in Chapter 4.

Referrals to the family courts by a child protection department

Some stakeholders raised concerns about the welfare of children where a parent or other family member is advised by a child protection department to obtain parenting orders during children's court proceedings. This might occur because a parent has addressed the department’s protective concerns for the child by ending their relationship with the other parent, or where a member of the child’s extended family has indicated a willingness to care for the child.236

The submissions on this point noted that the parent or carer may be advised that the department will withdraw its protective application once they obtain parenting orders from the family courts.237 For grandparents or other family members who are willing to assume responsibility for a child’s care, parenting orders will provide them with the legal capacity to make decisions about the child’s education, health and travel needs, and to access support services and government benefits for the child. Obtaining parenting orders will also be important for a parent who is identified as a protective carer, as they will be unable to exercise sole responsibility for the child without a court order.238

However, some stakeholders observed that family members, such as grandparents who are living off retirement savings or a parent who has been the victim of family violence, may be ill-equipped to manage the demands of private legal proceedings without support.239 A number of submissions noted the challenges for a family member who has to navigate the process of applying for parenting orders in the family courts after being in a children's court. The Children’s Court of Victoria, for example, pointed to the ‘markedly’ different nature of proceedings in the two courts, including the greater level of formality in the family courts,
which can inhibit access to the family law system for families who have been involved in child protection proceedings. This submission noted that the result is often that the children's court matter is ‘repeatedly adjourned’ while waiting to see if the parent will make an application for a parenting order in the Federal Circuit Court. This concern was also raised by the Senate Community Affairs References Committee in its recent report on Grandparents who take primary responsibility for raising their grandchildren report (the ‘Grandparents report’). This report noted that grandparents who step in to care for grandchildren are often unaware of how to formalise their care arrangements and can find it difficult to negotiate the complexities of the legal system. Some submissions to Council’s reference suggested that, as a consequence of these circumstances, family law proceedings may not be commenced, leaving children in the child protection system or without protection from the parent who represents a risk to their safety.

A number of submissions raised particular concerns for Aboriginal families in relation to accessing the family law system to obtain parenting orders at the request of a child protection department. As described in Chapter 1, Aboriginal and Torres Strait Islander families are over-represented in the child protection system, and there has been a substantial increase in the number of Aboriginal children on child protection orders in recent years. Nationally, Aboriginal and Torres Strait Islander children are ten times more likely to be on child protection orders and almost eleven times more likely to be in out of home care than non-Aboriginal children. The number of Aboriginal children removed from their families is particularly acute in some states. For example, the submission from Aboriginal Family Law Services Western Australia (AFLSWA) noted that Aboriginal children comprised 51.5% of all children in out of home care in Western Australia in 2014.

Several organisations suggested that family law orders could provide Aboriginal and Torres Strait Islander parents with a means of ensuring Aboriginal children are kept out of the foster care system and allow them to be raised within their own family. However, the family law system has been historically under-utilised by Aboriginal and Torres Strait Islander families. The continuing nature of this pattern was illustrated in a number of the submissions from Aboriginal and Torres Strait Islander agencies. For example, Aboriginal Family Law Services WA noted that 26% of its clients in 2013-14 presented with child protection issues, while only 16% sought assistance for family law matters. The submissions to Council’s reference canvassed a range of reasons for this pattern. These include issues of continuing mistrust of family law and child welfare courts among Aboriginal people, associated with the removal of Aboriginal children from their families. A number of stakeholders also raised the issue of remoteness as a barrier to Aboriginal and Torres Strait Islander clients accessing the family law system. This included considerations such as the need for clients in Alice Springs and remote communities in Western Australia to participate in court hearings by audio-link.

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Others raised concerns about the problems families face in obtaining parenting matters in the family courts where the orders they seek are contested, such as the relatively slow pace of proceedings in the family courts, and the associated cost implications for the person who has assumed the care of the child. For example, the *Grandparents report* suggests that the cost of legal representation is a significant constraint on the ability of grandparents to acquire court orders, especially for those who are no longer in paid employment. Some also noted that a grant of legal aid is not always available to assist family members in this situation. As a result of these financial constraints, protective carers may have to represent themselves in the family law proceedings, with responsibility for preparing their own documentation and running their own case. As outlined in Chapter 1, the current legislative framework governing decision-making in parenting order cases is detailed and complex, making it challenging for self-represented litigants to use.

A number of submissions noted that many of the difficulties that affect family members who are advised to seek parenting orders by a child protection department are likely to be exacerbated for Aboriginal families. For example, the Aboriginal Legal Service of Western Australia (ALSWA) submitted that clients involved in the child protection system ‘are commonly affected by chronic disadvantage’, with little capacity to afford legal representation, and many also have low levels of literacy, impeding their ability to engage with the legal process as a self-represented litigant.

Central Australian Women’s Legal Service (CAWLS) noted that one of the challenges of representing Aboriginal and Torres Strait Islander clients in family law proceedings involves devising an appropriate order that is sufficiently flexible to accommodate the practical realities of the client’s life. CAWLS noted, for example, that the prescriptive nature of standard parenting orders will often not fit with the lives of Aboriginal and Torres Strait Islander families, which may involve significant mobility between different places of cultural significance to the child and may be more reactive in nature than for non-Aboriginal families, such as responding to a death in the community or another pressing event.

Other submissions raised concerns about the *Family Law Act’s* relatively limited support for preserving the child’s cultural knowledge and connections by comparison with the legislative frameworks of Australia’s child protection systems. Although the *Family Law Act* has a number of provisions that require decision-makers to have regard to cultural issues when making parenting orders, these stakeholders noted the absence of any equivalent of the Aboriginal Child Placement Principle, which is a standard provision in child protection legislation. Nor is there any obligation to design a cultural plan to ensure the child’s ongoing connection with kinship networks and country, such as exists in Victoria’s child protection legislation. These deficits were said to act as a barrier to Aboriginal families approaching the family law system for orders. On the other hand, one organisation observed that the family courts had, in recent times, demonstrated a greater recognition of the importance of extended family for Aboriginal and Torres Strait Islander children. Council notes in this regard the Federal Circuit Court of Australia’s *Reconciliation Action Plan 2014-
2016 and the recent Federal Circuit Court decision in *Drake & Drake & Anor* [2014] FCCA 2950.

Overall, however, the submissions suggest that Aboriginal and Torres Strait Islander family members who wish to care for children can find it difficult to access and engage with the family law system, which can see children left in the care of the child protection system. The consequence of this is that family reunification for Aboriginal children becomes increasingly challenging, risking destruction of the child’s cultural connections and their development of a sense of Aboriginal identity and belonging.264

Multi-court cases

The prevalence of family violence in the population of separated parents, the frequent co-occurrence of family violence and child protection concerns,265 and the recent inclusion of family violence in child protection mandatory reporting requirements in several jurisdictions,266 mean that many separated families come into contact with the family law system in a context where the need for parenting orders is likely to be one of a number of legal issues the family is facing. This may see the family engage with a range of courts and systems. For example, a mother might be an applicant for a family violence protection order, a prosecution witness for assault charges where she is the victim, and a respondent in a child protection application, whilst simultaneously experiencing related legal issues concerning parenting issues and housing and debt.267

While an application for a family violence protection order in a state or territory magistrates’ court is often a client’s first point of contact in such circumstances,268 the submissions received by Council suggest there is no standard sequence of involvement with the different systems. In the following case study, provided by AFLSWA, their client’s involvement with the legal system was precipitated by contact with the child protection department:

A client (grandmother) sought advice and assistance with a parenting order for her 3 grandchildren after information she had received from [the child protection department]. The client was concerned that her daughter was dependent on drugs and was unable to care for her children. The children resided with the client and so did her daughter when she was not on drugs. There were a number of violent episodes between the client and her daughter and the client made an application for a family violence protection order against the daughter.

The client filed documents in the Family Court after the child protection department asked her to care for her grandchildren as the department had concerns about the children’s mother. When she attended the first mention in the Family Court, the judicial officer said that she was aware that the child protection department had filed a protective application in the children's court. The child protection department were concerned about the grandmother’s ability to protect the children from her daughter even though they had placed the children in her care. The concern that the child protection department had was that the family violence protection order did not protect the [grand]mother outside of her home. As a result of the child protection application in the children's court, the Family Court matter was adjourned.
In the case study below, which is drawn from the VLA submission, the family’s first court involvement arose from an application by the police for a family violence protection order:

After a history of family violence and allegations of sexual abuse of the children by the father, a mother relocated to regional Victoria with the children. The father followed her there. Upon discovering this, the mother made a notification to the Department of Health and Human Services (DHHS) but DHHS did not get involved.

The father committed further acts of family violence against the mother. The police applied for and obtained a family violence intervention order (FVIO) against the father.

Notwithstanding the history of family violence, the mother facilitated contact with the children as the children wanted to see their father. On one visit, the father failed to return the children to the mother’s care. VLA assisted the mother to issue recovery proceedings in the Federal Circuit Court.

An interim arrangement was agreed to by consent that saw the children split between the mother and the father’s care. VLA continued to assist the mother at mediation but the dispute could not be resolved and the matter was listed in the Federal Circuit Court. Subsequently concerns emerged about the behaviour of the children in the father’s care, and further allegations emerged that the father was continuing to sexually abuse the children. DHHS initiated proceedings in the Children’s Court while matters were still on foot in the Family Law Court.

Revised interim family law orders were made, that returned the children to the mother’s care (with no contact for the father), and the matter was adjourned in the Family Law Court so that Children’s Court’s proceedings could run their course. The Children’s Court permitted the younger children to continue living with the mother but the older children were placed on out of home care orders as they were exhibiting challenging behaviours. The father continued to seek access to the children living with the mother, with the mother attempting to act protectively.

Then there was a further family violence incidence, this time between the mother and her new partner. DHHS became involved again and the remaining children in the mother’s care were removed.

The Federal Circuit Court is now considering final family law orders, which will come into effect when DHHS involvement ceases. The mother would like the children to return to her care. She is no longer living with the new partner and she is undertaking counselling and following DHHS directions.269

In this third case study, provided by the Family Law Section, the family’s engagement with the legal system began with proceedings in the Family Court of Australia:

The husband is aged 45 years. The wife is aged 40 years. There are two children, aged 8 and 5. Proceedings were initially commenced in 2011 in the Family Court of Australia where
competing applications were filed for parenting orders. The father sought an equal time order and orders for equal parental responsibility. The mother sought orders for sole parental responsibility and for the father to spend limited time with the children (including supervised time).

There are allegations by the mother of extreme family violence – inappropriate discipline of children by the father – allegations by the father that the mother is attempting to influence his relationship with the children. Both parties have limited financial means but were not eligible for legal aid. The children had an Independent Children Lawyer (“ICL”) appointed for them. The proceedings in the Family Court proceeded over a period from filing to final orders of two years 10 months. There were three family reports prepared during that time by two separate family report writers. There was a psychiatric report in relation to both parents and the children’s psychologist also prepared two reports.

The proceedings were resolved by way of consent orders one week prior to a 5 day trial commencing. The orders provided for both parents to have equal parental responsibility and for a significant and substantial time order (9 days with the mother / 5 days with the father).

The proceedings in the Family Court concluded in January 2014. Between January 2014 and December 2014, six notifications were provided to the Department of Communities, Child Safety and Disability Services (‘the Department’). The Department investigated all of the notifications and after the sixth notification took steps in the Children’s Court to remove the children from both the mother and father and place the children in care. Both parents are permitted to enjoy supervised time with the children pending the final hearing of the Children’s Court matters. The father is legally represented in the Children’s Court proceedings. The mother is not.

The Department:
- Has arranged for a further family report to be prepared (the two report writers who provided reports in the Family Court proceedings were not considered appropriate by the Department because it perceived they may not be “independent”);
- Was unable to afford to have the parties again psychiatrically assessed;
- Did not contact the ICL, who was involved in this case for two years and 10 months. The assertions made by the mother against the father in the notifications post 2014 were of a similar nature to those complaints made by her in the Family Court proceedings.

At the time of this submission the Children’s Court proceedings have not been finalised and the children remain in care having limited time with both parents.

This family has been involved in litigation for four years, participating in proceedings in:
- (a) The Family Court of Australia;
- (b) The Children’s Court; and
- (c) The State Courts (during domestic violence proceedings).

These cases raise a number of concerns for both families and service providers, many of which have been discussed already. In its submission, the Family Law Section noted that in the above case the parties had appeared before six different judicial officers, each of whom
was required to obtain an understanding of the complex dynamics of this family. In addition, the family had been involved with three separate courts, each with distinctly different processes, rules and standards of proof in respect of the admissible evidence. The case also involved what the Family Law Section described as ‘extreme duplication of processes, affidavits [and] social science reports’, including reports prepared by four different professionals. The multiple court proceedings also meant that the children were required to meet with and talk to several different experts about their ‘thoughts and feelings’. As the Family Law Section’s submission notes:

> From the family’s perspective, interaction with three courts each with different and distinct processes during four years of litigation can only have been extremely confusing and frustrating.

These case studies also highlight the costs implications for clients of having to engage with a series of different courts to resolve related family violence, family law and child protection issues. In addition to the direct costs of multiple proceedings, a number of stakeholders said that the shift from one system to another could affect the level of legal aid assistance the family receives. The first and second cases noted above also highlight the resourcing and support capacity impacts on community legal services associated with appearing at multiple court dates across two or three jurisdictions, which can negatively impact on the number of clients the service can assist. The case studies also point to the challenges for legal system professionals, the majority of whom are specialists in a particular area of practice, in assisting clients to navigate their way from one system to the next. As the Family Law Practitioners Association of Tasmania noted:

> … practitioners find it difficult to adequately explain to clients (who are usually at crisis point anyway) the legal complexities of the difference in approach between the Courts.

**Information gaps and the risk of inconsistent orders**

A related concern raised in the submissions involved the scope for courts to make inconsistent orders because of a lack of awareness of previous orders made in another jurisdiction. The current mechanism for informing the family courts about relevant orders of state and territory courts relies on the parties bringing these to the court’s attention. As Victoria Legal Aid noted in its submission, this approach carries a risk of ‘information deficits’, which could see courts proceeding to make orders without knowledge of evidence about violence or abuse that has been identified in earlier proceedings.

Others noted that even when a client’s lawyer is made aware of previous proceedings, it could take some time to obtain formal approval for the release of relevant reports. This is in addition to dealing with evidentiary challenges in placing the material before the court. The submissions suggest that the impact of this issue varies across jurisdictions. For example, in New South Wales, the family courts are prescribed bodies for the purpose of Chapter 16A
of Children and Young Persons (Care and Protection) Act 1998 (NSW), which enables exchange of reports and information between the Department of Family and Community Services and the family courts. Chapter 16A is underpinned by the following principles:

(a) agencies that have responsibilities relating to the safety, welfare or well-being of children or young persons should be able to provide and receive information that promotes the safety, welfare or well-being of children or young persons,
(b) those agencies should work collaboratively in a way that respects each other’s functions and expertise,
(c) each such agency should be able to communicate with each other agency so as to facilitate the provision of services to children and young persons and their families,
(d) because the safety, welfare and well-being of children and young persons are paramount:
   (i) the need to provide services relating to the care and protection of children and young persons, and
   (ii) the needs and interests of children and young persons, and of their families, in receiving those services, take precedence over the protection of confidentiality or of an individual’s privacy.278

The issue of information-sharing between the family law and child protection systems has been considered in detail by Professor Richard Chisholm, in his reports on Information-Sharing in Family Law and Child Protection: Enhancing Collaboration and The sharing of experts' reports between the child protection system and the family law system. This issue is discussed in Chapter 6.

Inconsistent family violence protection orders and parenting orders

Two further intersection issues raised in the submissions involved concerns about children being left unprotected because of a reluctance by state and territory magistrates to use section 68R of the Family Law Act to vary family court orders when making family violence protection orders, and concerns about the limited duration of such variations.

Section 68R is in Part VII, Division 11, of the Family Law Act, and is designed to resolve inconsistencies between family violence protection orders and contact arrangements in parenting orders. It provides a mechanism for state and territory courts to amend the family law orders to remove any inconsistency. It does this by empowering state and territory courts of summary jurisdiction in proceedings for a family violence protection order to ‘vary, discharge or suspend’ an existing family law order to the extent that the latter ‘provides for a child to spend time with a person, or expressly or impliedly requires or authorises a person to spend time with the child’ 279 Section 68R allows the state court to do this on its motion without the consent of the parties.

As this suggests, s 68R provides an important mechanism for ensuring the safety of children and their carers in family violence matters where there are family court orders in place
providing for contact between the child and the perpetrator of family violence. However, a number of submissions noted problems with its application in practice. Several stakeholders submitted that some magistrates rarely apply s 68R in family violence hearings, or are reluctant to make family violence protection orders naming children where there are parenting orders in place. The following case study, provided by Legal Aid Western Australia, illustrates these issues:

A mother was referred to the FCWA by the magistrate in a metropolitan magistrate’s court who heard her application for a family violence protection order. The magistrate granted the mother’s application for an interim family violence protection order to protect herself but refused to make an order protecting her very young children because there were family court orders in place in relation to the children. The family violence protection order included the condition exempting contact required or authorised by a parenting order.

The mother was referred to the legal aid duty layer service at the FCWA to make an urgent ex parte application for suspension of the parenting orders which took a number of hours to prepare. The family court decided not to hear the matters on an ex parte basis (possibly because the children were in the mother’s care) and listed the proceedings for an urgent Case Assessment Conference some days later. The mother was very fearful that the father would insist on compliance with his spend time with orders pending the family court hearing, particularly once he was served with the interim family violence protection order and her family court application. As a consequence, the mother moved into a refuge for a week pending the family court listing to ensure that she and the children would be safe.280

A recent Victorian report raised a related concern about the misunderstanding of family court orders by magistrates in regional areas, who were said to sometimes assume that parenting orders are sufficient to protect children without needing to include the child on the family violence protection order.281 This misunderstanding has reportedly left women needing to return to court to have the orders varied to include the child as a protected person.

Some stakeholders also raised concerns about the associated section 68T of the Family Law Act. This section places certain time limits on the variation or suspension of parenting orders under s 68R. It provides:

(1) If, in proceedings to make an interim family violence order or an interim variation of a family violence order, the court revives, varies or suspends an order, injunction or arrangement under section 68R, that revival, variation or suspension ceases to have effect at the earlier of:
   (a) the time the interim order stops being in force; and
   (b) the end of the period of 21 days starting when the interim order was made.

The Magistrates’ Court of Victoria submitted that this provision ‘incorrectly assumes that a 21 day period is sufficient for the Family Law Court to consider the allegation and vary the family law order if required’.
Others expressed concerns that parenting orders may be suspended by a magistrates’ court without full information about the evidence of risk in the case that supported the making of the orders.\textsuperscript{282}

The Australian and New South Wales Law Reform Commissions examined similar concerns about the use of s 68R by state and territory magistrates and the application of s 68T in their 2010 \textit{Family Violence – A National Legal Response} report.\textsuperscript{283} They concluded that the underuse of s 68R at that time was attributable to a range of factors, including:

- a lack of awareness or understanding of s 68R among judicial officers, lawyers police and others involved in family violence protection order proceedings;
- a view taken by some magistrates that issues in relation to parenting orders should be a matter for the family courts;
- judicial officers lacking adequate information or evidence necessary to amend the parenting orders; and
- parties to proceedings not having access to appropriate legal advice.\textsuperscript{284}

The submissions received by Council raised a similar range of issues, as well as a lack of awareness of s 68R by self-represented litigants and a concern among some magistrates that allegations might be made in relation to children to gain an advantage in the family court.\textsuperscript{285}

In their 2010 report, the Commissions made a series of recommendations in response to the concerns about s 68R, including the following suggested amendments to state and territory family violence legislation:

\begin{itemize}
  \item \textbf{Recommendation 16–1} Family violence legislation in each state and territory should require judicial officers making or varying a protection order to consider, under s 68R of the \textit{Family Law Act 1975} (Cth), reviving, varying, discharging or suspending an inconsistent parenting order.
  \item \textbf{Recommendation 16–2} Application forms for protection orders under state and territory family violence legislation should include an option for an applicant to request the court to revive, vary, discharge or suspend a parenting order.
\end{itemize}

The Commissions also recommended amending s 68T of the \textit{Family Law Act} to provide that, ‘where a state or territory court, in proceedings to make an interim protection order under state or territory family violence legislation, revives, varies or suspends a parenting order under s 68R’, that parenting order will have effect until:

\begin{itemize}
  \item (a) the date specified in the order;
  \item (b) the interim protection order expires; or
  \item (c) further order of the court (Rec 16-5).
\end{itemize}

\textbf{Different approaches to parent-child contact}

Finally, a number of stakeholders raised concerns about the potential impact on children
and/or protective carers of the different approaches to parent-child contact in the family law and child protection systems.\textsuperscript{286}

One set of concerns here focused on sibling relationships. As described by Legal Aid Tasmania, the mandate of the child protection system is ‘primarily protective’, with a lesser emphasis on maintaining meaningful relationships between family members than in family law proceedings.\textsuperscript{287} The Northern Territory Legal Aid Commission commented similarly that children's courts and child protection departments are ‘not tasked with’ promoting parent-child relationships in the same way as in the family law system, particularly when children are removed from a parent’s care.\textsuperscript{288}

In light of this apparent distinction, a number of organisations noted the scope for different levels of contact between children and their parents and/or siblings where there have been family court and children's court proceedings involving children from the same family.\textsuperscript{289} Of particular concern were cases where the child protection department obtains orders removing a child from a parent and the child’s siblings are living with other family members in accordance with parenting orders made by the family courts. For example, the Family Law Practitioners Association of Queensland (FLPA Qld) submitted that its members ‘have experienced challenges in trying to arrange time between siblings when one child has been the subject of a Child Protection Order and another the subject of family law proceedings’.\textsuperscript{290}

This situation might occur, for example, because the father of one of the children brings proceedings under the \textit{Family Law Act} for parenting orders and the mother gives birth to another child to a different father in circumstances where the child protection department decides to initiate protective proceedings in respect of the newborn child.\textsuperscript{291} The following case study drawn from the NSW Legal Aid submission illustrates this scenario:

The child protection department made a care application in the children's court in relation to a newborn child. This child has a two year old sister who lives with the maternal grandmother. The children’s mother is alleged to have threatened both children while she was in a psychotic state and these threats form the basis of the child protection department’s application in relation to the newborn child. However, the child protection department did not include the two-year old sister in the protection application.

The grandmother has advised the child protection department that she is in the middle of family law proceedings in the Federal Circuit Court and has an ‘interim order for custody’ for the two year old child. There is no reference in the child protection department’s material associated with the protection application of consideration being given to commencing proceedings in relation to the newborn child in the Federal Circuit Court, nor had the department sought a copy of the orders made in relation to the sibling in the Federal Circuit Court.\textsuperscript{292}

A number of organisations raised concerns about the possibility that the siblings in this situation may experience different levels of contact with their parents even if they are placed with the same carer. For example, several stakeholders noted the differing capacities of the
child protection versus family law systems to facilitate supervised contact arrangements. Some suggested that the child protection system is better resourced than the family law system to provide long-term supervised contact between family members, due to the time limits on government funded service provision in the family law system. Some stakeholders mentioned broader concerns for family members who care for children associated with the different levels of services available in each system. The FLPA Qld noted in this regard:

> It is challenging for practitioners and services to assist clients in understanding why they may be eligible for some services/assistance in relation to some of the children in their care but not others. For example, those children within the Child Protection system may be eligible for certain medical treatment, access to education plans, assistance and support in facilitating time with parents and the like whereas these services may not be available in family law proceedings.

Others raised a different concern about the issue of systemic differences of approach to parent-child relationships. These submissions focused on the impact on protective parents of having to the shift from the child protection system to the family courts. Women’s Legal Service Queensland, for example, described the experiences of clients who have been the subject of protective notifications, who are advised by the child protection department to separate from the child’s father because of his violence and to obtain parenting orders that limit his contact with the child. One of the objectives underpinning Part VII of the Family Law Act is a concern to maintain a child’s relationships with both parents, provided this is safe. Within this context, a number of organisations noted the importance for clients who have been advised to seek parenting orders for protective reasons of having evidence, such as a letter from the child protection department, to support their application for limited contact with the other parent.

This issue was also the subject of a recommendation by the Australian and New South Wales Law Reform Commissions in their 2010 Family Violence – A National Legal Response report:

**Recommendation 19–3** Where a child protection agency investigates child abuse, locates a viable and protective carer and refers that carer to a family court to apply for a parenting order, the agency should, in appropriate cases:

(a) provide written information to a family court about the reasons for the referral;
(b) provide reports and other evidence; or
(c) intervene in the proceedings.

The submissions to Council’s reference suggest that this is a continuing problem. The Queensland Special Taskforce on Domestic and Family Violence made a similar observation in its recent report as did the Senate Community Affairs References Committee in the recent Grandparents Report. The latter recommended that state and territory governments reconsider the Australian and New South Wales Law Reform Commissions’ proposal from 2010.
2.3 Transferring proceedings between the children's courts and family courts

Question 1 of the terms of reference asks Council to report on the capacity for the federal family courts and state and territory courts exercising care and protection jurisdiction to transfer proceedings to one another.

Transfers of proceedings between state and federal courts in Australia are regulated by the cross-vesting scheme, which came into force on 1 July 1988. The scheme was effected by the enactment of the *Jurisdiction of Courts Cross-Vesting Act 1987* (Cth) in May 1987, with reciprocal legislation, identically described as the *Jurisdiction of Courts (Cross-Vesting) Act*, subsequently passed in all States and the Northern Territory. The cross-vesting scheme purported to do two things. The first was to vest State and Territory Supreme Courts with the civil jurisdiction of the Federal Court and the Family Court of Australia, and to vest the Federal and Family Courts with the full jurisdiction of State and Territory Supreme Courts. The second was to make provision for the transfer of proceedings between these courts.

Section 5(1) of each of the cross-vesting Acts provides for the transfer of proceedings from a State or Territory Supreme Court to the Federal Court or Family Court. Section 5(2) provides for the transfer of proceedings between one State or Territory Supreme Court and the Supreme Court of another State or Territory. Section 5(3) provides for the transfer of proceedings between the Supreme Court of a State and the State Family Court of that State. Section 5(4) provides for the transfer of proceedings from the Federal or Family Court of Australia to a State or Territory Supreme Court. Section 5(5) provides for the transfer of proceedings arising out of, or related to, proceedings previously transferred.

The aim of the cross-vesting scheme was to ensure that one court is able to deal with related disputes where there is ‘a real need to have matters tried together’ that would otherwise be dealt with in separate courts. However, there are a number of legal and practical obstacles to the use of this scheme as a way to resolve the problems for families outlined earlier in this chapter.

**Court structure considerations**

Direct transfers between state and territory children's courts and the Family Court of Australia are not contemplated by s 5 of the *Jurisdiction of Courts (Cross-Vesting) Act*. In order to achieve this, proceedings commenced in a children's court would first need to be transferred to the Supreme Court of the relevant state or territory for the purposes of a transfer to the Family Court.

This was the process employed in *Re Karen and Rita*, a 1995 decision of the Family Court of Australia sitting in Queensland. The original proceedings in this matter involved a family law dispute over parenting arrangements for two children, then aged 8 and 9, between the children’s mother and father. After hearing evidence from the Court Counsellor to the effect that neither parent was a suitably protective caregiver, the Family Court invited the Director-
General of the Queensland child protection department to intervene in the matter. The child protection department subsequently initiated a care and protection application in the Queensland children's court, which was transferred to the Family Court of Australia by order of the Supreme Court of Queensland pursuant to s 5 of the cross-vesting legislation. This allowed (the then) Chief Justice Nicholson, who heard the case, to deal with the department’s care and protection application and the mother’s application for (what was then called) custody of the children in the one hearing. His Honour found that neither parent had the capacity to care for the children and made orders under the *Children’s Services Act 1965* (Qld) admitting them to the care of the Director-General of the child protection department.

In a similar fashion, as most parenting matters are now dealt with by the Federal Circuit Court, any transfer of a parenting case to a state or territory court would first require the matter to be transferred to the Family Court.

**Jurisdictional issues**

A more significant barrier to using the cross-vesting scheme where there are concurrent family law and child protection proceedings is a jurisdictional one. The scheme’s transfer solution is premised on the ‘receiving’ court being able to exercise the jurisdiction of the ‘transferring’ court, in addition to its own jurisdiction, so that both matters can be dealt with together by the one judicial officer. However, while the Family Law Act provides State courts of summary jurisdiction with power to hear and determine parenting matters under Part VII of the Family Law Act in certain circumstances, and this power may apply to children's court magistrates (see Chapter 3), the federal family courts are not able to exercise the child protection legislative powers of State and Territory courts.

Underpinning the development of the cross-vesting scheme was a clear intention that the Family Court of Australia would be vested with the full jurisdiction of State and Territory Supreme Courts. But in 1999, the High Court of Australia in *Re Wakim: Ex parte McNally & Anor* ("Re Wakim") held that insofar as the cross-vesting legislation purported to vest State judicial power in the Federal and Family Courts, the scheme was constitutionally invalid. The vesting of federal civil jurisdiction in state courts, on the other hand, remains valid as such conferral of power is specifically contemplated in Chapter III of the Constitution. Hence, state and territory Supreme Courts remain able to exercise federal family law jurisdiction. But as a result of the High Court’s ruling in *Re Wakim*, the Family Court is not able to exercise the legislative powers of state and territory courts. This means that the possibility of a combined hearing of child protection and parenting matters in the Family Court, as occurred in *Re Karen and Rita* in 1995, is no longer available.

The substantive jurisdiction of the family courts is limited by the constitutional constraints upon the Commonwealth Parliament’s legislative power, as their jurisdiction derives from an Act of the Commonwealth Parliament. As noted in Chapter 1, the *Family Law Act* is mainly supported by two heads of legislative power in the Constitution; s 51(xxi) – marriage; and s 51(xxii) – divorce and matrimonial causes: and in relation thereto, parental rights, and the
custody and guardianship of infants. There is also an incidental power in s 51(xxxix), which gives the Commonwealth power to legislate on ‘matters incidental to the execution of any power’ vested by the Constitution in the Commonwealth Parliament. Furthermore, under s 51(xxxvii) of the Constitution, states may refer legislative powers to the Commonwealth that would otherwise remain within the exclusive purview of the states. In the family law context, the States (excluding Western Australia) have referred legislative powers to the Commonwealth on a number of occasions during the history of the Family Law Act. This includes a referral of powers in the 1980s with respect to the ‘maintenance, custody and guardianship of, and access to’ ex nuptial children. Notably, however, this reference was drafted to specifically exclude child welfare (child protection) law.

The Family Law Act contains its own child welfare power, which was inserted into the Act in 1983. This section, located in s 67ZC, provides the family courts with ‘jurisdiction to make orders relating to the welfare of children’. The main use of this power by the family courts has been to authorise ‘special medical procedures’ – such as surgical procedures for children with gender identity dysphoria – where the young person’s parents are not able to provide lawful consent to this treatment. This power has been described as ‘similar to the parens patriae jurisdiction’ enjoyed by State and Territory Supreme Courts, which is discussed further below. However, in Minister for Immigration, Multicultural and Indigenous Affairs v B (‘MIMIA v B’), the High Court of Australia ruled that, unlike the parens patriae jurisdiction, the welfare power in the Family Law Act cannot be relied upon to bind third parties in furtherance of the child’s welfare. The Family Law Act’s welfare power, therefore, is not available to support the making of child protection orders by the family courts.

While the decision in Re Wakim means that it is no longer possible for State and Territory Supreme Courts to transfer child protection matters to the Family Court of Australia, transfers from the Family Court to the Supreme Courts remain available. The Supreme Courts have an inherent parens patriae jurisdiction that may be used to protect the welfare of children. In the High Court’s decision in Secretary, Department of Health and Community Services v JWB and SMB (‘Marion’s Case’), in 1992, Justice Brennan provided the following description of this jurisdiction:

The parens patriae jurisdiction has become essentially protective in nature and protective orders may be made either by the machinery of wardship or by ad hoc orders which leave the guardianship and custody of the child otherwise unaffected. The court is thus vested with a jurisdiction to supervise parents and other guardians and to protect the welfare of children.

One question that arises in the context of child protection matters is whether the child protection legislation of a particular State purports to extinguish the inherent parens patriae jurisdiction of the Supreme Court. Council’s review of this question suggests that the parens patriae jurisdiction remains available to be used in this context by the Supreme Courts of all States and Territories except Western Australia. For example, in the recent case of Re
Madison, the NSW Supreme Court expressly relied on the *parens patriae* jurisdiction when making an order that the father of the child and the Minister have ‘joint parental responsibility’ pending the final determination of proceedings that were before the NSW Children’s Court. Similarly, in the 2013 decision of *Re Beth*, the Supreme Court of Victoria confirmed that neither the *Children, Youth and Families Act 2005* (Vic) nor the *Disability Act 2006* (Vic) exclude the court from exercising its *parens patriae* jurisdiction.

These cases provide examples of circumstances in which a State Supreme Court has used its *parens patriae* jurisdiction to place a child or children into the care of a child protection department, in a similar way to orders made under care and protection legislation by a children’s court. As such, they suggest there may be some scope for proceedings to be transferred from the Family Court to a Supreme Court for the purposes of a combined hearing of family law proceedings and child protection concerns. However, Council’s review of the cases suggests that applications to the Supreme Courts that invoke the *parens patriae* jurisdiction for ‘child protection’ purposes are not a common occurrence.

**The need for proceedings to be pending in another court**

A further limitation on the transfer of a proceeding from the Family Court to a State or Territory court under the cross-vesting legislation is the requirement that the proceeding in the Family Court ‘arises out of, or is related to, another proceeding pending’ in that court. This requirement means the scheme cannot provide assistance to the family courts in those cases such as *Ray & Males* where the judicial officer has concerns about the parenting capacity of both parties but the risk threshold for child protection intervention is not met. As noted in Chapter 1, children’s court proceedings can only be initiated by the relevant state or territory child protection department, and without any proceedings pending in the children's court the family law matter cannot be transferred.

In fact, as discussed at Chapter 2.1, it is not clear how many of the problems faced by families affected by the child protection and family law systems involve concurrent proceedings in different courts. Many of the cases described by stakeholders above concerned difficulties arising from sequential, rather than concurrent, proceedings – such as the initiation of protective proceedings in the children's court after parenting proceedings have been finalised – or stemmed from advice from a child protection department to a protective parent to seek orders from the family courts where no children's court proceedings had (as yet) been initiated. These patterns suggest there is limited scope for inter-court transfers to remedy the difficulties for courts and families in this area.
CHAPTER 3: THE EXERCISE OF FAMILY LAW ACT POWERS BY CHILDREN'S COURTS

The second question in the terms of reference asks Council to examine:

The possible benefits of enabling the family courts to exercise the powers of the relevant state and territory courts including children’s courts, and vice versa, and any changes that would be required to implement this approach, including jurisdictional and legislative changes.

This chapter reports on the possible benefits of enabling state and territory children’s courts to exercise Family Law Act jurisdiction and any changes that would be required to implement this. As discussed in Chapter 2, previous research suggests a significant number of cases are referred to the family law system each year by child protection departments. This may occur because a parent has addressed the department’s protective concerns and the department is willing to withdraw its protective application, or because another family member is able to care for the child and the department considers that person to be a ‘viable and protective carer’ for the child. However, the research by Kelly and Fehlberg, and the submissions received by Council, suggest that not all of these referrals result in orders being obtained from the family courts.

Stakeholders outlined a range of barriers affecting access to the family law system by parents and others who are advised by a child protection department to obtain parenting orders, particularly where the orders are opposed by a/the other parent. These include concerns about the cost and pace of proceedings in the family courts and concerns about the relative formality of family law proceedings by comparison with children's court processes. For protective parents, it might also include a fear of having to re-litigate the issue of risk to the child in circumstances where there is no evidence from the child protection department to support an application for limited contact. Given these obstacles, and the clear protective benefits for children of parenting orders being made, it would seem desirable that parents and other family members who need such orders are able to obtain them without moving from the children's court.

This chapter examines the current capacity for children's courts to make parenting orders under Part VII of the Family Law Act and reports on the views of stakeholders about the benefits and challenges for children's courts of taking on this work. The submissions and consultations suggest there is widespread support for the idea of enabling children's courts to make parenting orders in the circumstances described above, to ensure the protection of children who might otherwise fall through the gap between the child protection and family law systems. At the same time, however, stakeholders noted the considerable resource implications of this proposal and the need for inter-jurisdictional collaboration and dedicated training for relevant professionals in order to make it work.
3.1 Jurisdictional issues

Section 69J of the *Family Law Act* vests state and territory ‘courts of summary jurisdiction’ with federal jurisdiction to make orders under Part VII of the *Family Law Act*, including parenting orders. This power is limited to circumstances where the parties consent to the orders being sought or where the parties consent to the court of summary jurisdiction hearing and determining the matter.

The *Acts Interpretation Act 1901* (Cth) defines a court of summary jurisdiction as: ‘any justice of the peace, or magistrate of a state or territory, sitting as a court of summary jurisdiction’. In Tasmania and the Northern Territory child protection matters are heard by magistrates in the Magistrates Court of Tasmania and the Family Matters Court where jurisdiction to make parenting orders is available under s 69J of the *Family Law Act*. However, uncertainty remains about whether this jurisdiction extends to specialist children's courts that are not part of a magistrates’ court. The children's courts in some states have also expressed concern about the ability of the heads of jurisdiction to exercise *Family Law Act* powers pursuant to s 69J where the President of the children's court is a judge of a superior court rather than a magistrate.

These uncertainties were the subject of concern for several stakeholders. In its submission, the Children's Court of Victoria supported clarification of the statutory uncertainty on this issue ‘as a matter of priority’, adding that:

Any residual uncertainty regarding jurisdictional matters … should be addressed by clear legislative reform to the Family Law Act 1975 giving the Children’s Court unambiguous power to exercise the federal jurisdiction conferred by s69J under that Act.

The NSW Department of Family and Community Services submitted similarly that any doubt about whether ‘specialist children's courts’ are able to exercise family law jurisdiction should be clarified by legislative amendment.

3.2 Support for children's courts making parenting orders

The submissions, forums and consultations demonstrated widespread support for the idea of children's courts exercising *Family Law Act* jurisdiction to make parenting orders. This included in principle support from the three children's courts that contributed to Council’s reference. In their submissions, the NSW Children's Court and the Children's Court of Victoria pointed to the significant potential benefits for families if their judicial officers were able to make parenting orders in circumstances where a parent or kinship carer who needs parenting orders is already involved in children's courts proceedings. The Children's Court of Victoria submitted:

By ensuring that all proceedings are dealt with in one court the families can at least continue to be involved with an entity that they have become familiar with; they will be acquainted
with the buildings, the court staff, the legal practitioners and the judicial officers. The court may not be where they would ideally choose to be, but it would at the least be an environment with which they are familiar and that familiarity with the court would minimise at least one barrier to their ongoing participation in the ongoing court process.

The Presidents of the Children's Court of Western Australia and the NSW Children's Court were both similarly supportive of their courts being able to make parenting orders in the circumstances described above, with the latter Court’s submission noting that the current situation is ‘less than ideal, particularly given the delays in the family law jurisdiction’.

Practitioner organisations, commissions for children and young people and legal aid commissions were also generally supportive of children's courts being able to make parenting orders in these circumstances. Like the children's courts themselves, these stakeholders noted a range of potential benefits for families and children. These included both practical and emotional benefits for families and children.

For example, the Victorian Commission for Children and Young People noted that, by comparison with the family courts, children's courts ‘offer less formal proceedings and greater embedding within the support service system for families’, as well as a greater focus on ensuring ‘abuse issues are resolved rapidly to prevent significant harm to children’. It also submitted that practitioners who work in the children's courts are likely to be ‘more familiar with trauma informed practice’ than are their counterparts in the family law system. Such practice involves service delivery that is influenced by an understanding of the impact of violence and abuse on the client or child’s development, including early screening of children for exposure to trauma and an understanding of the coping strategies and adaptations used by individuals who have experienced violence or abuse. The Queensland Family and Child Commission submitted along similar lines that the making of parenting orders by the children's court would reduce the likelihood of family members and victims of violence having to ‘revisit traumatic events in different courts’.

Others emphasised the cost benefits for families of being able to obtain parenting orders from children's courts. As noted in Chapter 2, this can be a particular issue for grandparent carers where financial means are limited. Legal Aid NSW also suggested that there may be a saving to legal aid commissions where there is no need to fund two separate proceedings. A number of stakeholders, including the Federal Circuit Court of Australia, also pointed to the benefits to the family courts of reduced court hearings if children's courts begin making parenting orders in favour of ‘viable carers’.

Some submissions also noted potential advantages for families in relation to the outcome achieved at court if children's courts are able to make parenting orders. Of significance here is the increased likelihood that parents and other family members who are advised to seek parenting orders will actually obtain them, given the present barriers to accessing the family courts described in Chapter 2.
It is important to note that the idea of children's courts exercising family law jurisdiction was not universally supported. Several stakeholder organisations raised serious concerns about the capacity of the children's courts in their state or territory to undertake this work. This issue is discussed further below. In addition, while the various state and territory child protection departments detailed a number of potential advantages for families of this approach, they also urged the adoption of a measured and careful consideration of the issues and extensive stakeholder consultation before any reforms are developed.

3.3 Limits on the exercise of Part VII by children's courts

Consideration of enabling children's courts to make parenting orders is not new. A number of earlier reports have recommended this step in order to reduce the need for family court hearings and to provide better outcomes for children. Previous recommendations have tended to limit the proposed jurisdiction in light of the resource implications for children's courts (discussed below). While some reports have recommended children's courts be vested with the same jurisdiction as currently applies to courts of summary jurisdiction under s 69J of the Family Law Act (which includes power to hear contested matters with the consent of the parties), others have suggested children's courts should only be enabled to make consent orders, or only where a matter is already before the children's court.

Concern to limit the extent to which children's courts would be required to exercise family law jurisdiction was also evident in the submissions received by Council. As the above descriptions suggest, the preponderance of submissions on this question focused on the jurisdiction to make parenting orders. Within this context, some stakeholders suggested that children's courts should be able to exercise jurisdiction under Part VII of the Family Law Act to the same extent as magistrates courts currently enjoy, that is, to make parenting orders by consent and to hear contested parenting cases with the consent of the parties. However, many of these submissions suggested that the exercise of this jurisdiction should be limited to when the jurisdiction of the children's court is already invoked. This reflects the recommendation of the Australian and New South Wales Law Reform Commissions in 2010.

In light of the resource and time availability issues discussed below, many submissions supported an even more limited exercise of family law powers by children's courts, suggesting it be confined to the making of consent orders only. This position reflects the recommendation made by Council in its 2002 Family Law and Child Protection report. Importantly this was also the view expressed by both the NSW and Victorian Children's Courts in their submissions to Council’s current reference.
3.4 Challenges for children's courts

While many of the submissions received by Council supported a power for children's courts to make parenting orders in limited circumstances, stakeholders also identified challenges for these courts in implementing this proposal.

In particular, some submissions expressed concern regarding the potential difficulties for children's court magistrates of moving between the different underpinning philosophies of the child protection and family law systems. Some stakeholders, for example, suggested that while each system is guided by the principle of the best interests of the child, this concept is interpreted in different ways in each court system. As described above (in 1.3), the family courts are required to consider a range of factors when making parenting orders, including the benefit to the child of having a meaningful relationship with both parents and the need to protect the child from harm. If these two ‘primary’ considerations are in conflict in a particular case, a family court must give greater weight to the second of these matters. In contrast to this approach, stakeholders from the child protection sector suggested that the focus for the children's courts in making decisions about whether a child is in need of protection is more singular. This was evident in the submission from the NSW Children's Court, which noted:

The principle that the safety, welfare and well-being of the child or young person are paramount, even over the rights or interests of a parent, informs every decision [in the children's court]. This may be contrasted with the objects and principles set out in Part VII of the Family Law Act 1975 (FLA).

In addition to this concern, a number of submissions pointed out that the legislative framework in Part VII is particularly complex and time consuming to apply, and suggested there would be a need for specialist training for children's court magistrates to support them to take on family law work. In fact, many organisations submitted that it would be critical to the workability of any proposal to vest children's courts with family law jurisdiction to ensure that both children's court staff, child protection department personnel and legal practitioners are given specialist training in the law and practice governing parenting order decision-making under the Family Law Act. In addition, some stakeholders, such as Legal Aid NSW, submitted that appropriate training will only be achievable if there are appropriate resources allocated to this endeavour.

More generally, a number of key stakeholders raised concerns about the capacity of children's courts to take on family law matters given their limited resources, and the implications for magistrates of incorporating an added area of jurisdiction into their existing workload. For example, while the NSW Children’s Court supported the making of consent parenting orders, it noted that any broadening of the Court’s power beyond this might ‘divert its resources’ and ‘inhibit its current ability’ to hear child protection matters in an ‘expeditious manner’.
3.5 Contested cases in the family courts following child protection involvement

In order to better contextualise and consider the concerns about workload and different underpinning philosophies raised by stakeholders such as the NSW Children's Court (above), Council examined a small selection of interim and final judgments in contested family law matters where the applicant had sought parenting orders following intervention and referral by a child protection department. Two cases are described here to explore these issues. While these are both judgments from final hearings, they nevertheless illustrate some of the complexities associated with contested applications for parental responsibility in cases where there has been child protection department involvement, and some of the differences in approach between the systems.

The first judgment, *Koster & Dowd & Ors*, is a 2014 decision of Judge Whelan. The case concerned a contested application for parenting orders in relation to a three-year-old child. The child’s mother suffered from a serious mental health condition and drug dependency. In February 2012, when the child was less than a year old, the mother was admitted to hospital for treatment in relation to drug-induced psychosis. As a result of this admission, the child protection department in Victoria removed the child and placed her into the full-time care of her maternal grandparents. The Children's Court of Victoria subsequently made an order for custody to Secretary of the department and placed a series of conditions on the mother’s contact with the child, including that all time with the child be supervised and that the mother submit to random supervised drug and alcohol testing.

Upon being made aware of the Children's Court order, the child’s father contacted the department seeking to have the child placed with him. After undergoing various assessments and drug screens to satisfy the department’s concerns about the father’s drug use, the child protection department permitted the father to spend supervised time with the child, initially supervised by department and later by the paternal grandmother. The father’s time with the children was gradually increased until the department determined that he had met their protective concerns.

In April 2013 the child protection department placed the child into the care of her father. The father then applied for parenting orders from the Federal Circuit Court seeking sole parental responsibility for the child. The maternal grandparents opposed the father’s application and responded by seeking orders for shared parental responsibility with the father. After a 3-day hearing in the Federal Circuit Court, orders were made providing for the father to have sole parental responsibility for the child and for the child to spend two days each week and one weekend a month with the maternal grandparents.

The second case, *Josey & Meibos and Hellier & Josey*, is a 2014 decision of Judge Burchardt. The case concerned consolidated applications for parenting orders in relation to three children, who were aged 12, 8 and 5 at the time of the hearing. The applications were made by the children’s fathers - Mr Meibos, the father of the two older siblings, and Mr
Hellios, the father of the youngest child. All three children had previously lived together with their mother, Ms Josey, until the evening of 17 July 2013. On that night, the oldest child, a girl, phoned her father ‘sobbing and distressed’ to tell him that her mother was drunk and had hit her. She also sent her father a text message saying ‘Pls help me dad’. The father contacted the police who removed the children from the mother’s care and notified the child protection department. The department’s investigation concluded that the children were at risk of physical and emotional harm in their mother’s care (as a result of her alcohol abuse and poorly controlled mental health issues) and placed the children with their fathers.

The mother opposed the men’s applications. She appeared in person throughout the trial in the Federal Circuit Court, which was heard over 7 days. The judgment in this case runs to 362 paragraphs, much of which is concerned with the question of whether the mother’s mental health ‘is such a risk to the children’ that they should ‘spend only supervised time with their mother’. After hearing evidence from the parties and a large number of witnesses, including medical experts and the family report writer, his Honour made orders that each father have sole parental responsibility for their child/ren and that each child live with his or her father. Burchardt J also made detailed orders allowing the children to spend supervised time with their mother for two hours once per week on condition that the mother undergo cognitive analytical therapy to address her mental health issues.
CHAPTER 4. THE EXERCISE OF CHILDREN'S COURT POWERS BY THE FAMILY COURTS

As noted in the previous chapter, the second question in the terms of reference asks Council to examine:

The possible benefits of enabling the family courts to exercise the powers of the relevant state and territory courts including children’s courts, and vice versa, and any changes that would be required to implement this approach, including jurisdictional and legislative changes.

The data provided by child protection departments during Council’s consultations (discussed at 2.1) suggest that very few family law notifications become the subject of child protection applications in a children's court. The submissions discussed at 2.2 also highlight the constraints on the family courts where neither party to the proceedings is a suitably protective carer for the child. Against this background, the first section of this chapter examines the potential benefits of enabling the family courts to exercise the powers of state and territory children's courts where a case is already before the court, and the practical challenges that such a course would entail. The second part of the chapter outlines the views of stakeholders about this proposal.

As outlined in Chapter 1.4, reforms along this line have recently been proposed in Western Australia. As a state court, the Family Court of Western Australia is in a unique position to trial such a proposal, as it is vested with jurisdiction under the Children and Community Services Act 2004 (WA) to exercise children's court powers.378 This is not the case in relation to the Family Court of Australia and the Federal Circuit Court of Australia. Beyond Western Australia, jurisdiction to determine child protection applications is vested exclusively in the relevant state and territory courts. This represents a significant barrier to any proposal for the federal family courts to exercise the jurisdiction of children's courts. This problem and the possibilities for addressing it are canvassed in the final section of this chapter.

4.1 Potential benefits of enabling the family courts to exercise children's court powers

Council invited stakeholders to comment on what they regarded as the likely benefits and challenges of enabling the family courts to exercise the powers of state and territory children's courts. While there was little support for vesting the family courts with child protection jurisdiction (discussed below), many submissions outlined what they regarded as the significant theoretical benefits for families of this approach, particularly where a family is already involved in proceedings in a family court.
Potential benefits for families

Citing the ‘one court principle’ recommended by Council in its 2002 report, many of these submissions pointed to the capacity for this model to overcome some of the problems for families canvassed in Chapter 2, such as the concerns about families having to navigate the transition between courts, the duplication of documentation, multiple reports and interviews with children and the change of decision-maker.379 For example, the Children’s Court of Victoria submitted:

As a logical extension of the Court’s fundamental view that the best interests of children cannot be advanced where children and their families are required to navigate multiple jurisdictions, proceedings in relation to the care, protection, wellbeing and custody of children should, to the extent that it is reasonably possible, be dealt with in the originating Court. This is particularly so when the parties have provided informed consent for this to occur.

The Family Law Practitioners’ Association of Queensland recited similar advantages for client families, noting ‘the ability for separated families to have their dispute resolved in a single Court proceeding dealing with both family law and child protection matters’ and thereby ‘circumventing any need for proceedings to be litigated in two separate Courts’. This submission regarded this as being particularly advantageous for families living in regional and remote locations.380

Others pointed to the potential benefits of a continuity of location in terms of having a single judicial officer with knowledge of the family’s circumstances determining all relevant legal matters,381 and (potentially) a reduced ‘need for family members or victims of events such as family violence, to avoid continually revisit traumatic events in different courts’.382 Several organisations suggested that having child protection matters determined by family courts might facilitate greater involvement of third parties in the proceedings, such as extended family members who could be considered as a viable carer for the child.383 Some stakeholders submitted that the family courts are a more appropriate forum than the children's courts for making child protection decisions about Aboriginal and Torres Strait Islander children because of their ‘greater focus on maintaining the relationship and time spent between parent and child than in the Children’s Court’.384

Practical challenges

Despite these potential benefits, many submissions also listed a number of significant challenges to the successful exercise of state and territory child protection jurisdiction by the family courts.

Noting the different mandates of the child protection and family law systems,385 some stakeholders suggested that this difference, and the different historical antecedents of each system, would make it difficult for one court to exercise the other’s jurisdiction.386 More particularly, some stakeholders expressed concerns about the need for family court judicial
officers to become sufficiently fluent in the area of child protection practice to take on this work, and queried the value of this exercise given the very small number of crossover cases. Another issue raised by some stakeholders concerned the fact that each state and territory has its own separate care and protection legislation, which would present a significant challenge for judicial officers of the family courts in this:

There would be challenges for practice created by that change as each State and Territory has its own child protection legislation and each child protection authority is structured differently. Legal practitioners and the judicial officers of the federal family courts would need to become familiar with each.

Relatedly, several stakeholders foresaw significant difficulties for families and their legal representatives in moving between the two different legislative regimes. For example, the NSW Department of Family and Community Services noted:

> [G]iving jurisdiction to the family law courts to make orders under the Care Act, and vice versa, has the potential to cause confusion for the parties and for practitioners in the proceedings in the application of these different provisions to decision-making.

In a similar vein, several submissions expressed concerns for families, and particularly for self-represented litigants, in navigating the jurisdictional and procedural shifts from a family law hearing to a child protection hearing.

Some stakeholders also questioned whether the benefits of family court proceedings for Aboriginal and Torres Strait Islander children would endure if this proposal were implemented. For example, although the National Family Violence Legal Prevention Services remarked positively on the family courts’ attention to preserving family relationships (see above), it nevertheless expressed concern that if the family courts commenced using children’s courts powers, this could lead to increased child protection intervention in Aboriginal families and a further increase in the removal of Aboriginal children from their families.

Another obstacle raised by some stakeholders concerned the relative cost of family court proceedings. The main concern here was that a shift of child protection proceedings to the family courts would result in litigants bearing costs more properly the responsibility of the state and, as the Victorian Commission for Children and Young People submitted, the ‘shifting of costs to carers’.

A related cost issue raised by some stakeholders concerned the impact of this proposal on appeals pathways for families in child protection matters. Decisions about the child’s care arrangements are made the child protection department in some states, rather than by the children's courts (see 1.2 above). This means that appeals from these decisions are currently dealt with through an administrative tribunal process. Professor Heather Douglas, Associate Professor Tamara Walsh and Ms Kathryn Thomas noted in their submission:
If the family courts were empowered to make Children’s Court orders, in Queensland this would shift the appeals process from QCAT to the Federal Circuit Court, increasing costs and raising deeper advocacy issues (i.e. currently parties do not usually need a lawyer for QCAT).

Several submissions also cited the difference in child representation models in the different courts as posing a challenge to the prospect of family courts exercising children’s court powers, while others pointed to the absence of support services for families within the family law system such as exist in the child protection system.

4.2 Stakeholder views about enabling the family courts to exercise care and protection powers

In addition to canvassing the benefits and challenges associated with enabling the family court to exercise children's court jurisdiction, many of the submissions that Council received provided a view about their level of support or opposition to this course of action.

Support for family courts exercising the powers of children's courts

Only two submissions, both from Tasmania, supported enabling the family courts to hear child protection matters. The Legal Aid Commission of Tasmania supported a general reference of child protection powers to the Commonwealth to enable the family courts to exercise children's court jurisdiction. This support was offered in the context of concerns about the lack of a specialist children’s court in Tasmania, where generalist magistrates, particularly in regional areas, may have little experience or expert knowledge of child protection law. Within this context, the Legal Aid Commission of Tasmania regarded the Family Court of Australia’s specialist child-focused jurisdiction, with its ‘on site’ counsellors and judicial officers who are accustomed to assessing risk to children, as offering a superior forum for the determination of child welfare matters. A second submission, from a Tasmanian legal practitioner, recommended the family courts be given powers to determine matters in which the department seeks long-term child protection orders.

Support for a limited exercise of power in cases with ‘no viable and protective carer’

As discussed at 2.2, a number of stakeholders raised concerns about parenting cases where the family court is concerned that neither party to the proceedings is capable of addressing the child’s safety needs, but where the level of risk does not meet the threshold for seeking protective orders under the relevant state or territory child protection legislation. This can leave family court judicial officers in the invidious position of having to decide between the ‘least worst’ of the proposals before the court in making orders for parental responsibility for the child.
This dilemma was the subject of examination by the Australian and New South Wales Law Reform Commissions in their 2010 report. In response to this problem, the Commissions suggested the need for two changes, encapsulated in a single recommendation. The relevant recommendation is as follows:

**Recommendation 19-2**: State governments should refer powers to enable the Australian Government to make laws allowing family courts to confer parental rights and duties on a child protection agency in cases where there is no other viable and protective carer. Family courts should have the power to join a child protection agency as a party in this limited class of cases.\(^{397}\)

In light of the continuing problems faced by the family courts in relation to these cases, several submissions received by Council supported a limited referral of child protection powers to the family courts along the lines recommended by the Australian and New South Wales Law Reform Commissions.\(^{398}\) However, there was no agreement amongst these stakeholders about the extent to which one or both of these powers should be vested in the family courts. There were also some strong cautions against this approach.

Legal Aid NSW submitted that while its first preference was for the creation of a single court operating at the federal level, it also supported a ‘corresponding jurisdictions’ model whereby the children’s courts and family courts would each be able to use some, but not all, of the other’s powers. In this regard, Legal Aid NSW supported both limbs of the Australian and New South Wales Law Reform Commissions’ above recommendation:

Under this ‘corresponding jurisdictions’ model, the Family Court should have the power to make some Children’s Court orders and compel the Secretary of the New South Wales Department of Family and Community Services (FaCS) to intervene in family law proceedings. We agree with the Australian Law Reform Commission (ALRC) recommendation that ‘the law should allow family courts to confer parental rights and duties on a child protection agency, in cases where there is no other viable and protective carer’ and that ‘family courts should have the power to join a child protection agency as a party in this limited class of cases’.

The Children’s Court of Victoria also referred to Recommendation 19-2 of the Commissions’ report:

These issues however do not come without complexity and challenges and must be approached cautiously. In this context, the Court supports the Australian Law Reform Commission’s observations around the complexity involved in vesting state child protection jurisdiction to the family law courts and its disinclination towards a general reference. It’s recommendation (19-2) that a limited reference of powers to enable the making of orders giving parental rights and duties to a child protection agency is sensible and is supported.

However, unlike Legal Aid NSW, the Children’s Court of Victoria did not support vesting the family courts with power to compel the involvement of a child protection agency in a
family law proceeding. This was also the position taken by the Law Society of South Australia, which submitted that the family courts should only be able to make orders conferring parental responsibility on a child protection department official where it ‘becomes apparent that it is not in the best interests of the children to live with either the applicant or respondent’ and the department has chosen to intervene in the family law proceedings.

The Northern Territory Legal Aid Commission also recommended that the family courts have power to order that ‘a child be [placed] in the primary care of the relevant child protection authority’. However, this submission did not state a view about whether the family courts should be able to make this order in the absence of the child protection department’s consent.

Council notes that in making its recommendation on this issue, the Australian and New South Wales Law Reform Commissions emphasised that they did not support a general referral of child protection powers to the Commonwealth and that they regarded the proposed powers as applicable to a ‘very limited class of cases’. More particularly, the Commissions’ report cautioned that:

> It would be an exceptional step for a court to join an agency as a party against its will. There would be significant cost implications for child protection agencies, in staff time, representation in hearings and possible adverse costs orders.\(^399\)

The Australian and New South Wales Law Reform Commissions also questioned whether a referral of powers to the family courts was the best way to proceed, particularly where the proposed powers involve compelling the involvement of child protection departments in family law proceedings contrary to their wishes. In general, the Commissions took the view that fostering collaborative processes between the two systems was the preferable method of addressing the issues arising at their intersections, noting:

> …it is highly desirable that the provision of child protection investigatory services in matters before the family courts is dealt with by negotiation, collaboration and agreement.\(^400\)

Several stakeholders expressed similar cautions in their submissions to Council’s reference. For example, the Queensland Family and Child Commission submitted that expanding the jurisdiction of the family courts in this way ‘will not address the existing long-standing issues associated with streamlining collaboration’ between the two jurisdictions,\(^401\) while the Tasmanian Department of Health and Human Services submitted:

> [I]t would seem that a more immediately fruitful issue to consider is how the Family Court and state and territory child protection systems can collaborate more effectively.

In her submission, Professor Belinda Fehlberg raised a similar concern that allowing the family courts to confer parental rights and responsibilities on state child protection departments without their consent ‘seems unlikely to facilitate the cooperative and collaborative working relationships across jurisdictions’ that will be crucial to addressing the
problems for families caught in the intersection between these systems.

**Power to order a child protection investigation**

As distinct from powers to compel the relevant child protection department to become a party to parenting proceedings, two submissions discussed the potential for the family courts to be vested with power to direct child protection departments to undertake investigations of allegations of risk of harm to a child or children, and to arrange support services, in cases where the court has concerns about the capacity of both parties to the proceedings. For example, the Federal Circuit Court submitted on this point:

> There is an obvious benefit in courts exercising family law jurisdiction being able to make orders which are otherwise only available in the children’s courts. It would allow a range of resources to be available to assist in the implementation of protective arrangements for children. For example, orders could be made for the relevant child protection authority to investigate serious allegations of risk, to provide reports and to provide particular targeted support for a family.

A modified version of this idea was put forward by Women’s Legal Service Queensland, which referred to another of the recommendations by the Australian and New South Wales Law Reform Commissions (Recommendation 19-1). Women’s Legal Service Queensland submitted that ‘serious consideration’ should be given to the establishment of a federally funded agency within state and territory child protection departments ‘to provide investigatory and reporting services to the Family Law Courts in cases involving child safety’. Professor Patrick Parkinson proposed an alternative approach, suggesting that child protection departments might be engaged to conduct investigations for the family courts on a paid basis.402

**Concerns about the family courts exercising children’s court powers**

A number of stakeholders did not support enabling the family courts to exercise the powers of children's courts.403 As noted already, some stakeholders expressed concerns about the potentially negative impact on collaboration between the two systems of a coercive approach to involving child protection departments in family law matters. However, a number of stakeholders raised other problems with this proposal. These included concerns about the ability of child protection departments to perform their primary function if they were required to provide support for proceedings in the family courts, concerns to maintain a distinction between the different underpinnings and mandates of the two systems, and concerns for families related to the relatively slower pace of proceedings and hearing delays in the family courts.
Concerns for the ability of child protection departments to perform their work

A number of key stakeholders from the child protection sector raised significant concerns about the idea of the family courts making children’s court orders on the basis that this would have a negative impact on the workload of child protection departments. For example, the NSW Children’s Court noted in this regard:

[I]f the family courts are given power to make Children’s Court orders, to compel the state child protection authority to become involved in cases, or to transfer cases to the Children’s Court, this will force state child protection authorities to become involved in particular cases notwithstanding that they may have already assessed that other cases should have a higher priority. Only the state child protection authority can assess priorities having regard to all of the notifications made to it. Regrettably, their resources do not match the demand for their services. Therefore such an approach may have the unintended consequence of leaving children who are at even greater risk without intervention.

The NSW Department of Family and Community Services submitted similarly that:

There is … a risk that if FACS is required to exercise orders made by a family law court, resourcing may be stretched and directed to children who are not assessed as being at most risk.

The NSW Department of Family and Community Services explained that in its experience, court attendances in the children’s court already account for a significant proportion of their caseworkers’ time, and that if caseworkers were required to attend additional hearings in the family courts, this could place strain on the department’s workload and could result in limiting the number of cases the department was able to take on. Thus, in their submission, allowing the family courts to compel departmental involvement in family law matters was likely to ‘divert resources away from children who are assessed as being at most, or greater, risk’ than the children subject to family law proceedings.

Different underpinnings, and procedural fairness concerns

Several submissions commented on the different philosophical underpinnings of children’s courts and family courts (noted in 2.2), and maintained that the differences in nature and purpose of each system should be maintained and not blurred. For example, the NSW Children’s Court noted that:

[There is a] fundamental difference between public and private litigation, between an adversarial, party driven process, and a case-management process, driven by the child protection authority, and overseen, or supervised, by the Children’s Court… The Children’s Court maintains that there should be a clear distinction between the two jurisdictions.
A number of submissions also raised concerns about the capacity of the family courts to manage child protection cases, particularly in relation to matters involving child sexual abuse. In part, these submissions reflect concerns about the differences in the focus of child protection system practices and the ‘unacceptable risk’ test that underpins family law decision-making in this area. This test, developed by the High Court of Australia, is designed to assist judicial officers to achieve a ‘proper balance’ between ‘the risk of detriment to the child from sexual abuse and the possibility of benefit to the child from parental’ contact. As mentioned in Chapter 3, a number of organisations commented on the relative lack of trauma-informed practice in the family law system by comparison with child protection systems. Some stakeholders also noted the benefits of specialist court lists for child sexual abuse cases that operate in some states, which have no counterpart in the family courts.

Professor Heather Douglas, Associate Professor Tamara Walsh and Ms Kathryn Thomas submitted on the basis of their research that the family law and child protection systems should remain separate in order to maintain procedural fairness.

**Timeframe concerns**

Another major issue contributing to the conclusion by some stakeholders that family courts should not make children’s court orders was a concern about the pace of proceedings in the family courts. A number of submissions noted that, compared with children’s courts, there are significant delays in the family court system, which means that the latter is a poor fit for determining matters of risk to children. For example, the Victorian Commission for Children and Young People raised a concern that child protection matters could become protracted if dealt with in the family courts, submitting that ‘abuse issues must be resolved rapidly to prevent significant harm to children’.

The NT Department of Children and Families stated similarly that:

> Given the pressure the Family Law Court is already under to deliver services with limited resources, it would be unlikely the Court could deliver the same timely and effective services currently provided by the current NT Local Court.

This submission noted that this issue is particularly pertinent to the Northern Territory, given its vast geographical area.
### 4.3 Enabling the federal family courts to exercise the powers of state and territory children’s courts

As discussed in Chapter 2.3, the federal family courts are limited in their exercise of jurisdiction by the legislative powers of the Commonwealth parliament. The Commonwealth parliament derives its power from two main sources for the purposes of the *Family Law Act*. First are the two primary constitutional heads of power in ss 51(xxi) and (xxii) (the marriage and matrimonial causes powers), and matters incidental to those powers. The second source of jurisdiction involves referrals of legislative power from the states. However, there have been no referrals of power to the Commonwealth in relation to child protection. This area remains within the legislative purview of the states.

The family courts do possess a ‘welfare power’. However, High Court authority effectively prevents the family courts from using this power in a way akin to the care and protection jurisdiction of the states and territories - that is, so as to make orders vesting parental responsibility for a child in a child protection department without the department’s consent. Further, as described at 2.3, as a result of the High Court’s ruling in *Re Wakim*, the states cannot vest the federal courts with non-federal jurisdiction. Thus, the cross-vesting legislation does not provide a solution for the jurisdictional capacity issue raised in question 2 of the terms of reference.

In light of these limitations, this section examines the range of possible options for enabling the family courts to exercise the powers of state and territory children's courts. The measures examined here are:

1) **Referrals of power from the states**
2) **Tied grants**
3) **Accrued jurisdiction**
4) **Dual commissions**
5) **Reliance on the External Affairs power**
6) **Constitutional reform**

#### Referrals of power

Although the Commonwealth Parliament’s power to legislate is limited to that which is allocated in the *Constitution*, there is scope within the heads of power enumerated in the *Constitution* for its legislative power to be substantively enlarged by the consent of the states. Section 51(37) of the *Constitution* provides that the Commonwealth has the power to make laws with respect to:

> matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterward adopt the law.
In light of this provision, the states may choose to refer any matter within their residual legislative powers to the Commonwealth. The referral need not be made by all states, however the resultant laws would apply only to those states that had chosen to refer legislative power. References can be desirable where there are actual or perceived gaps in the Commonwealth’s power to legislate that may, in the absence of a reference, lead to uncertainty about the constitutionality of Commonwealth legislation.\textsuperscript{416}

Although the mechanism by which referrals of power may be made is not set out in the \textit{Constitution}, it is clear that states must pass legislation specifying the powers to be referred to the Commonwealth.\textsuperscript{417} Two kinds of references can be made; text references, whereby the text of the forthcoming Commonwealth legislation is used as the basis for the reference; or subject-matter references, whereby states refer a more general matter to the Commonwealth.\textsuperscript{418} The former are the more common form of reference.\textsuperscript{419}

It is important to note that a reference does not imply that a state has ceded legislative power over the referred matter.\textsuperscript{420} Indeed, Twomey notes that any attempt to delegate an exclusive power of the states to the Commonwealth would be invalid.\textsuperscript{421} Rather, as with all heads of power under s 51 of the \textit{Constitution}, the state retains concurrent jurisdiction over the matters referred. However, in the case of conflicting state and federal legislation, the federal law will prevail to the extent of the inconsistency.\textsuperscript{422}

Although states have traditionally been reluctant to increase the legislative power of the Commonwealth via this method,\textsuperscript{423} references have occurred in a number of areas of law in recent times, including in corporate regulation,\textsuperscript{424} counter-terrorism,\textsuperscript{425} and, significantly for our purposes, family law.

\textbf{References in the family law context}

In the context of family law, referrals of legislative power by the states to the Commonwealth can be useful in overcoming gaps in the family courts’ jurisdiction. Once a referral is made, the Commonwealth Parliament can legislate on that topic and thus endow the family courts with the requisite jurisdiction. As noted in Chapter 2, there have been several referrals of family law-related powers by the states. These include referrals on two key areas that have been acted on by the Commonwealth to broaden the powers available to the federal family courts under the Family Law Act.\textsuperscript{426} These references were concerned with parental responsibility for ex-nuptial children and financial arrangements associated with the breakdown of de facto relationships.

\textit{Ex-nuptial children}

From 1986 to 1990, the states (except Western Australia) referred power to the Commonwealth with respect to ex-nuptial children.\textsuperscript{427} Before this referral, the Commonwealth could only legislate with respect to children of a marriage owing to the
limitations imposed by the constitutional powers upon which the Family Law Act depends. Section 51(xxii) provides legislative power over ‘divorce and matrimonial causes: and in relation thereto, parental rights, and the custody and guardianship of infants’. The limits of the Commonwealth’s powers with respect to children were confirmed in In the Marriage of Cormick; Salmon Respondent. The Commonwealth Parliament had amended the definition of ‘children of a marriage’ in the Family Law Act in 1983 to extend to children who ordinarily lived with a married couple. The High Court held that the Commonwealth Parliament could not extend its jurisdiction by deeming a child to fall within a constitutional head of power. Thus, a referral of power from the states was necessary in order to avoid the evident jurisdictional inconsistency whereby the family courts dealt with children of marriages, while ex-nuptial children were subject to the jurisdiction of state and territory courts.

In addition, there have been subsequent amendments that allow the Commonwealth to exercise legislative power to make custody, guardianship, access and child maintenance orders for children who are the subject of welfare orders.

Unmarried (de facto) relationships

From 2003 to 2009, all states except Western Australia referred power to the Commonwealth over ‘financial matters arising out of a relationship breakdown (other than by reason of death).’ The referral of power resulted from insistence by the Commonwealth that de facto property reforms must be uniform across Australia, meaning that the Commonwealth required this power to be referred so that the Family Law Act would apply to all couples, and not only those who were married. The reference applies to both heterosexual and same-sex couples. Before this reference, de facto couples were required to resolve their property disputes in state and territory courts and their parenting disputes in the family courts, since the earlier reference meant that the family courts had jurisdiction over parenting disputes relating to all children.

Both of the above references are subject-matter references and each includes the possibility of revocation of the reference by proclamation of the Governor of the relevant state. The implications of a possible revocation by a referring state are unclear.

Reform proposals

Although the states have referred some degree of legislative power in relation to family law by way of the abovementioned references, the states explicitly maintained exclusive jurisdiction in matters of child protection. This area is intrinsically linked with family law and arguably may be dealt with in a more consistent way across Australia if the family courts were vested with a measure of jurisdiction over this subject. A further referral of power from the states could provide the necessary basis for this to occur.
The Family Law Council recommended such a step in its 2009 report on *Improving responses to family violence in the family law system*, with a view to providing the federal family courts concurrent jurisdiction with state courts in relation to family violence and child protection matters. 440 The Australian and New South Wales Law Reform Commissions recommended a somewhat more limited referral of power in their 2010 report, as follows:

State governments should refer powers to enable the Australian Government to make laws allowing family courts to confer parental rights and duties on a child protection agency in cases where there is no other viable and protective carer. Family courts should have the power to join a child protection agency as a party in this limited class of cases. 441

**Potential barriers to a referral of powers**

Given that the states expressly reserved the power to legislate for child protection in the referral relating to ex-nuptial children and the subsequent amendments relating to children the subject of welfare orders, and since previous recommendations have not been implemented, it appears there is little interest among the states to refer this power. Furthermore, a comprehensive set of referrals of power over child protection to the Commonwealth could have the result that the federal level of government would have to create the requisite infrastructure, including a child protection investigation service. This could potentially be overcome by a limited referral, of the kind recommended by the Australian and New South Wales Law Reform Commissions (discussed above), whereby the states retain responsibility for the relevant child protection agencies, but the Commonwealth may legislate to allow the family courts to bind third parties in matters of child protection.

Aside from the policy concerns highlighted above, there are further barriers to consider when debating a referral of child protection powers to the Commonwealth. One such barrier concerns the potential for future amendment of a reference. In considering what kind of referral to make, the inherent inflexibility of text references or very specific subject-matter references should be taken into account. There is uncertainty surrounding the future amendment of a Commonwealth statute that is based on a referred power, since the amended act may stray too far from the referred power. In 2003, Justice French (as he then was) questioned whether this might have the result that the legislation discontinues altogether. 442 However, most referring statutes will contain what is called an ‘amending reference’ appended to the original reference, which allows the Commonwealth to amend the original act based on the referral of power. In the absence of such an ‘amending reference’, it is unclear whether the Commonwealth would have the power to amend the original legislation at all, especially in the case of a text reference. 443 However, although these issues have been raised in academic debate, there is a lack of jurisprudence in this area.

Another potential risk associated with referrals of power is the risk of fragmentation. Each individual state must refer the requisite power, and in more or less the same terms, in order
for a Commonwealth law based upon the referral to be effective in every state. This has occurred so far in the field of family law (with the exception of Western Australia, which has its own separate arrangements regarding family law). If all states do not participate in a referral of child protection matters then the resultant Commonwealth laws would only be applicable in the referring states, resulting in fragmentation.

Furthermore, all referrals of power are subject to repeal by each state. Each of the referrals in the field of family law contains a specific power for the referral to be repealed by proclamation by the Governor.\textsuperscript{445} In addition, since referring statutes are acts of parliament, it follows that they may be repealed by the parliament of each state. This could also result in fragmentation. There is no authority on these points, however, so the effect of a repeal is speculative.

For these two reasons, referrals of power are somewhat precarious. However, it does not appear from previous references that the theoretical barriers described above occur in practice. Short of constitutional amendment, a referral of power by the states to the Commonwealth on matters of child protection appears to be the most effective and sound method for enabling the family courts to exercise the powers of state and territory children's courts.

**Tied Grants**

Although the Commonwealth Parliament is limited by ss 51 and 52 of the Constitution in the areas in which it has legislative competence, under s 96 of the Constitution the Commonwealth Parliament may ‘grant financial assistance to any State on such terms and conditions it thinks fit.’\textsuperscript{446} This power has allowed the Commonwealth Parliament to regulate areas that would ordinarily fall within the exclusive jurisdictional competence of the states by a system of tied grants, whereby states are required to adopt certain measures or implement certain policies in order to access federal funding. Due to the vertical fiscal imbalance present in the Australian federation – largely due to federal dominance over income tax – the Commonwealth has greater revenue at its disposal than do the States\textsuperscript{447} and can thus use this leverage to effect change on a national level in areas where it would otherwise lack legislative power. Although tied grants are voluntary rather than mandatory, this fiscal imbalance can make the acceptance of a tied grant attractive for States. The Commonwealth could potentially make use of the tied grants system in the field of family law in order to gain access to the care and protection jurisdiction of states and territories, perhaps by requiring states to refer legislative power that would allow the Commonwealth Parliament to confer jurisdiction on the family courts to bind state child protection authorities.

Such a system is used in the United States to ensure a nationally consistent approach to child protection. Congress relies on what is called a ‘grants-in-aid’ system, which has been facilitated by the broad interpretation afforded to Art. 1, s 8 of the Constitution of the United States by the Supreme Court of the United States during the 20\textsuperscript{th} Century.\textsuperscript{448} These grants are
overwhelmingly ‘categorical grants’, which may only be used by states for a narrow purpose. Congress has relied on this system to implement a number of national child protection policies, beginning with the *Child Abuse Prevention and Treatment Act 1974* (US) (‘CAPTA’) and continuing over the intervening years with a ‘plethora’ of other statutes, each with a compliance requirement for states to access the associated funding. The result has been increasing uniformity in child protection and legal representation. However, there appear to be a number of problems associated with this development. For example, demonstrating compliance has proven to be a costly administrative burden for states, detracting from resources that would otherwise be directed towards achieving the core aims of the legislation.

It is beyond the scope of Council’s interim report to consider in detail how tied grants might be used in Australia to enable the family courts to access the care and protection jurisdiction of the states and territories. Policy considerations would need to be taken into account in order to determine the content of the conditions of a tied grant and the degree of funding that would be provided to states. Significantly, inter-jurisdictional cooperation would be necessary to ensure uniformity. Council also notes that in phase one of the National Commission of Audit’s 2014 report it was recommended that there should be a reduction in the use of s 96 tied grants.

**Accrued Jurisdiction**

Accrued jurisdiction refers to the ability of federal courts to exercise what would otherwise be non-federal jurisdiction where the matter before the court comprises federal and non-federal aspects. It is now well accepted that the Federal Court has accrued jurisdiction. The doctrine was recognised by the High Court in *Phillip Morris Inc v Adam P Brown Male Fashions Pty Ltd.* The doctrine hinges on the meaning of the word ‘matter’, and will apply where a non-federal claim is joined to a non-severable and non-colourable federal claim arising out of the same matrix of facts. A matter ‘is the justiciable controversy between the actors to it, comprised of the substratum of facts and claims representing or amounting to the dispute or controversy between or among them’. It is not a legal proceeding itself, but the subject matter for determination in that proceeding. As Barwick CJ observed:

> The identification of the matter is very much a question of substance and not of form. The facts alleged by either or any of the parties and their consequences will in the last resort be the determinant of what is relevantly the matter.

Once jurisdiction is attracted by way of the doctrine of accrued jurisdiction, such jurisdiction becomes federal and persists so that the court can resolve the entirety of the matter.

Prior to the High Court’s decision in *Re Wakim*, when the federal courts could exercise state jurisdiction, the question of accrued jurisdiction was reduced to an academic curiosity. However, in the case of *Warby v Warby* in 2001, the Full Court of the Family Court of Australia observed that in the wake of *Re Wakim*: 

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If jurisdiction exists for the Family Court to deal with matters which are outside the jurisdiction which it has been expressly granted by the Commonwealth Parliament, it must be found in the doctrine of “accrued jurisdiction.”

Indeed, according to Justice Kenny, *Re Wakim*, which held that the Federal Court had accrued jurisdiction to determine the issues of negligence and breach of contract, which are aspects of state law, has strengthened the doctrine of accrued jurisdiction.

**Accrued Jurisdiction and the Family Court of Australia**

Although there is no High Court authority confirming that the Family Court possesses accrued jurisdiction, the Full Court of the Family Court in *Warby v Warby* held that there was such a jurisdiction. Six factors were identified as relevant in determining whether the court will exercise the accrued jurisdiction:

1. what the parties have done;
2. the relationships between or among them;
3. the laws which attach rights or liabilities to their conduct and relationships;
4. whether the claims are part of a single justiciable controversy and in determining that question whether the claims are “attached” and not “severable” or “disparate”;
5. whether the claims are non-severable from a matrimonial cause and arise out of a common sub-stratum of facts; and
6. whether the court has the power to grant appropriate remedies in respect of the “attached” claims.

That case involved a property dispute where the rights of a third party had to be determined in order to determine the rights of the parties to the marriage under the *Family Law Act*. The accrued jurisdiction of the Family Court allowed it to determine the rights of that third party, as that question formed part of the same ‘matter’ and was not severable from the claim between the parties to the marriage. The notion of an accrued jurisdiction has since been applied by the Family Court in other cases. However it appears that most, if not all, of these cases have involved property disputes. Fehlberg et al surmise that accrued jurisdiction is currently available to the family courts in two kinds of cases:

First, it permits the courts to resolve matters beyond the scope of the FLA in a dispute between parties to a marriage (for example, contract or tort issues not considered to be property proceedings arising out of the marital relationship ...). Second, it permits the courts to determine issues involving third parties whose property interests are bound up with the property of the parties to the marriage.

The only example of a court attempting to exercise accrued jurisdiction in relation to a child protection is found in the case of *Ray & Males* (discussed in Chapter 2), which was the subject of appeal in *Secretary of the Department of Human Services v Ray & Ors* (*Ray’s
In that case, the judge at first instance attempted to make an order binding the Secretary of the Tasmanian Department of Health and Human Services in relation to the care and protection of two children. In so doing, his Honour purported to rely on powers conferred under the *Family Law Act* or, alternatively, on the accrued *parens patriae* jurisdiction of the Tasmanian Supreme Court. However, the Full Court held that he could not rely on either. Relevantly for the present discussion, the court found that the *parens patriae* jurisdiction did not support the order for two reasons. First, the court was not persuaded that the *parens patriae* jurisdiction could require the Secretary to assume parental responsibility for the children against his will; and second, there must be some proceeding pending in a state court in order for the accrued jurisdiction to be available.

Writing extra-curially, Justice Benjamin has suggested that this decision effectively closes the door on use of the accrued *parens patriae* jurisdiction by the family courts. A contrary view is provided by Justice Allsop, who respectfully disagrees with the appellate court and suggests that the justiciable controversy in question in fact ‘encompassed the proper party to fulfil the parenting responsibilities’, that such party could indeed be the State, and that there was no apparent reason why there needed to be proceedings on foot in the state jurisdiction in order for there to be a single matter attracting the operation of the doctrine of accrued jurisdiction.

Although the door may not be entirely closed for the family court to exercise accrued jurisdiction in the field of child protection, there is little to suggest that this would be effective. Absent a High Court decision on the matter, and in light of the Full Court’s decision in *Ray’s case*, a single judge of the Family Court or a judge of the Federal Circuit Court lacks an authoritative basis to make use of this mechanism.

**Dual Commissions**

Another possible way of enabling the judges of the federal family courts to exercise the powers of state and territory children's courts is via a dual commission. A dual commission is where a judge holds an appointment in two different jurisdictions. These are not unheard of in Australia – for example, a number of Federal Court judges hold dual commissions to the Supreme Court of various Australian Territories. The Australian and New South Wales Law Reform Commissions indicated that dual commissions could theoretically resolve some of the jurisdictional issues faced by the family courts, however no such appointment had yet been made and there is a lack of clarity surrounding the constitutionality of such an appointment. On the other hand, Justice Spigelman has championed dual commissions as a way of creating a unified Australian judiciary without the need for constitutional reform.

Dual commissions are the mechanism by which judges of the Family Court of Western Australia exercise both federal and state jurisdiction. The Family Court of Western Australia is a state court established pursuant to s 41 of the *Family Law Act*. Section 41 provided states with the opportunity to create a family court at the state level that would be vested with jurisdiction under the *Family Law Act*. All states other than Western Australia refused the
option of creating a state family court. The judges of the Family Court of Western Australia hold dual commissions to the Family Court of Western Australia and the Family Court of Australia.\textsuperscript{477} This puts Western Australia in a unique position in the Australian family law landscape in that it is a 'unified jurisdiction'.\textsuperscript{478} Thus, unlike the federal family courts, the Family Court of Western Australia can exercise the care and protection jurisdiction under the relevant state child protection legislation, the \textit{Children and Community Services Act 2004} (WA).\textsuperscript{479} However, as noted in Chapter 1.4, in practice child protection matters are dealt with in the dedicated children’s court of that state, as is the case in other states.

Despite announcements from Attorneys-General to the effect that judges would be offered dual commissions to state supreme courts and the Family Court as far back as 2009,\textsuperscript{480} no such dual appointments have eventuated. This could be due to the practical and constitutional hurdles posed by such a scheme. The Australian and New South Wales Law Reform Commissions have indicated that the constitutionality of dual commissions to the Supreme Court of a state or territory and to the Family Court remains untested, and thus uncertain.\textsuperscript{481}

Murray classifies the constitutional challenges as falling into two categories.\textsuperscript{482} First, there are appointment complications related to the requirements of s 72 of the Constitution that appointments be full-time and permanent, and regarding matters of remuneration.\textsuperscript{483} Second, there is the potential for incompatibility between the roles of state and federal judges based on the High Court’s rulings about the different functions each may perform under the Constitution.\textsuperscript{484} Specifically, there are some types of decision-making that State judges may undertake that federal judges may not.\textsuperscript{485} Murray indicates that:

’[t]he potential for incompatible functions to be exercised by Federal Court judges dually appointed to the State Supreme Courts, and the difficulty of suitably being able to monitor the exercise of such functions, is enough to characterise dual appointment as a risky constitutional venture’.\textsuperscript{486}

Furthermore, similarly to concerns discussed in Chapter 2 regarding inter-court transfers, proposals for dual appointments have focused on the supreme courts of the states and territories rather than the children’s courts and magistrates courts.\textsuperscript{487} The jurisdictional dilemma would thus remain unresolved.
Reliance on the Commonwealth’s external affairs power, coupled with Australia’s ratification of the United Nations *Convention on the Rights of the Child* (UNCRC), may present a limited possibility for the Commonwealth to legislate for the protection of children.

The external affairs power is a head of power located in s 51 of the *Constitution*. The external affairs power allows the Commonwealth to make laws with respect to things outside Australia and the implementation of treaty obligations and customary international law. The leading case regarding this second aspect of the external affairs power is *The Tasmanian Dam Case*, where a 4:3 majority of the court held that that the Commonwealth may rely on the external affairs power to implement international treaty obligations, even where the subject of the legislation was entirely domestic.

It is the Executive that enters into international treaties and assumes obligations thereunder on behalf of Australia. International treaties do not become domestic law unless the Parliament enacts laws implementing Australia’s obligations. Where there is no other head of power that supports the legislation giving effect to treaty obligations, or where other heads of power are insufficient, the Commonwealth Parliament may rely on the external affairs power in part or in whole.

However, the external affairs power is not without restriction, and nor does it provide the Commonwealth with plenary power with respect to the subject matter of an international treaty. For a domestic law to be validly enacted pursuant to this aspect of the external affairs power, the motivating international treaty must set out in sufficiently specific terms the regime to be implemented by signatory states, the domestic law must carry out and give effect to the terms of the treaty, and the law must not infringe upon any express or implied prohibitions found in the Constitution.

There is presently one reference to the UNCRC in the *Family Law Act*. Section 60B, which sets out the objects of Part VII, includes the following subsection: ‘An additional object of this Part is to give effect to the *Convention on the Rights of the Child* done at New York on 20 November 1989’. The Explanatory Memorandum to the Bill that introduced this provision confirmed that it ‘is not equivalent to incorporating the Convention into domestic law’, rather, the purpose of the inclusion of this provision was stated to be ‘to confirm, in cases of ambiguity, the obligation on decision makers to interpret Part VII of the Act, to the extent its language permits, consistently with Australia’s obligation under the Convention’.

The question remains whether the Commonwealth Parliament could chose to legislate for the protection of children on the basis of the external affairs power. In order to satisfy the requirements of the external affairs power set out above, there would need to be a sufficiently specific regime for child protection set out in the UNCRC, and any Commonwealth law would need to carry out and give effect to those terms.
The most relevant provision for the purposes of this inquiry is Article 19, which provides:

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.500

Article 9 of the UNCRC is also relevant to the role of the court when a child is removed from their parents by the State. It provides:

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

It appears from the foregoing that there is insufficient specificity in the UNCRC to found broad child protection powers in favour of the Commonwealth based on the external affairs power. Specifically, the provisions in question are vague in nature and do not appear to require that States Parties establish a regime for wardship or state guardianship of children. Article 9 envisages that such a regime may exist, but merely seeks to impose certain rights in the event that a child is removed from their parents against their will.

It is unlikely that the external affairs power can be relied upon to found a care and protection jurisdiction for the family courts, although there may be some scope for greater inclusion of the obligations under UNCRC in the Family Law Act.

Constitutional reform

Finally, constitutional reform is a possible solution for enabling the federal family courts to exercise the care and protection jurisdiction of state and territory courts. The family courts are Chapter III courts that derive their jurisdiction from Commonwealth Acts and are limited by constitutional constraints. Section 51 of the Constitution contains the heads of legislative power that the Commonwealth shares concurrently with the states, while s 52 sets out the exclusive legislative powers of the Commonwealth. In order to endow the Commonwealth
with the power to legislate for child protection, an additional provision could be inserted in s 51 that gives the Commonwealth the power to legislate for child welfare and protection.

The procedure for constitutional reform is set out in s 128 of the Constitution. First, the proposed law for the alteration of the Constitution must be passed by an absolute majority of both Houses of Parliament. The proposal is then subject to a referendum. In order to achieve constitutional amendment, a majority of voters in a majority of states must agree to the amendment, as well as an absolute majority of voters across Australia. However, Constitutional change has been notoriously difficult to effect in Australia, with only eight of a total of 44 referendums having succeeded since the Constitution entered into force.
CHAPTER 5. INTEGRATED MULTI-JURISDICTION FAMILY VIOLENCE COURTS

Council’s 2002 report on the intersection between the child protection and family law systems recommended the adoption of a ‘one court principle’. This recommendation proposed the family courts and children's courts each undertake an early assessment of the most appropriate forum for the resolution of matters before them and take steps to ensure the case proceeds to finalisation in the chosen forum. However, the submissions and data discussed in Chapter 2 indicate that many clients of the family law system engage with a broader combination of jurisdictions. The VLA file analysis also shows that the most common first point of contact with the legal system for families with complex needs is often a magistrates’ court in relation to a family violence matter. As such, any consideration of implementing a ‘one court principle’ must include a focus on the capacity for state and territory magistrates courts to address the multiple legal needs of families in this circumstance.

This conclusion is reinforced by the descriptions in Chapter 4, which highlight the limited stakeholder support for vesting the family courts with the jurisdiction of state and territory children's courts. Reflecting this situation, and the centrality of family violence to matters where families are involved in more than one jurisdiction, a number of stakeholders favoured the development of specialist courts that can deal with a range of relevant legal issues, including jurisdiction in family law, child protection matters and (both civil and criminal) family violence matters.

It is worth noting here that the majority of stakeholders who supported this approach pressed the advantages of state and territory magistrates courts to this solution, rather than locating multi-jurisdiction courts in the federal sphere. There are a number of reasons for this choice of forum. For some stakeholders, this emphasis reflected concerns about the lack of infrastructure support and experience in the family law system for managing safety risks to families. More particularly, as some stakeholders noted, supporting magistrates courts to undertake multi-jurisdictional work recognises the centrality of family violence to many of the cases involving families with multiple and complex needs. It also builds on the VLA evidence of the ‘common pathway’ through the legal system for families with complex needs, which sees many families approach the family law system after proceedings for family violence protection orders in a state or territory magistrates’ court. In this way it responds to the concerns about the barriers affecting clients’ access to the family law system (discussed in Chapter 2), and the concerns about the pace of proceedings in the family courts (discussed in Chapters 3 and 4). It also addresses the concern raised by the Senate Finance and Public Administration References Committee in its recent Interim Report on Domestic Violence in Australia, that services for victims of domestic and family violence must be delivered in a co-ordinated way that does not ‘leave it up to the victim’ to navigate the complexities of the wider legal system.
The choice of a state-based solution also recognises the lack of capacity in the federal system to enforce family violence protection orders, an issue that was noted by the Australian and New South Wales Law Reform Commissions in their 2010 report. More pertinently, it recognises the fact that magistrates courts are already vested with multiple jurisdictions, including limited jurisdiction under the *Family Law Act*.

In the main, the submissions and consultations on this issue came from stakeholders in Victoria and Queensland, reflecting either their experience of such courts (in Victoria) or recent recommendations for their establishment (in Queensland). This chapter examines the views of these stakeholders about the potential for (further) developing integrated family violence courts that can deal with the range of legal and support issues affecting families with complex needs. The chapter commences with a description of the law governing family violence protection orders in Australia and the aims and features of existing specialist family violence courts, before outlining the submissions and consultations and their consideration of the benefits and limitations of this model for addressing the problems described in Chapter 2.

### 5.1 Family violence protection orders

All states and territories in Australia have a statutory regime that provides for the making of civil family violence protection orders. While the terminology used to describe these orders varies from jurisdiction to jurisdiction, the underlying rationale and basic framework of each legislative regime are similar. A table of the relevant legislation and corresponding terminology for family violence protection orders in each jurisdiction is provided in Appendix C.

The development of these statutory schemes, most of which were enacted in the 1980s, was a response to a growing recognition that the criminal justice system, with its inherently reactive nature, was not able to adequately protect victims of domestic and family violence from continuing abuse. In the past decade, however, most states and territories have enacted new legislation. As a result, while the primary focus remains on victim safety, the objects of these schemes have been broadened to include other aims. Though expressed differently in each jurisdiction, these schemes aim to:

- Ensure the safety and protection of those who fear or are exposed to domestic and family violence;  
- Prevent or reduce the occurrence of domestic and family violence;  
- Reduce children’s exposure to domestic and family violence;  
- Promote the accountability of perpetrators of domestic and family violence for their actions.

Recent legislative changes have also seen a number of jurisdictions broaden the coverage of their scheme to ensure that people other than those in existing familial relationship are able to apply for family violence protection orders. In some states the definition of family violence
(or domestic abuse) has also been expanded to encompass emotional and economic abuse.\(^{513}\) Other recent developments include dedicated efforts to improve policing practices in relation to this issue in some jurisdictions.\(^{514}\)

In several states, these changes have led to an increase in reports to the police and applications for family violence protection orders to the courts. For example, in Queensland 66,016 occurrences of domestic and family violence were reported to the police in 2013-14, an increase of over 30% since 2009-10,\(^{515}\) while in Victoria, 65,737 family violence protection orders were made in 2013-14, an increase of 47% since 2008-09.\(^{516}\)

**Obtaining a family violence protection order**

Although the process for obtaining a family violence protection order differs between jurisdictions, in practice the schemes operate in similar ways. In most jurisdictions, the ‘aggrieved person’ who fears for their safety, or a police officer or a representative chosen by them or approved by the court, may apply for the order.\(^{517}\) In some circumstances and in some jurisdictions, a police officer may be obliged to make an application with or without the consent of the aggrieved person.\(^{518}\)

A court may grant a family violence protection order where there are reasonable grounds for believing that an individual will commit a family violence offence if there is no order in place. As a family violence protection order is a civil order, the court must apply the civil standard of proof in considering these matters. Interim orders are also available. The type of conduct or threatened conduct that may provide grounds for a family violence protection order is relatively similar across all jurisdictions and may extend beyond physical violence and damage to property to emotional\(^{519}\) and economic abuse\(^{520}\) and other forms of intimidation.

Each statute provides a number of considerations to guide the court in deciding whether to make a final or interim order. Typical of these is a requirement that the court give consideration (or in some cases ‘paramount’ consideration) to the safety of the affected person and any children who have been subjected to the violence.\(^{521}\) Some jurisdictions also require the court to consider the parties’ accommodation needs, in particular the accommodation needs of the victim and any children affected by the violence.\(^{522}\) Queensland’s legislation also requires the court to give consideration to any ‘characteristics that may make [the applicant] particularly vulnerable to domestic violence’, for example, where the victim is a child or elderly or has a disability.\(^{523}\)

Courts have broad powers to make orders to ensure the safety and protection of ‘aggrieved persons’. The potential contents of a family violence protection order are broadly similar across each jurisdiction. For example, an order might prevent entry to a property where the person resides, prevent the respondent from contacting the aggrieved person, or prevent the respondent from committing an act of family violence. In the ACT, the court is required to ensure any order made ‘is least restrictive of the personal rights and liberties of the
respondent as possible’ while bearing in mind its obligation to ensure the safety of the victim.524

Once made, an order will stay in place for a period of time specified by the court, for the maximum period allowed, or until the order is altered or revoked. In exceptional circumstances in some jurisdictions courts may make orders that extend beyond the statutory maximum period.525 Where specified, the maximum period is usually two years, however most jurisdictions impose no maximum period, instead allowing the court to specify an appropriate length of time.526 An application to extend the length of the order may be made before its expiry.

In South Australia, it is not possible to set a maximum duration of a family violence protection order.527 Instead, the order continues in force indefinitely until it is altered or revoked. An application by the defendant to alter or revoke an order may only be made after a period of 12 months has lapsed.528 South Australia is unique in that it does not require an aggrieved person to return to court to extend a protection order, but rather shifts the onus to the defendant to show why the order should be lifted. An application by a defendant to lift a family violence protection order in South Australia cannot succeed unless there has been a sufficient change in circumstances since it was granted.529

Although family violence protection orders are civil orders, criminal penalties apply to their breach in all jurisdictions. The consequences for breaching a family violence protection order vary across jurisdictions but can include fines or imprisonment. The conduct amounting to the breach of an order may also constitute a separate criminal offence, such as stalking, in addition to the breach of the order.530

While each state and territory has its own separate legislative scheme for the making of family violence protection orders, an order can be enforced in any other state or territory – or in New Zealand – by registration of the order in the receiving jurisdiction.531 This goes some way to ensuring that affected persons remain protected even if they relocate. However, the Senate Finance and Public Administration Committee’s Domestic Violence Interim Report has highlighted the need for automatic recognition and harmonisation of orders across jurisdictions.532 The Council of Australian Governments (COAG) has also committed to the creation of a national family violence protection order scheme, which would allow such orders to be recognised and enforced across all states and territories and would allow information sharing between courts and police in all jurisdictions.533 This is consistent with the recommendation of the National Plan to Reduce Violence against Women and their Children 2010-2022 that a national scheme addressing integration of family violence protection orders be developed.534

5.2 Specialist family violence courts

Originally developed in the United States, specialist family violence courts now operate in most Australian states and territories as a dedicated division or special list within existing
state or territory magistrates courts. Framed as a ‘problem-solving’ court, and underpinned by a therapeutic jurisprudence ethos, such courts typically employ a collaborative or integrated services approach which draws together justice and support personnel in recognition of the multi-dimensional nature of the problems the court is called on to address. As such, they sit alongside other specialist courts of summary jurisdiction, such as drug courts and mental health courts.

In general, family violence courts have been implemented in response to concerns that domestic and family violence was not being addressed adequately by the traditional (adversarial) justice system, and to facilitate access to justice for victims. However, reflecting similar changes to family violence protection order legislation, recent reports suggest that in some states this focus has begun to shift to incorporate a greater emphasis on prevention and reduction of re-offending by perpetrators.

There is no single model of specialist family violence court in Australia. Those in New South Wales, Queensland and the ACT are largely focused on a criminal justice response, while family violence courts in South Australia and Western Australia can address both criminal and civil protection order matters. Victoria’s Family Violence Courts Division, which currently operates in two locations, deals with a broader range of matters, including family law parenting matters, child protection applications and victims of crime compensation. However, while the models vary, specialist family violence courts tend to share a core set of common goals. These are reflected in the aims of the Family Violence Courts Division (FVCD) of the Magistrates' Court of Victoria. These are to:

- make access to the court easier
- promote the safety of persons affected by violence
- increase accountability of persons who have used violence against family members and encourage them to change their behaviour
- increase the protection of children exposed to family violence, and
- ensure support services are available to improve victims’ safety and assist in overcoming the trauma that is caused by family violence.

More pertinently for the purposes of Council’s reference, with their powers to adjudicate a range of related legal matters, specialist family violence courts such as those in Victoria and South Australia aim to minimise the need for parties to be ‘shuttled from court to court’, and to reduce the repetition of evidence and hearings that would ensue if the parties’ different legal concerns were litigated in separate courts.
Key features

In their 2010 report, the Australian and New South Wales Law Reform Commissions identified a number of typical components of specialist family violence courts. These included:

**Specialised personnel:** These will include specialised judicial officers, but may also involve specialised prosecutors, lawyers, victim support workers, and community corrections officers. In some cases, these personnel may be chosen because of their specialised skills, or be given specialised training in family violence.

**Specialised procedures:** These will include special days in court dedicated to family violence matters (‘dedicated lists’). They may also include ‘case coordination mechanisms’ to ‘identify link, and track cases related to family violence’, such as integrated case information systems, or the use of ‘specialised intake procedures’ (specialised procedures that apply when the victim first enters the court system).

**Emphasis on specialised support services:** There will be someone, employed by the court or another organisation available to support family violence victims in managing the court process, and often these workers are responsible for referring victims to other services, such as counselling. There may also be specialised legal advice or representation available for both the victim and defendant.

**Special arrangements for victim safety:** Some courts will also include specially designed rooms and separate entrances to ensure the safety of victims, and may offer facilities which enable vulnerable witnesses to give evidence remotely.

**Offender Programs:** Some courts have the capacity to order or refer an offender to a program which aims to educate the offender and address personal issues to prevent re-offending, usually through counselling. Some courts have offender support workers to engage and refer offenders to behavioural change programs.

Other reports, drawing on both domestic and international examples, have suggested some additional features and benefits of specialist family violence courts, such as ‘interagency co-ordination and co-operation’, the ability to exercise multiple jurisdictions, and a capacity to understand and manage co-morbidities such as mental health and drug and alcohol issues.

Recent reform recommendations in Australia

The international literature indicates a number of significant benefits associated with specialist family violence courts. These include improved information-sharing, a positive impact on the experiences of victims and their feelings of safety, improved access to services, and speedier case processing. Findings from other evaluations of specialist family...
violence courts in Australian and overseas jurisdictions point to improved safety levels for victims through the combination of protection orders, offender monitoring and victim services, and suggest that having a single specialist judge who can deal with related legal issues improves the consistency of decision-making.\textsuperscript{552} The Australian and New South Wales Law Reform Commissions also noted the following benefits of such courts:

- greater sensitivity to the context of family violence and the needs of victims through the specialised training and skills of staff;
- greater integration, coordination and efficiency in the management of cases through identification and clustering of cases into a dedicated list, case tracking, inter-agency collaboration, and the referral of victims and offenders to services;
- greater consistency in the handling of family violence cases both within and across legal jurisdictions; \textsuperscript{[and]}
- greater efficiency in court processes.\textsuperscript{553}

Reflecting these benefits, a number of law reform reports in Australia have recommended the development of specialist family violence courts to deal with the growing numbers of family violence related legal issues discussed above. In their 2010 report, the Australian and New South Wales Law Reform Commissions took the view that ‘the specialisation of key individuals and institutions is crucial to improving the interaction’ of the different legal frameworks governing family violence in Australia.\textsuperscript{554} They recommended state and territory governments establish or further develop specialised courts with powers to determine family violence protection matters, criminal matters related to family violence and family law matters to the extent that family law jurisdiction is conferred on state and territory courts.\textsuperscript{555} They also recommended mainstreaming the conceptual framework of these courts.\textsuperscript{556}

More recently, in 2015, two state-based reports made similar recommendations. In its \textit{Not Now, Not Ever} report, the Queensland Special Taskforce on Domestic and Family Violence recommended a greater use of specialised family violence courts in that State with power to deal with interim family law matters. This included a recommendation that the Queensland Government consider providing these courts with child protection jurisdiction.\textsuperscript{557} In response to this report, the Queensland Government has indicated it will pilot a specialist family violence court at the Southport Magistrates Court on the Gold Coast.\textsuperscript{558}

Similar recommendations were made in March 2015 by the Centre of Innovative Justice, which is based in Victoria. Its report called for the expansion of Victoria’s existing specialist family violence courts, a recommendation that was supported by the Magistrates’ Court of Victoria in its submission to Council.\textsuperscript{559} In recognition of the multiple legal needs of families affected by family violence, its report also recommended the Magistrates’ Court of Victoria:

\begin{quote}
[E]xplore the development of ‘One Judge, One Family’ docket schemes, as far as is practicable, in order to bring all matters relevant to a party, including family law disputes, before the same judicial officer in order to maximise informed and targeted adjudication.\textsuperscript{560}
\end{quote}

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5.3 The family law work of state and territory magistrates courts

As noted, state and territory magistrates courts have jurisdiction under Part VII of the *Family Law Act* to make consent parenting orders and to determine interim parenting matters with the consent of the parties. However, the Australian and New South Wales Law Reform Commissions’ report indicated that the latter jurisdiction is rarely exercised in practice. Several stakeholders also offered this view, suggesting that magistrates courts in some locations might have reduced their family law workload following the establishment of the (then) Federal Magistrates Court. The submissions to Council also suggest that there are a number of barriers affecting the ability of magistrates to use their *Family Law Act* powers, including a lack of familiarity with the jurisprudence of the family courts, and ‘insufficient training, minimal access to relevant information and a lack of resourcing’ for magistrates courts to undertake this work.

On the other hand, these and other submissions recognised the need to expand the family law workload of state and territory magistrates courts in order to better meet the needs of client families with multiple legal needs, particularly those affected by family violence. For example, the submission from the Magistrates’ Court of Victoria, which made just over 1,200 (consent and interim) family law orders in 2013-14, suggests there is an urgent need to address the resourcing and knowledge gap issues noted above so as to support state and territory magistrates to take on a greater family law workload.

5.4 Developing specialist family violence courts

In light of the recent inquiries and reform proposals noted above, some stakeholders supported the development or expansion (as the case may be) of specialist multi-jurisdiction courts and training for magistrates to hear the range of family violence, parenting order and child protection legal issues outlined in Chapter 2 of this report. Some stakeholders suggested that these magistrates should also be vested with jurisdiction to make small family law property orders, so that women and children trying to leave a violent relationship have funds to resettle without having to approach the family courts.

As these submissions suggest, the development of specialist family violence-oriented magistrates’ court lists has the capacity to address a number of the problems for families discussed in Chapter 2. Importantly, they would overcome the lack of flexibility affecting judicial officers in the family courts when dealing with a family’s multiple legal issues. Instead of families having to negotiate their own way from one court to another, a local magistrate could move across the various different jurisdictions to provide the range of appropriate remedies and to adopt a genuine problem-solving approach to addressing the client’s needs. For example, a judicial officer could use the court’s crimes compensation jurisdiction where appropriate to provide a victim of family violence with money for accommodation, or to change the locks on the house.
The existence of a multi-jurisdiction court located at the ‘first point of contact’ also means that a family has to go to only one place to seek family violence protection and parenting orders. This benefit could be strengthened further through consistent Practice Directions or agreements about information sharing, so that all the relevant information about the family travels to the one place. This could also overcome the problems discussed in Chapter 2 regarding duplication of resources and assessments, and offer the family significant cost benefits. Significantly, this structure would reduce the risk of children ‘falling through the gaps’ between the different systems because of the current barriers affecting access to the family law system.

Several submissions also noted the benefits for families of ‘procedural streamlining’, by having different jurisdictional matters heard in the one (therapeutic justice oriented) court, with a single judicial officer providing continuity in the family’s experience of the legal system. Others noted the benefits for families of having co-located support services, providing families with complex needs with ‘access to wider community service supports available through the integrated response practice’. For example, the submission from the Child Protection Practitioners Association of Queensland commented that such an integrated approach ‘recognises the impossibility of separating children’s welfare needs from their protection needs’.

Perhaps most significantly, some submissions suggested that this model reflects an appropriate prioritisation of safety for children and families. As several stakeholders noted in this regard, the development of specialist family violence courts leverages the considerable experience of state and territory magistrates in hearing and determining violence-related matters, including their daily experience of assessing the risk of family violence in bail applications.

Other stakeholders noted the potential benefits to families of a problem solving approach that can address the multiple issues facing a family holistically at their first point of contact with the legal system.

5.5 Challenges for this reform proposal

Although there are a large number of advantages for families with complex needs of developing or expanding the use of specialist family violence courts, it is important to note the qualifications to this approach raised by some stakeholders. Significantly, stakeholders who favoured this approach noted its resource implications for magistrates courts. One Magistrate also cautioned that it might be difficult to allocate resources to a specialist family violence court in smaller jurisdictions.

Underpinning the submissions and consultations that supported this reform direction was a strong view that such courts will need to be supported by collaborative arrangements with the family courts and child protection departments, as well as the police. Other stakeholders
emphasised the critical importance of ensuring that magistrates and other relevant professionals – lawyers, police and court staff – receive training in family law and have an expert knowledge of family violence dynamics. Stakeholders also stressed the need for specialist family violence courts to have on-site support workers for both victims and perpetrators of family violence, as well as opportunities for referral to culturally safe support services, including mental health and drug and alcohol services. Some also pointed to the need for such courts to have suitable accommodation, which are safe and child friendly.

Finally, some organisations pointed to concerns for clients being pressured into parenting agreements when applying for family violence protection orders, where parenting arrangements are sometimes used as a negotiating tool. Reflecting this issue, several submissions cautioned against magistrates making family law orders and family violence protection orders at the same hearing.
CHAPTER 6: ENHANCING INTEGRATED SERVICE DELIVERY

The previous chapters outlined a number of problems experienced by families associated with the separation of the family law, family violence and child protection jurisdictions in Australia. These descriptions suggest that for families with complex legal needs, the present jurisdictional model can be confusing, repetitive and incoherent. The data described in Chapter 2 suggest that large numbers of families engage with more than one of these jurisdictions each year, and that these families are likely to be affected by family violence concerns.

Council has previously recommended the adoption of a ‘one court principle’ to address the issue of jurisdictional overlap for families who come into contact with both the family law and child protection systems. However, as outlined in Chapters 3 and 4 of this report, there appears to be little stakeholder support for the family courts and children's courts exercising a significant measure of co-extensive jurisdiction. While there is a degree of support for children's courts being supported to make parenting orders in certain circumstances, and enabling the children's courts to do so would not entail major legislative difficulties, there are significant constitutional barriers to vesting the family courts with the powers of state and territory children's courts. There is also a limited capacity for transferring proceedings between the family courts and state and territory children's courts.

Against this background, this chapter examines some of the suggestions offered by stakeholders for improving a client’s experience of the interface between the family law, child protection and family violence systems within the current jurisdictional frameworks. These submissions focused broadly on three areas for enhancing service delivery to families who engage with multiple jurisdictions across the federal / state and territory divide. These centre on:

1. Information sharing;
2. Collaboration building; and
3. Harmonisation of terminology, practices and data collection processes.

These issues will be explored in more detail in Council’s final report, which will address terms of reference 3-5. However, in light of their relevance to some of the problems discussed above, this chapter provides a brief overview of some of the key proposals.

6.1 Information sharing initiatives

The discussion of client experiences in Chapter 2 highlighted a number of significant problems for families and the courts created by the lack of information shared between jurisdictions. This issue was the subject of review by Professor Chisholm in relation to information sharing between the family law and child protection systems. Council also notes at this point the centrality of family violence to many of the families with multiple and complex needs, and the requirement under the Second Action Plan of the National Plan to
Publication prohibitions and the sharing of reports

A number of submissions suggested that the current wording of s 121 of the Family Law Act poses a problem for practitioners and parties who wish to produce reports that were prepared for a family law matter in subsequent proceedings in another jurisdiction. Section 121 restricts the publication of any part of a family court proceeding ‘to the public or to a section of the public’ in a way that identifies a party or witness to the proceedings. Contravention of this prohibition is an indictable offence. Section 121 contains a number of exceptions to this prohibition, including where publication is approved by the family court. Some stakeholders commented on the problems created by this section, including the delays caused by the need to seek the court’s permission to produce a family report in children's court proceedings, and the need for reform to either s 121 or the Family Law Rules to address this problem.

Council notes that Professor Chisholm’s recent report on The Sharing of Experts’ Reports between the Child Protection System and the Family Law System addresses this issue and that an amendment to clarify that children's courts are not considered ‘the public’ for the purposes of s 121 has recently been passed by parliament.

Provisions prohibiting the publication of proceedings also exist in various state and territory child protection statutes, raising similar problems for practitioners who wish to produce reports that were prepared for children's court hearings in family law proceedings. In some jurisdictions this problem has been addressed by legislative amendment. For example, as described in Chapter 2, in New South Wales the family courts are prescribed bodies for the purpose of Chapter 16A of Children and Young Persons (Care and Protection) Act 1998 (NSW) (the Care Act), which enables exchange of reports and information between the Department of Family and Community Services and the family courts. Amendments to s 29 of the Care Act also permit child protection department reports to be admissible in family law proceedings.

Council was advised that in some states and territories, Practice Directions and/or Memoranda of Understanding also operate to assist in overcoming the problems created by confidentiality provisions that limit the publication of reports. A number of submissions also referred to Professor Chisholm’s reports as having prompted their organisation to review their protocols and Memoranda of Understanding. For example, several stakeholders in New South Wales noted that, on the basis of Professor Chisholm’s recommendations, the Department of Family and Community Services (FaCS) and the Federal Circuit Court and Family Court of Australia are currently reviewing their Memoranda of Understanding with a view to legislative amendment so as to allow further sharing of reports. At present the reports of the NSW Children's Court Clinic are confidential, and may be used in child
protection proceedings only. The submission from FaCS indicated the department is currently exploring ways in which these reports may be released in appropriate circumstances. Similarly, the Family Court of Western Australia noted that it and the Children’s Court of Western Australia have each issued Practice Directions dealing with information sharing between the two courts.

More generally, there was widespread stakeholder support (including by the courts themselves) for the greater sharing of reports across the family law and child protection jurisdictions, and for the use of Practice Directions and Memoranda of Understanding to achieve this.592

Nevertheless, some stakeholders raised concerns about the scope of the reports to be shared and the range of potential recipients with whom information from court proceedings might be shared. For example, some submissions supported the sharing of expert reports only. More particularly, a number of stakeholders indicated they did not support the automatic sharing of reports generated by child protection departments in the course of their investigations, such as ‘Application’ or ‘Disposition’ reports,593 noting that the evidentiary value of allegations of risk in these may be quite weak. Several submissions also expressed concerns about the automatic sharing of specialist family court reports with children’s courts.594

In addition, a number of stakeholders raised privacy concerns in relation to the sharing of reports across jurisdictions. Various submissions expressed particular concerns about the impact of automatic information-sharing provisions on individuals, therapeutic relationships and legal decisions.595 For example, Women’s Legal Services NSW submitted:

There are real concerns about potential risk of harm to persons/s who disclose violence, integrity of the counselling relationships and the family dispute resolution processes; and the possibility that failure to indicate family violence could lead to an assumption that there is no family violence.596

The submission from National Family Violence Prevention Legal Services raised similar concerns about the potential impact of information sharing on Aboriginal and Torres Strait Islander families, noting a risk of unintended and harmful consequences for Aboriginal children of increasing child protection department scrutiny of Aboriginal families.597 Some stakeholders also expressed concerns as to the scope of information from court files that could be subject to automatic access by statutory agencies, such as police departments or drug and alcohol support services.598

Finally, many submissions noted that information-sharing systems are not resource or time neutral, and that any recommendation for enhancing sharing of reports must be supported by adequate funding.599
A national database of orders

The submissions received by Council suggest there is broad support for the creation of a national repository of family law, family violence and children's court orders that is accessible by each relevant court and child protection department in Australia. This suggestion builds on the Commonwealth Government’s plan to establish a National Domestic Violence Order Scheme.600

However, the submissions offered a range of different views about the potential scope of any database of court orders, including different views about whether it should include court reports that were received in evidence in addition to interim and final orders. Concerns were also raised about the capacity for cross-referencing of client families given the different methods of identifying cases in different jurisdictions (noted at 2.1). The submissions on this point also expressed a range of different views about which institutions should have access to any such database.

6.2 Collaboration-building initiatives

Many submissions favoured expanding the use of co-located child protection department practitioners in the family courts (as now occurs in Western Australia, Melbourne and Dandenong) and joint training initiatives to increase understanding of and ‘dual proficiency’ in child protection and family law practice.

Co-located child protection practitioners

A large number of submissions reflected positively on this initiative and advocated its expansion to other or all court registries.601 In the main, stakeholders indicated that the co-location of child protection department practitioners in the family courts has brought significant benefits in terms of co-ordination and information sharing between the two jurisdictions. Stakeholders noted in particular benefits in the speed in transferring information, an improved ‘interface between the two systems’, and an enhanced understanding among practitioners of how each other’s system works.602 These benefits were also noted by the co-located child protection practitioner in the Melbourne registry of the family courts, who described the role as akin to ‘directing traffic at a junction of bordering countries of different languages and cultural practice’.603

It is important to note that several stakeholders cautioned that while this initiative had worked well in Western Australia and Victoria, it might be less successful in smaller jurisdictions such as the Northern Territory due to funding limitations.604 The Department for Child Protection and Family Support in Western Australia also urged the importance of conducting an in-depth evaluation of the program before considering any roll-out in other locations.
Several submissions recommended developing this initiative in other ways. For example, one submission suggested expanding the role of the co-located child protection practitioner to include a co-ordination role with members of the family, and to facilitate connections with support services. National Family Violence Protection Legal Services suggested the incorporation of Aboriginal and Torres Strait Islander liaison officers within the children's courts and family courts in order to provide culturally appropriate support and referral pathways for Aboriginal and Torres Strait Islander families. This submission also recommended the establishment of special lists or Aboriginal and Torres Strait Islander hearing days in the children's courts.

Co-location of courts

One submission proposed an idea for extending the co-located practitioner approach to incorporate the co-location of different courts ‘under one roof’. This model was canvassed in the WA Consultation Report as a possibility for achieving greater integration of jurisdictions. Under the model proposed in that report, this move would not entail the cross-vesting of any power but would aim to facilitate a more integrated approach to child welfare by locating a dedicated children's court list in the family courts precinct, along with a co-located child protection practitioner.

A similar proposal was made by Legal Aid NSW, which submitted that co-location of the children’s courts and family courts within the same building would go a long way to reduce confusion and dismantle barriers to information sharing. This submission suggested that a more collaborative culture would result, with greater opportunities for communication and continuity of representation, and even the opportunity for IT systems to be integrated. An example was cited of this in practice, where despite the distinct jurisdictions in a matter that was transferred from one court to the other, the experience of the parties – who were largely blind to the difference in the jurisdictions in the first place – was one of a significant degree of continuity.

Joint training initiatives

Many submissions called for joint training for staff and professionals from the different jurisdictions. Stakeholders generally suggested this should incorporate knowledge of processes and practice, not just law. By way of designing such training, the Magistrates’ Court of Victoria suggested that with proper resourcing, a systematic curriculum with related materials and training could be developed by a Judicial College.

Others suggested a need for cross-professional development centred on increasing understanding of child abuse, family violence and trauma related issues, in addition to an understanding of the requirements of practice in the different jurisdictions. There was also considerable support for professional development to focus on the requirements and use of reports in each jurisdiction. Victoria Legal Aid urged training to support information sharing.
initiatives, such as cross-filing of expert reports, on the types of reports prepared in each jurisdiction, and how they are used in the home jurisdiction to inform decision-making about risk and best interests. The Northern Territory Legal Aid Commission suggested that training regarding reports should also include the limitations on the evidentiary value of such reports in the respective jurisdictions. With regard to the report writers themselves, the Law Society of South Australia proposed broad legal training, so that they have knowledge of each decision-making framework governing family law and child protection orders, while others noted the need for culturally competent report writers.

Several submissions also supported training for child protection department staff to enhance their understanding of the family law system, and for increased cultural awareness training for all professionals to better support Aboriginal and Torres Strait Islander children, especially regarding the importance of extended family structures and kinship groups, the roles of grandmothers and aunties and the importance of being able to move around country.

Several Western Australia submissions testified to the benefits of ongoing stakeholder meetings, in particular the Western Australian Intersection and Integrated Services Reference Committee where there are opportunities to workshop over time ideas about how practice changes and system efficiencies could be developed.

**Collaborative practices**

Many suggestions for change were concerned with enhancing collaboration between child protection departments and the family courts in the interests of client families. Some of these focused in particular on the concerns for parents or carers who are advised to obtain family law orders and the barriers affecting their access to the family law system (discussed in Chapter 2). A number of submissions suggested the need for child protection departments in some jurisdictions to play a greater role in assisting families to make the transition to the family law system in this circumstance. For example, some stakeholders proposed having child protection departments adopt a practice of appearing at the first court date to support the parent’s application in such cases. Alternatively, several submissions suggested it would be helpful for families if the child protection department could provide the parent or the family court with a supporting letter or other documentation outlining their protective concerns. Council’s consultations and Working Group meetings with child protection system professionals indicate that these practices already occur in some jurisdictions.

Victoria Legal Aid also proposed that where following a family court notification a child protection department has concerns but does not wish to institute proceedings in the children’s court, the department should appear in the family law matter and provide its views on the orders proposed by the parties. VLA submitted that this practice would avert the risk of subsequent protective action in the children's courts following the making of final orders by the family courts.
Another practice issue that was mentioned in many of the submissions concerned response times in relation to s 69ZW orders from the family courts and the workload associated with responding to these orders for child protection departments. A section 69ZW order requires the relevant child protection department to provide the court with documents or information requested in the order (see 1.3 above). In the case of child protection departments, this normally refers to the department’s file or to particular documents in the file. The submissions received by Council indicate that the approach to responding to s 69ZW orders varies from state to state. Council notes in this regard the ‘Person History’ approach currently being piloted in the Federal Circuit Court by the NSW Department of Family and Community Services.

This issue will be the subject of further examination during the second stage of Council’s work on this reference.

6.3 Harmonisation and cross-fertilisation initiatives

Finally, many submissions pointed to the potential benefits for families of creating consistent practices and terminology across the child protection and family law jurisdictions.

For example, there was broad agreement among many stakeholders regarding the utility of eliminating differences in terminology across the various systems, particularly where the same concepts are defined or interpreted differently or different language is used to describe them. One example of this concerns the different terms for family violence protection orders in each state (variously known as Family Violence Intervention Orders, Apprehended Violence Orders, Violence Restraining Orders etc). One submission also urged the adoption by each court of standardised terms for describing body parts in cases involving child sexual abuse,617 while others urged the use of consistent methods of referencing cases and identifying parties across courts.618

Some submissions argued that the legislative threshold for child protection intervention should also be standardised across Australia,619 or suggested the need for uniform national child protection legislation,620 while others wanted to see work commenced to harmonise the models of children’s representation across the family law and child protection jurisdictions. In addition, a number of stakeholders submitted that when cases move from one jurisdiction to another, children should be able to retain the same lawyer wherever possible.621

It is important to note that many stakeholders cautioned that any work on collaboration and integration of the family law and child protection jurisdictions be accompanied by efforts to improve services and practices within each system. As described in Chapter 2, a number of concerns were expressed about the quality of services for Aboriginal and Torres Strait Islander families in both the child protection and family law jurisdictions,622 while many
submissions called for systemic improvements in responding to family violence\textsuperscript{623} and child sexual abuse investigations\textsuperscript{624}.

In this context, some stakeholders pointed to effective initiatives to address these issues in one jurisdiction that might usefully be adopted in another. Examples included potential benefits for the family courts of adopting the kinds of therapeutic justice processes used in some state and territory courts of summary jurisdiction\textsuperscript{625}, a broader use of Aboriginal and Torres Strait Islander conferencing processes, hearing days and court liaison workers, along the lines used in the Neighbourhood Justice Centre in Melbourne, and the creation of a Sexual Abuse List and a Family Drug Treatment Court with specially trained judicial officers, such as exist in the Children's Court of Victoria\textsuperscript{626}. 
CHAPTER 7: COUNCIL’S VIEWS AND RECOMMENDATIONS

As acknowledged by Council’s terms of reference, the need to ensure children and their carers are protected from harm extends beyond the state and territory child protection courts and family violence systems. Council’s examination of its reference to date confirms that this issue is also a significant feature of the modern family law system, with many families affected by multiple risk issues presenting at the family courts and relying on the assistance of family relationship centres and family lawyers. The issue is therefore a national one.

Recent developments in Australia, including the Special Taskforce on Domestic and Family Violence in Queensland, the Royal Commission into Family Violence in Victoria, and the Advisory Panel to the Council of Australian Governments (COAG) on domestic and family violence, show a growing community awareness of the negative impacts on children of being subjected to or exposed to family violence and other risk concerns within families. As a signatory to the United Nations Convention on the Rights of the Child, Australia has an obligation to ensure its legal systems meet their responsibilities to protect children from harm and to provide the necessary services to support children’s healthy development. In Council’s view it is essential that the criminal law, child protection and family law systems, along with relevant federal, state and territory agencies, are encouraged and supported to work collaboratively to achieve safe outcomes for children.

Council’s advice in this report is aimed at offering some workable preliminary solutions to the problems faced by families with multiple legal needs outlined in Chapter 2, and to enhance the capacity of the family law system and state and territory jurisdictions that deal with child protection and family violence to deliver integrated services to client families.

In keeping with the interim nature of this advice, these recommendations represent the first step in a larger program of reform to address the wider systemic issues. In particular, Council’s recommendations are designed to build on the stated priorities of the National Framework for Protecting Australia’s Children 2009-2020 and the National Plan to Reduce Violence against Women and their Children 2010-2022.

7.1 The need for reform

Council’s review of the research data and submissions it received point to two aspects of the current legal system that impede the protection of children:
(1) the increasingly public law nature of the parenting order work of the family courts, which were designed to deal with private law matters; and
(2) the separation of courts and systems dealing with parenting orders, child protection and family violence matters.
The shifting boundary between public and private family law

Recent research conducted by the Australian Institute of Family Studies (AIFS) shows that while there has been a reduction in court filings in the family courts since 2006, the proportion of contested parenting matters involving families with complex needs has increased over this period. This research shows that family law judicial officers regularly adjudicate parenting matters with multiple risk factors, involving a combination of family violence, child (sexual) abuse, drug and alcohol dependency and/or serious mental illness. Council notes in particular the 2014 survey of family reports described in Chapter 1, which revealed that 31% of the surveyed cases involved three of these risk factors, while 26% involved four risk factors. Family violence was present in 81% of the surveyed cases. The recent AIFS research supports this profile.

These data challenge the foundational assumption of a clear distinction between the work of the family courts and child protection systems. However, the family law system has no independent investigative body akin to a child protection department to provide the courts with a forensic assessment of child risk issues, and the family courts have no capacity to compel a child protection department to intervene in a family law case or to investigate the court’s concerns. These limitations mean that the risk of harm to children in family law cases is being managed by judicial officers within a framework designed for ‘private’ disputes about how much time a child should spend with each parent, rather than a ‘trauma informed’ child protection or family violence framework. Although the family courts are not strictly bound by the proposals of the parties, there is rarely an option available to a judicial officer beyond making a parenting order in favour of the ‘least detrimental’ of the proposals presented to the court.

These features of the family law system raise questions about the capacity of the family courts, which were designed to deal with private disputes, to assess and manage risk to children in families with complex needs. They also raise questions about the appropriate policy ‘lens’ for approaching family law matters that involve child protection concerns. Council’s consultations suggest there is widespread stakeholder concern about these issues and their implications for the safety of children in family law disputes.

Separation of systems and services

The second aspect of the Australian legal system that impedes the protection of children is the fact that parenting disputes, child protection issues and family violence protection orders are dealt with by three separate jurisdictions. The analysis of legal aid files by Victoria Legal Aid (described in Chapter 2) suggests that thousands of families across Australia each year are involved in proceedings in more than one of these jurisdictions, and that compound proceedings are more likely to arise where a family has complex risk and support issues. However, the submissions to Council’s reference indicate that families with multiple legal needs are presently faced with a justice system that is not easy to navigate.
More particularly, the submissions received by Council suggest that in the experience of client families, the current system can be:

- Confusing and opaque, requiring families to negotiate different legal frameworks, different terminology, different procedural rules and different decision-makers in the different jurisdictions. Council notes that families who are most likely to be involved with more than one of the jurisdictions canvassed in this report are those with support needs associated with family violence, and that clients in this circumstance are likely to be engaging with these systems at a time of high risk and vulnerability.

- Repetitive, with parents and children having to repeat their story, engage new legal representatives and re-litigate risks issues in different forums.

- Time-consuming and slow to respond. As described in Chapter 2, the submissions and consultations suggest that matters that traverse the family law and child protection systems can involve multiple adjournments and ‘limbo periods’ while waiting for child protection investigations to be conducted, for protective carers to obtain parenting orders from the family courts, or for legal practitioners to obtain permission to produce reports prepared for proceedings in one jurisdiction in another court.

- Unco-ordinated, with no overall case management to ensure that relevant information from one jurisdiction is available to another or to assist families with the transition from one system to another. The submissions received by Council suggest that this problem is compounded by a lack of cross-professional training for legal practitioners, most of whom specialise in a particular jurisdiction, limiting their ability to assist clients to understand the complexities of the different jurisdictions and to ‘interpret’ reports that were prepared for proceedings in other courts.

- Inflexible, with little capacity for one court to use the jurisdiction of the other courts to address the family’s multiple legal needs.

- System-driven rather than client-needs driven, with responses to child and family safety shaped by the specific (historical) policy underpinnings, resource infrastructure and practice culture of the particular jurisdiction.

Previous research has also shown that many families whose first point of contact with the legal system is a state or territory court fail to access the family courts to obtain the orders they need. Council’s consultations indicate the existence of several barriers inhibiting the ability of families in this circumstance to engage with the family law system, including concerns about the relative cost, pace and formality of family law proceedings by comparison with those of state courts. The impact of these barriers can be particularly acute for Aboriginal and Torres Strait Islander families and grandparent carers.
Council also notes the importance for parents who have been advised by a child protection department to seek protective parenting orders of having evidence from the department to support their application in the family courts.

Together these factors suggest the need for a more co-ordinated approach to the provision of legal services in meeting the national obligation to protect children from harm. Although these jurisdictions have operated in a parallel way for a long time, there is in Council’s view a pressing need for greater collaboration to ensure that children at risk do not ‘fall through the gap’ between the private family law system and the protections offered by state and territory magistrates courts and child protection systems.

7.2 Guiding principles

Council has developed a set of principles to guide its consideration of this reference that reflect these concerns and are consistent with the priorities of the National Framework for Protecting Australia’s Children and the National Plan to Reduce Violence against Women and their Children.

The National Framework for Protecting Australia’s Children, endorsed by COAG in April 2009, outlined six outcome objectives for children, namely that:

1. Children live in safe and supportive families and communities
2. Children and families access adequate support to promote safety and intervene early
3. Risk factors for child abuse and neglect are addressed
4. Children who have been abused or neglected receive the support and care they need for their safety and wellbeing
5. Indigenous children are supported and safe in their families and communities
6. Child sexual abuse and exploitation is prevented and survivors receive adequate support.

The Second Action Plan of the National Plan to Reduce Violence against Women and their Children has as a priority area ‘supporting innovative services and integrated systems’ (National Priority 3). Council also notes the Interim Report of the Senate Finance and Public Administration Committee, Domestic Violence in Australia (March 2015), and its concern that victims of family violence are not left to navigate the legal system unassisted. As the Prime Minister, the Hon Tony Abbott M.P., and Senator the Hon Michaelia Cash have made clear:

We must ensure systems across Australia work effectively to provide better, more integrated support to women and we must simplify the complex maze of services victims of domestic and family violence are expected to navigate.527
In line with these priorities, the issues examined by Council during its work on this reference suggest the need to redevelop the justice system in a way that maximises its effectiveness for families with multiple and complex needs. In Council’s view, this redevelopment must:

- Ensure a client-centred design, with services that are comprehensible and accessible to families with multiple and complex needs;
- Provide timely responses to child safety concerns, including early assessment of risk and exposure to trauma;
- Support the use of flexible problem-solving approaches to clients’ needs, including the exercise by judicial officers of multiple jurisdictions where appropriate;
- Incorporate tailored services for specific problems and demographic groups, including dedicated case-managed responses to family violence and child abuse and specialised services for Aboriginal and Torres Strait Islander families;
- Employ a teamed approach, including integrated legal and support services; and
- Facilitate information sharing and collaboration across jurisdictions.

It is important that any re-design of the current justice system builds on existing initiatives that have proved effective in enhancing collaboration and integrated service delivery within and across the family law, child protection and family violence jurisdictions. During Council’s work on this reference we have become aware of a number of such initiatives. These include:

- The Magistrates’ Court of Victoria Family Violence Courts Division. As described in Chapter 5, this specialist family violence court, currently located in two locations, has jurisdiction to determine interim parenting matters alongside family violence protection matters and criminal matters related to family violence. These courts are supported by specialist magistrates, prosecutors and legal services and provide support workers for both victims and perpetrators of family violence.
- The enactment of Chapter 16A of the Children and Young Persons (Care and Protection) Act 1998 (NSW), which enables exchange of reports between the NSW Department of Family and Community Services and the federal family courts.
- The development of an Integrated Services Reference Committee in Western Australia, comprising representatives from the Family Court of Western Australia, the Children's Court of Western Australia, the Department for Child Protection and Family Support, the Commonwealth and State Attorney-General's Departments and Legal Aid WA, to explore ways of developing an integrated approach to the management of cases involving families with multiple and complex needs.

Council appreciates that the redevelopment of the justice system’s services for vulnerable families is a long-term project. However, in Council’s view there is scope for some immediate responses to the issues facing families with complex needs while this work is considered. The following sections outline these responses and Council’s recommendations.
7.3 Enhancing the capacity for courts to exercise multiple jurisdictions

Term of reference 2 asked Council to consider:

The possible benefits of enabling the family courts to exercise the powers of the relevant state and territory courts including children’s courts, and vice versa, and any changes that would be required to implement this approach, including jurisdictional and legislative changes.

This section sets out Council’s views and recommendations on this question in relation to:

- The exercise of Family Law Act powers by state and territory children's courts,
- The exercise of Family Law Act powers by state and territory magistrates courts, and
- The exercise of children's court powers by the federal family courts.

Children’s courts and family law orders

As outlined in Chapter 3 of this report, there are a number of potential benefits of enabling state and territory children's courts to exercise jurisdiction under the Family Law Act to make parenting orders in certain circumstances. In particular, there are significant potential benefits for children where the matter is already before the children's court and a parent or kinship carer needs orders for (sole) parental responsibility to support their care of the children. Enabling children's court judicial officers to exercise Family Law Act powers in this situation would mean that the parent or carer could obtain parenting orders in the court with which they are familiar. As such, it would also address the issue of the barriers to access to the family courts described above, such as concerns about the cost, pace and formality of proceedings in the family courts and the need to prosecute risk concerns in a family law context.

Section 69J of the Family Law Act vests state and territory ‘courts of summary jurisdiction’ with federal jurisdiction to make parenting orders under the Family Law Act in certain circumstances. This includes the power to make consent parenting orders. However, section 69N of the Family Law Act provides that where the orders sought by a parent are contested, the court of summary jurisdiction must transfer the proceedings to a family court unless the parties consent to the matter being heard (on an interim basis) in the state court. As outlined in Chapter 3, it is not clear whether, and if so to what extent, this jurisdiction extends to state and territory children's courts. Council notes in particular that not all children's courts in Australia are courts of summary jurisdiction, and that the heads of jurisdiction in some children's courts are judicial officers from a superior court.

Council’s view is that the reach of s 69J should be clarified by amendment to clearly permit children's courts, however constituted, to exercise jurisdiction under Part VII of the Family Law Act to make parenting orders in the same circumstances that currently apply to state and territory courts of summary jurisdiction. Such amendment will need to be accompanied by amendment to s 69N of the Family Law Act. In Council’s view, this amendment will also
require a consideration of the appropriate process of appeal from the family law decisions of state and territory children's courts.

Council notes there is substantial stakeholder support for enabling children's courts to make consent parenting orders. However, Council is aware that some submissions have raised concerns about the capacity of children's courts to hear contested interim parenting matters given their current workload and resource constraints and the complexity of the decision-making framework governing parenting orders in Part VII of the *Family Law Act*. Council also notes that the writing of detailed judgments is not part of the usual practice of children's courts, and the concerns of some stakeholders that the hearing of interim parenting matters might operate to divert the children's courts from their primary work.

Council believes there are circumstances where an interim decision by a children's court would be beneficial for families who need parenting orders when a child protection matter has been finalised and the children's court (and the child protection department) is familiar with the family’s circumstances. In Council’s view, children's courts should be supported to exercise jurisdiction under the *Family Law Act* in such circumstances where appropriate.

**Magistrates courts and specialist family violence courts**

As courts of summary jurisdiction, state and territory magistrates courts are already vested with jurisdiction to make parenting and other orders under Part VII of the *Family Law Act*. At present, however, this jurisdiction is under-utilised.

Council notes the desire of magistrates courts in some states, particularly in Victoria, to increase their family law workload in order to meet client demand for parenting orders. There are significant potential benefits for families in magistrates courts adopting this approach. This is particularly so given the evidence (discussed in Chapter 2) that state and territory magistrates courts are often the first point of contact with the legal system for families with complex needs. As noted above, such a course would remove the need for families in this circumstance to move to the family law system to obtain parenting orders.

Council also notes the existence and proposed expansion of specialist family violence courts in several states. As described in Chapter 5, these courts provide a ‘one judge, one family’ model, allowing a single magistrate to exercise multiple jurisdictions where appropriate to address the range of legal needs of clients affected by family violence. This includes powers to determine family violence protection matters, criminal matters related to family violence and family law matters to the extent that family law jurisdiction is conferred on state and territory courts under Part VII of the *Family Law Act*.

Previous inquiries have detailed a number of benefits associated with these courts. These include improved information sharing, safety levels and access to support services for victims of family violence. Council’s consultations also suggest the potential for this model to support a flexible problem-solving approach to addressing the client’s needs and to overcome
the problems discussed in Chapter 2 regarding duplication of resources and assessments. Council notes that these benefits reflect the principles it has developed to guide this reference and the priorities of the National Framework for Protecting Australia’s Children and the National Plan to Reduce Violence against Women and their Children. Council supports the proposed expansion of specialist family violence courts in Victoria and Queensland.

The federal family courts and children’s court jurisdiction

There are several potential benefits of enabling the family courts to exercise the powers of state and territory children's courts where a child protection department decides to bring protective proceedings after a family law matter has commenced. These include the continuity of location and having a single judicial officer with knowledge of the family’s circumstances determining both issues.

However, there are a number of significant challenges to enabling the federal family courts to exercise the powers of state and territory children's courts. These include the constitutional barriers outlined in Chapter 4. With the exception of the Family Court of Western Australia, which is a state court, the process of enabling the family courts to exercise the jurisdiction of state and territory courts would require a referral of relevant powers from these jurisdictions to the Commonwealth. Council also notes that the exercise of children's court powers by a family court would be dependent on an application being made by a child protection department, and that very few family law notifications become the subject of protective applications by a child protection department.

Council has considered the proposal by several stakeholders that the family courts be provided with limited jurisdiction to make orders vesting parental responsibility in the Secretary or Director of a child protection department regardless of the Department’s consent. Council has also had regard to the view of some esteemed legal figures that the Family Court of Australia has accrued jurisdiction to make such orders.

In Council’s view, addressing the protective needs of children in families affected by multiple and complex concerns will require each of the relevant systems and services to work together in a collaborative way. Council notes that this is the foundation of the successful integration work that has been progressed in Western Australia. In keeping with the principles guiding our consideration of these terms of reference, Council believes that a coercive approach is not conducive to achieving this goal. As such, Council does not see a need for the Attorney-General to seek a referral of powers from the states and territories in relation to this issue at this time.
Supporting the family law work of state and territory courts

In recognition of the practical barriers affecting the capacity of children's courts and magistrates courts to undertake family law work, Council believes it will be critical that any legislative amendments are supported by professional development for relevant judicial officers and practitioners, including court staff and child protection department personnel. Council also notes that these courts will need to be properly resourced to undertake this work.

In addition, Council believes that simplification of the Family Law Act’s decision-making framework in Part VII will be necessary to support the workability of this proposal. Concern has been expressed in recent years about the complex and time consuming nature of the decision making framework for parenting order matters established by Part VII. This is an issue that currently impacts on the work of the family courts and could impose a significant burden on busy magistrates and children’s court judicial officers.

Provision for short-form judgments in interim matters would also simplify the process of providing judgments in family law matters for judicial officers in magistrates courts, children’s courts, as well as the family courts. As described in Chapter 1, Council understands that it is not the practice of state and territory children’s courts to provide written judgments in all matters. Where a written judgment is supplied, it is usually less detailed than are judgments of the family courts in interim matters. Allowing children’s courts and magistrates courts to provide family law interim decisions in short form will support an efficient use of a judicial officer’s time and help to ensure that family law work does not lead to hearing delays in these courts.

In addition, Council believes that state and territory magistrates courts should be supported to make interim orders suspending or varying family law parenting orders that have effect until a parent is able to bring proceedings in the family courts. Section 68T of the Family Law Act 1975 (Cth) currently provides that interim orders of this kind made by a court of summary jurisdiction are effective for up to 21 days. In 2004 Council considered the operation of section 68T, but at that stage did not recommend changing the period of operation from 21 days. Council is aware from its recent consultations that not all parties who have proceedings in children's courts and/or state courts hearing family violence matters manage to institute proceedings or have them heard in the federal family courts in a timely way. In light of this evidence, Council now takes the view that interim orders should continue until the matter is heard in a family court so as to provide certainty for victims of family violence.

Council’s recommendations in relation to these issues are as follows:

**Recommendation 1**

(i) That section 69J and section 69N of the Family Law Act be amended to remove any doubt that children's courts, no matter how constituted, are able to make family law
orders under Part VII of the *Family Law Act* in the same circumstances that are currently applicable to courts of summary jurisdiction.

(ii) That the government consider the appropriate process of appeal from family law decisions made by state and territory courts.

**Recommendation 2**

That Part VII of the *Family Law Act* be amended to provide a simplified decision-making framework for interim parenting matters.

**Recommendation 3**

That the *Family Law Act* be amended to enable judicial officers to deliver ‘short form’ judgments in interim proceedings.

**Recommendation 4**

That the government implement the relevant part of Recommendation 16–5 of the Australian and NSW Law Reform Commissions’ 2010 report, namely that:

Section 68T of the *Family Law Act 1975* (Cth) should be amended to provide that, where a state or territory court, in proceedings to make an interim protection order under state or territory family violence legislation, revives, varies or suspends a parenting order under s 68R [...] that parenting order has effect until:

(a) the date specified in the order;
(b) the interim protection order expires; or
(c) further order of the court.

**7.4 Enhancing inter-jurisdictional collaboration**

Terms of reference 1 asked Council to consider:

The possibilities for transferring proceedings between the family law and state and territory courts exercising care and protection jurisdiction within current jurisdictional frameworks, including any legal or practical obstacles to greater inter-jurisdictional co-operation.

Council’s examination of this question indicates that there are very limited possibilities for inter-court transfers owing to the operation of the *Jurisdiction of Courts Cross-Vesting Legislation* and the ruling by the High Court of Australia in *Re Wakim* (see Chapter 2.3).

Council’s work also revealed a number of legal and practical obstacles to inter-jurisdictional collaboration. In summary, these include:
• The scope for courts to make inconsistent orders because of a lack of awareness of previous orders made in another jurisdiction.

• The use of different decision-making frameworks, terminology and approaches to determining arrangements for the care and protection of children in each jurisdiction, and the tendency for legal professionals to specialise in the practice of one jurisdiction.

• The use of different models of child representation in the family law and child protection jurisdictions, and the tendency for lawyers who act for children to specialise in the practice of one jurisdiction.

• Provisions prohibiting the publication of proceedings in state and territory child protection legislation, which can create obstacles to producing reports that were prepared for children's courts hearings in family law proceedings;

• The use of different data collection methods and approaches to case identification in each system, which can make it difficult to identify whether a family has been involved in more than one jurisdiction.

• Particular obstacles affecting access to the family courts for Aboriginal and Torres Strait Islander families who would benefit from family law orders.

Council’s view is that these obstacles should be addressed as a matter of priority. In particular, Council is of the view that a more coordinated national approach to the protection of children and protection from family violence is essential and recommends the Attorney-General engage with his State and Territory counterparts as well as with Ministers with responsibility for child protection to find ways in which this could be achieved. This includes consideration of:

• The development of a national database of relevant court orders that can be accessed by each court. This would complement COAG’s work on a National Domestic Violence Order Scheme and the National Domestic Violence Order Information Sharing System, which Council supports.

• The development of local stakeholder groups in each state and territory along the lines of Western Australia’s Integrated Services Reference Committee, to explore ways of developing a collaborative approach to the management of cases involving families with multiple and complex needs;

• Encouraging the development of dual competencies among lawyers who represent children.

• Legislative amendments to state and territory legislation to remove barriers that inhibit the production of reports prepared for children's courts proceedings in family law proceedings.

• The development of protocols for the exchange of relevant information between the family courts and child protection departments, the police and mental health services.

• The adoption of consistent terminology in orders relating to children across the child protection, family law and family violence systems.
Council also believes the federal government should provide funding for the employment of Aboriginal and Torres Strait Islander family liaison officers within Indigenous-specific legal and support organisations, in order to enhance access to the family courts for Aboriginal and Torres Strait Islander families who need family law orders. This matter was the subject of recommendations by Council in its 2012 report, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*. At that time, Council noted the importance of locating these support positions within Indigenous-specific organisations so as to enhance the opportunities for retaining Aboriginal and Torres Strait Islander staff within the family law system and in recognition that people working in these organisations are likely to have connections with relevant local communities.

Council’s recommendations in relation to these issues are as follows:

**Recommendation 5**

The Attorney-General raise the following matters at the COAG level:

a) The development of a national database of court orders to include orders from the Family Court of Australia, the Family Court of Western Australia, the Federal Circuit Court of Australia, state and territory children's courts, state and territory magistrates courts and state and territory mental health tribunals, so that each of these jurisdictions has access to the other’s orders.

b) The convening of regular meetings of relevant stakeholder organisations, including representatives from the children's courts, child protection departments, magistrates courts, family courts, legal aid commissions and Attorney-General's Departments, to explore ways of developing an integrated approach to the management of cases involving families with multiple and complex needs.

c) Amending the prohibition of publication provisions in state and territory child protection legislation to make it clear that these provisions do not prevent the production of reports prepared for children's court proceedings in family law proceedings.

d) The entry into Memoranda of Understanding by state and territory child protection agencies and the federal family courts to address the recommendations of Professor Chisholm’s reports.

e) The co-location of state and territory child protection department practitioners in federal family court registries.

f) The development of dual competencies for Independent Children's Lawyers to achieve continuity of representation for children where appropriate.
Recommendation 6

(i) The Family Law Council has previously made recommendations in relation to a number of issues that are covered by the present terms of reference in its 2009 report, *Improving Responses to Family Violence in the Family Law System*. These include:

- Recommendation 7.3.1:
  The adoption of consistent terminology in orders relating to children across relevant State and Commonwealth legislation so that orders are more readily understood by parents and carers of children and those working in family law and child protection, including law enforcement.

- Recommendation 9.3:
  The Attorney-General facilitate the development of protocols for the collaborative exchange of information between the family courts and child protection departments, police, and mental health services.

Council recommends that these matters be placed on the COAG agenda.

(ii) The Family Law Council has previously made recommendations in relation to the issue of Aboriginal and Torres Strait Islander family liaison officers in its 2012 report, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*. These include:

- Recommendation 6:
  The Australian Government provides funding for further positions for Indigenous Family Consultants and Indigenous Family Liaison Officers (identified positions) to assist the family law courts to improve outcomes for Aboriginal and Torres Strait Islander families.

Council recommends the government implement this recommendation.

7.5 Addressing the changing nature of the family law system

The recommendations provided above arise out of Council’s work on terms of reference 1 and 2. In particular, the issues canvassed in this report focus on the problems for families associated with the separation of courts and jurisdictions governing family law, family violence and child protection. As noted, a second problem affecting client families with complex needs is the increasingly public law nature of the parenting disputes in the family law system, and the absence of any ‘child protection’ infrastructure to support the work of the family courts and family dispute resolution services in these cases. These issues will be central to Council’s consideration of terms of reference 3 and 4 and will be addressed in Council’s final report.
Endnotes


2. Ibid, 13.


5. For eg, the Magistrates’ Court of Victoria finalised 65,737 applications for family violence protection orders in 2013-14, an increase of 47% since 2008-09. The Magistrates’ Court of Victoria also noted in its submission that applications for family violence intervention orders have increased by 100% over a ten year period: Magistrates’ Court of Victoria, Submission, 29 May 2015, 9.

6. Courts of summary jurisdiction have power to make parenting orders under Part VII of the Family Law Act with the consent of the parties. Where the orders sought by the applicant are contested, a court of summary jurisdiction must transfer the proceedings to a family court unless the parties consent to the matter being heard in the state court: Family Law Act 1975 (Cth), ss 69J and 69N.


11. Family Law Act 1975 (Cth), s 60I(1).


14. In a sample of parents who used family law system services prior to 2006, family dispute resolution was reported by 6% compared with 7.3% in 2008: R Kaspiew, M Gray, R Weston, L Moloney, K Hand, L Qu and the family law evaluation team, Evaluation of the 2006 family law reforms (Australian Institute of Family Studies, Melbourne, 2009), Table 4.1. This increased to 9.5% in 2011: J De Maio, R Kaspiew, D Smart, J Dunstan and S Moore, Survey of Recently Separated Parents: A Study of Parents Who Separated Prior to the Implementation of the Family Law Amendment (Family Violence and Other Measures) Act 2011 (Australian Institute of Family Studies, Melbourne: 2013), Table 4.8.

15. Family Law Act 1975 (Cth), s 60I(9).

16. See eg, L Qu, R Weston, L Moloney, R Kaspiew and J Dunstan, Post-Separation parenting, property and relationship dynamics after five years (Australian Institute of Family Studies, Melbourne, 2014), 43, 44 and 59-65; De Maio et al 2013, above n 14, 51-55. The report by Qu et al details the findings of Wave 3 of the Longitudinal Study of Separated Families. Wave 1 findings are reported in Kaspiew et al 2009 above n 9. Wave two findings are reported in L Qu and R Weston, Parenting dynamics after separation: A follow-up study of parents who separated after the 2006 family law reforms (Australian Institute of Family Studies, Melbourne 2010).

17. De Maio et al 2013, above n 14, 51. For parents who did not report a history of family violence, resolution of parenting arrangements through discussions with the other parent was substantially more common than for parents who reported a history of family violence, with 80% of the former group reporting this, compared with 65% of parents who reported emotional abuse and 52.7% who reported physical violence: Table 4.10.

18. The AIFS Allegations of Violence Study, based on a sample of 300 cases filed in the Melbourne and Dandenong Registries of the Family Court of Australia and the then Federal Magistrates Court, found that more than half the cases involved allegations of family and/or child abuse, most commonly classified by the research team as ‘severe’: L Moloney, B Smyth, R Weston, N Richardson, L Qu, and M Gray, Allegations of Family Violence and child abuse of family law children’s proceedings: A pre-reform exploratory study, Research Report No 15, (Australian Institute of Family Studies, Melbourne: 2007). The family law courts’ File Analysis conducted as part of the Evaluation of the 2006 family law reforms also demonstrated that allegations of family violence and child abuse were raised in more than half of the cases in a sample that involved matters determined by consent after proceedings were initiated and judicial determination across registries in Melbourne, Sydney and Brisbane in the Family Court of Australia and the then Federal Magistrates Court and the Family Court of Western Australia: Kaspiew et al 2009, above n 14, 310-314.
Family violence is a complex phenomenon. The discussion in this section is based on the measures used by the Australian Institute of Family Studies in the Longitudinal Study of Separated Families (LSSF Study). Wave 1 was reported in Kaspiew et al 2009, above n 14, and in the Survey of Recently Separated Parents 2012 (De Maio et al 2013, above n 14). Measures that were common to both studies were questions about physical harm and whether the former partners had: tried to prevent the participant from using the telephone or car, contacting family or friends, knowing about or having access to money; threatened to harm the participant, the child, themselves, other family or friends, pets, damaged or destroyed property, insulted the participant with intent to shame, belittle or humiliate. In addition, the SRSP included a further question on whether there had been attempts to force unwanted sexual activity, as well as a number of questions about frequency of the behaviours: De Maio et al 2013, above n 14, 23). In LSSF Wave 3, the family violence measures concerning attempts to prevent access to money, cars and family and friends etc were omitted but three others were asked: attempts to force unwanted sexual activity, monitoring whereabouts, and circulating defamatory comments with intent to shame, belittle and humiliate. It is important to recognise that the way these questions are asked has some limitations in supporting understanding of the significant issues of gender dynamics and family violence. One important dimension that cannot be understood on the basis of these data is the dynamics of defence and aggression.

Kaspiew et al 2009, above n 14, Table 2.6; De Maio et al 2013, above n 14, Table 2.4. De Maio et al 2013 applied a similar methodology to the earlier SRSP study, in which 64% of the sample reported pre-separation violence, but with a more detailed focus on family violence. Subtle differences in sample selection for the two studies resulted in slightly different sample profiles as far as parents who had never lived together were concerned. There were fewer of these in the SRSP 2012 sample and this may account for the subtle differences in the incidence of family violence reported: De Maio et al 2013, above n 14, 12.


Note that these dispute resolution time frames are consistent with the AIFS LSSF Wave 3 evidence of the extent to which family violence and safety concerns are sustained after separation: 5-6 years after separation, 43.2% of mothers and 37.9% of fathers in LSSF Wave 3 reported experiencing emotional abuse in the preceding twelve months: Qu et al 2014, above n 17, 22.

Qu et al 2014, above n 16, 62-63.


Children’s Protection Act 1999 (Qld) s 13E.

Care and Protection of Children Act 2007 (NT) s 26.


For example, in Queensland all notifications to the child protection department are recorded as an intake. Intakes are screened and if they reached the threshold of a reasonable belief that a child may be in need of protection they are then recorded as a ‘notification’. All notifications are investigated and the outcome recorded as either the child being not in need of protection or being in need of protection. See http://www.communities.qld.gov.au/resources/childsafety/about-us/performance/child-protection-system-framework.pdf.


Australian Institute of Health and Welfare 2014, above n 26, 43. From 2009 – 2013 the rate of Aboriginal or Torres Strait Islander children on orders has increased from 43.8 to 59.2, while the non-Indigenous rate has remained ‘relatively stable’ from 5.2 – 5.8 per 100,000 children.

41 See: In Victoria, the Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014 (Vic) will commence in March 2016; South Australia is currently conducting a Child Protection Systems Royal Commission.
42 See: Magistrates Court Act 1930 (ACT) chapter 4A (note that the court is called the Childrens Court); Children’s Court Act 1987 (NSW) s 4; Children’s Court Act 1992 (Qld) s 4; Children, Youth and Families Act 2005 (Vic) s 504; Children’s Court of Western Australia Act 1988 (WA) s 4 (where the formal title is the Children’s Court of Western Australia).
43 Youth Court Act 1993 (SA).
44 Care and Protection of Children 2007 (NT) s 88.
45 Magistrates Court (Children’s Division) Act 1998 (Tas).
48 See, for example: Care and Protection of Children Act 2007 (NT) s 10, s 90; Children, Youth and Families Act 2005 (Vic) s 10; Children and Community Services Act 2004 (WA) s 7; Children and Young People Act 2008 (ACT) s 8.
49 Children and Young Persons (Care and Protection) Act 1998 (NSW) s 9.
50 Child Protection Act 1999 (Qld) s 5A.
51 See, for example: Children and Young Persons (Care and Protection) Act 1998 (NSW) s 13; Care and Protection of Children Act 2007 (NT) s 12; Child Protection Act 1999 (Qld) s 5C s 83; Children’s Protection Act 1993 (SA) s 5 and 6; Children, Youth and Families Act 2005 (Vic) s 13; Community Services Act 2004 (WA) s 12.
52 See, for example: Children and Young Persons (Care and Protection) Act 1998 (NSW) s 9(2)(a) s 10; Children’s Protection Act 1993 (SA) s 4(4)(d); Children, Youth and Families Act 2005 (Vic) s 10(3)(d); Children and Community Services Act 2004 (WA) s 10; Child Protection Act 1999 (Qld) s 5E.
53 See for example: Care and Protection of Children Act 2007 (NT) s 8 (‘no other reasonable way to safeguard their wellbeing’); Children’s Protection Act 1993 (SA) s 4(4)(a) (‘the desirability of keeping the child within the child’s own family’); Children, Youth and Families Act 2005 (Vic) s 10(3)(a) (‘the need to give the widest possible protection and assistance to the parent and child as the fundamental group unit of society and to ensure that intervention into that relationship is limited to that necessary to secure the safety and wellbeing of the child’); Children and Young Persons (Care and Protection) Act 1998 (NSW) s 9(2)(c) (‘the course to be followed must be the least intrusive intervention in the life of the child or young person and his or her family that is consistent with the paramount concern to protect the child or young person from harm and promote the child’s or young person’s development’); Children and Community Services Act 2004 (WA) s 9(f).
54 Children’s Protection Act 1993 (SA) s 4(4)(c). See also: Children, Youth and Families Act 2005 (Vic) s 10(3)(I); Children and Young Persons (Care and Protection) Act 1998 (NSW) s 9(2)(b); Children and Young People Act 2008 (ACT) s 9(1)(a); Children and Community Services Act 2004 (WA) s 8(1)(j); Child Protection Act 1999 (Qld) s 5B(m).
55 Children, Youth and Families 2005 (Vic) s 10(3)(q); Child Protection Act 1999 (Qld) s 5B(l).
56 See for example: Children and Young People Act 2008 (ACT) s 349(1)(c); Children and Community Services Act 2004 (WA) s 9(g); Child Protection Act 1999 (Qld) s 5B(l).
57 See for example: Children and Young Persons (Care and Protection) Act 1998 (NSW) s 9(2)(e) s 10A; Children and Young People Act 2008 (ACT) s 349(1)(h); Child Protection Act 1999 (Qld) s 5B(g).
For example Victoria. The Cummins Inquiry recommended that the Victorian Children's Court become a court of record with transcripts available to the public and significant judgments reported in de-identified
form: Cummins et al 2012, above n 41, 407. The Victorian Children’s Court does now provide some de-
identified judgments on its website.

85 See for example, the website of the New South Wales Children’s Court:

86 C Tilbury, ‘Child protection proceedings in the Children’s Court in Queensland: Therapeutic

87 Australian Institute of Health and Welfare 2014, above n 26; Child Protection Australia, above n 57, 34-
35.

88 Children and Young Persons (Care and Protection) Act 1998 (NSW) ss 46, 69, 76, 79, 79A.

89 Children Youth and Families Act 2005 (Vic) Division 4.9 and 4.10.

90 Children and Community Services Act 2004 (WA) ss 47, 54, 57, 60, 133.

91 Children Youth and Families Act 2005 (Vic) s 246.

92 Children and Young Persons (Care and Protection) Act 1998 (NSW) s 91A.

93 Children and Young Persons (Care and Protection) Act 1998 (NSW) s 86.

94 Children’s Court of New South Wales (2011) Contact Guidelines.

95 Child Protection Act 1999 (Qld) s 51B.

96 Note however that one study suggests that, in practice, case plans are rarely subject to judicial scrutiny:
Walsh and Douglas 2012, above n 77, 188.

97 Children and Community Services Act 2004 (WA) ss 38, 89, 93.

98 Family Law Act 1975 (Cth) ss 70C-70E.

99 Family Law Act 1975 (Cth) s 67Q.

100 T Hands and V Williams, Report on the Intersection of the Family Law and Child Protection Jurisdictions
in Western Australia (2012), 104.

101 Higgins and Kaspiw, above n 10, 4. See also: L Bromfield, F Arney and D Higgins, ‘Contemporary
issues in child protection intake, referral and family support’ in Alan Hayes and Daryl Higgins (eds)
Families, policy and the law: Selected essays on contemporary issues for Australia (2014), 121; Australian
and New South Wales Law Reform Commissions 2010, above n 10, 914; Parliament of Tasmania (2011)
Select Committee on Child Protection Final Report 161; D West and D Heath ‘Youth Justice, Child Protection
and the Role of the Youth Courts in the Northern Territory’ in Sheehan and Borowski, above n 47, 57.

102 Borowski 2013, above 46, 176.

103 Ibid, 170.


105 For example Section 48 Children’s Protection Act (SA)

106 Child Protection Act 1999 Queensland

107 Section 524(4). Children, Youth and Families Act 2005 Vic


109 Ibid.


111 Family Law Act 1975 (Cth), s 64B(2).

112 Family Law Act 1975 (Cth), s 65C.

113 See for example Meighan & Gains [2012] FamCA 27; Marcus & Jeffries [2012] FMCAfam 273; Beck &

114 Family Law Act 1975 (Cth), s 60CA.

115 Revised Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill
2005 (Cth), 1.

116 Family Law Act 1975 (Cth), s 60CC(2)(a).

117 Family Law Act 1975 (Cth), s 60CC(2)(b).

118 Family Law Act 1975 (Cth), s 60CC(2A).

119 Family Law Act 1975 (Cth), s 61DA(2).

120 Family Law Act 1975 (Cth), s 61DA(4).

121 Family Law Act 1975 (Cth), s 65DAA(1).

122 Family Law Act 1975 (Cth), s 65DAA(2).

123 Family Law Act 1975 (Cth), s 65DAA(6).

124 Goode & Goode [2006] FamCA 1346, at paras 71-72. This ruling overturned the previous case law
approach in relation to interim hearings, established in the case of Cowling [1998] FamCA 19, which
emphasised the importance of ensuring stability of arrangements for the child pending trial unless there
were protective concerns.
Goode & Goode [2006] FamCA 1346, para 82.

Family Law Act 1975 (Cth), s 60CC(5).

Family Law Act 1975 (Cth), s 60CA.


Family Matters dominate the filings in the Family Court.

Section 41 of the Family Law Act provides for the States to establish their own family court, which is to be declared by Proclamation to be covered by that section. Western Australia is the only jurisdiction to have done this.

Kaspiew et al 2015, above n 13, 22.

Family Law Act 1975 (Cth), ss 60CA.

133 Family Law Act 1975 (Cth), s 69N(3).

Family Law (Family Dispute Resolution Practitioners) Regulations 2008, Reg. 25.

Family Law (Family Dispute Resolution Practitioners) Regulations 2008, Reg 25(2)(a) and (b).

Family Law (Family Dispute Resolution Practitioners) Regulations 2008, Reg 25(4).


Family Law Act 1975 (Cth) s 65F(2) & (3)

Family Law Act 1975 (Cth), ss 63C(1), (2)

Rule 65 Family Court of Western Australia Case Management Guidelines

Family Law Act 1975 (Cth), s 69ZN.

Family Law Act 1975 (Cth), ss 69ZT and 69ZV.


See for the functions of a Family Consultant, Family Law Act 1975 (Cth), s 11A.

Bryant and Faulks, above n 145, 100.

Family Law Act 1975 (Cth), s 62G.

Family Law Act 1975 (Cth), s 11B.

Family Law Regulations 1984 (Cth), Reg. 7.

Family Law Act 1975 (Cth), s 60CC(3)(a).


Family Law Act 1975 (Cth), s 60CE.

Family Law Act 1975 (Cth), s 62G(3B).

Family Law Act 1975 (Cth), s 68LA(4).


Family Law Act 1975 (Cth), s 68LA(2).

Family Law Act 1975 (Cth), ss 68LA(5) and (6).


The then Family Law Act 1975 (Cth), ss 68F(2)(f)(i) and (j).


Family Law Act 1975 (Cth), s 4AB.

Family Law Act 1975 (Cth), s 4AB(3).

Family Law Act 1975 (Cth), s 4AB(4).

171 *Family Law Act 1975* (Cth), s 69ZQ(1).

172 *Family Law Act 1975* (Cth), s 60CC(2A).


174 *Family Law Act 1975* (Cth), ss 67Z and 67ZBA

175 *Family Law Act 1975* (Cth), ss 67ZA.

176 In the Family Court of Australia, the proportion of matters involving applications for final orders in which Notices of Risk were filed rose from 10.2% (n=334) in 2011-12 to 14.4% (n=403) in 2012-13, steadying at 14.6% (n=426) in 2013-14: *Family Court of Australia, Annual Report 2012-13*, 73. In the Federal Circuit Court, the number of matters in which a Notice of Risk form was filed increased from 1573 in 2011-12 to 4204 in 2012-13 and 5811 2013-14: *Federal Circuit Court of Australia, Annual Report 2012-13*, Figure 3.7. In part, the latter figures reflect the operation of a pilot program in the South Australian Registry of the Federal Circuit Court, which required a Notice of Risk to be filed in all matters not just those where risk was alleged. This program has since been rolled out to all Federal Circuit Court registries. In the Family Court of Western Australia, the number of Form 4 notices filed in 2011-12 was about 400, increasing to more than 500 in 2012-13 and more than 600 in 2013-12: *Family Court of Western Australia, Annual Review 2013-2014* (2014), 14.


180 *Secretary of the Department of Human Services v Ray & Ors* (2010) 45 Fam LR 1.

181 *Family Law Act 1975* (Cth), s 69ZW(3). Note that child protection legislation in each jurisdiction provides that the child protection department must not disclose information that would reveal the identity of a person who notified the department of suspected child abuse. See for eg, *Children, Youth and Families Act 2005* (Vic), s 191.


183 *Family Court Act 1997* (WA), s 35.

184 *Family Court Act 1997* (WA), s 36.

185 *Family Court Act 1997* (WA), s 36(6).

186 *Family Court Act 1997* (WA), s 207(1).

187 *Family Court Act 1997* (WA), s 207(2).

188 J Jackson, *Bridging the Gaps between Family Law and Child Protection: Is a unified family court the key to improving services in the family law system?* (Churchill Fellowship, 2011).

189 Hands and Williams 2012, above n 100. Currently the release of this report has been limited to the stakeholders, the Family Law Council and National Legal Aid. The main findings of the report are set out in J Jackson, ‘Wisdom from the West?’, Paper presented to the National Family Law Conference, Sydney, October 2014.

190 Western Australian Department for Child Protection and Family Support, Submission, 5 May 2015.

191 Hands and Williams 2012, above n 100, 138.


193 Hands and Williams 2012, above n 101, 75.

194 Victoria Legal Aid, Submission, 30 April 2015, 9-14

195 Victoria Legal Aid, Submission, 30 April 2015, 9.

196 Victoria Legal Aid, Submission, 30 April 2015, 14.

197 Magistrates’ Court of Victoria, Submission, 29 May 2015, 3.

198 See for example, *Theophane & Hunt (Final parenting orders)* [2014] FamCA 1038; *Phitzner & Hollas* [2014] FamCA 344; *Garcon & Havener and Ors* [2015] FamCA 257; *Henley & Henley* [2014] FamCA 762.


201 Family Law Practitioners Association of Tasmania, Submission, 8 May 2015, [1.2].
The submission for the Women’s Legal Service Queensland notes that the danger for women who leave a violent relationship ‘peaks again’ when they take steps ‘towards permanent separation e.g. the finalisation of family law matters’: Women’s Legal Service Queensland, Submission, 6 May 2015, 1. See also Women’s Legal Services Australia, Submission to the Productivity Commission Inquiry on Access to Justice Arrangements, 4 November 2013, 3-4.

Federal Circuit Court, Submission, 1 May 2015.

See also Hands and Williams 2012, above n 100, referred to in the submission from Legal Aid Western Australia to the Family Law Council reference on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems, 8 May 2015. This report identified 10 categories of intersection between the two systems.

Northern Territory Legal Aid Commission, Submission, 6 May 2015, 1-2.

Several submissions raised concerns or related experiences of difficulties for families and children associated with the internal practices or processes of one or other system rather than the intersections or gaps between them. To the extent that these issues went beyond Council’s current terms of reference they have not been included in the description in this chapter.

Family Law Practitioners Association of Tasmania, Submission, 8 May 2015, [1.7.1] and [1.7.2].

Victoria Legal Aid, Submission, 30 April 2015; Federal Circuit Court, Submission, 1 May 2015; Family Law Practitioners Association of Tasmania, Submission, 8 May 2015, [1.7.2]; NSW Legal Aid, Submission, 7 May 2015.

Law Society of South Australia, Submission, 30 April 2015.

Western Australia Department for Child Protection and Family Support, Submission, 5 May 2015; Legal Aid Commission of Tasmania, Submission, 30 April 2015.

NSW Legal Aid, Submission, 7 May 2015; Northern Territory Legal Aid Commission, Submission, 6 May 2015, 3.

NSW Department of Family and Community Services, Submission, 6 May 2015.

Family Law Practitioners Association of Queensland, Submission, 30 April 2015.

Women’s Legal Services Australia, 2013, above n 202, 4.

Northern Territory Legal Aid Commission, Submission, 6 May 2015; Western Australia Department for Child Protection and Family Support, Submission, 5 May 2015.

Children’s Court of Victoria, Submission, 29 May 2015.

NSW Legal Aid, Submission, 7 May 2015, 5; Legal Aid Commission of Tasmania, Submission, 30 April 2015. See also Victorian Commission for Children and Young People, Submission, 4 May 2015.

Legal Aid Commission of Tasmania, Submission, 30 April 2015.

Victorian Commission for Children and Young People, Submission, 4 May 2015, 2.

Northern Territory Legal Aid Commission, Submission, 6 May 2015, 2.


See for eg, Victoria Legal Aid, Submission, 30 April 2015; Northern Territory Legal Aid Commission, Submission, 6 May 2015. Victoria Legal Aid suggested this was a function of the limited resources of the child protection department.

National Family Violence Prevention Legal Services, Submission, 6 May 2015; Legal Aid Western Australia, Submission, 8 May 2015.

Victoria Legal Aid, Submission, 30 April 2015.

Professor Heather Douglas et al, Submission, 30 April 2015. See also Higgins and Kaspiew 2011, above n 10.


Family Law Section of the Law Council of Australia, Submission, 14 May 2015. See also Chief Justice Bryant, Submission, 15 May 2015, Annexure A, 2; Legal Aid Commission of Tasmania, Submission, 30 April 2015.


Ray & Males [2009] FamCA 219, [22], [23].

Under Family Law Act 1975 (Cth), s 91B.

NSW Department of Family and Community Services, Submission, 6 May 2015, 5. Its submission notes that it intervened in 522 family law matters in 2012/13. It also shares information (the family courts are prescribed for the purpose of s 16A of the Children and Young Persons (Care and Protection) Act 1998 (NSW), which allows exchange of information.
See for eg, Family Law Practitioners Association of Tasmania, Submission, 8 May 2015, [1.7.1] and [1.7.2].

See for example, *Johnson & Knight* [2014] FamCA 107.

Rec 19-2.

See for example, *Johnson & Knight* [2014] FamCA 107.

As noted in Chapter 1.3, parents are presumed to have equal shared parental responsibility for the child absent a court order providing otherwise: *Family Law Act* 1975 (Cth), s 61DA.

Aboriginal Legal Service of Western Australia (ALSWA), Submission, 12 May 2015, 6.

Children's Court of Victoria, Submission, 29 May 2015.

Senate Community Affairs References Committee, *Grandparents who take primary responsibility for raising their grandchildren* (Commonwealth of Australia, 2014), [6.27], [6.42] (hereafter *Grandparents report*). See also Australian and New South Wales Law Reform Commissions 2010, above n 10, [19.32].

Victoria Legal Aid, Submission, 30 April 2015; Women's Legal Service Queensland, Submission, 6 May 2015; Aboriginal Legal Service of Western Australia (ALSWA), Submission, 12 May 2015, 6.

Australian Institute of Health and Welfare 2014, above n 26; *Child Protection Australia*, above n 57, 43, 51, and 55.

Ibid, 43 and 55.


Central Australian Women's Legal Service, Submission, 6 May 2015, 7; Aboriginal Family Law Services (WA), Submission, 11 May 2015, 5; Aboriginal Legal Service of Western Australia (ALSWA), Submission, 12 May 2015, 7.


Aboriginal Family Violence Prevention & Legal Service Victoria, Submission, 7 May 2015.

Aboriginal Legal Service of Western Australia (ALSWA), Submission, 12 May 2015, 4. See also on this, Family Law Council 2012, above n 247, at Chapter 3.5.

Aboriginal Family Law Services (WA), Submission, 11 May 2015, 8; Central Australian Women's Legal Service, Submission, 6 May 2015, 5.

For eg, the NSW Department of Family and Community Services suggested that in Parramatta, the Federal Circuit Court takes an average of 17 months between commencement and finalization.

Victorian Commission for Children and Young People, Submission, 4 May 2015.

*Grandparents report*, 2014, above n 241, [6.7].

Child Protection Practitioners Association of Queensland, Submission, 24 April 2015; Victorian Commission for Children and Young People, Submission, 4 May 2015; Women's Legal Service Queensland, Submission, 6 May 2015; Victoria Legal Aid, Submission, 30 April 2015; Children's Court of Victoria, Submission, 29 May 2015.

Aboriginal Legal Service of Western Australia (ALSWA), Submission, 12 May 2015, 4.

Aboriginal Legal Service of Western Australia (ALSWA), Submission, 12 May 2015, 4.

Central Australian Women's Legal Service, Submission, 6 May 2015, 5.

Family Law Practitioners Association of Queensland, Submission, 30 April 2015.

*Family Law Act* 1975 (Cth), ss 60CC(3)(h) and 60CC(6)

*Grandparents Report*, 2014, above n 241, [7.9].

*Children, Youth and Families Act 2005* (Vic), s 176. See also Family Law Council 2012, above n 242, 72-73.


For a discussion of the research literature on this point, see Queensland Taskforce Report 2015, above n 200, 77.

See for example, *Domestic and Family Violence Act 2007* (NT), s 124A.

Central Australian Women's Legal Service, Submission, 6 May 2015, 4-5.


Victoria Legal Aid, Submission, 30 April 2015, 5.

271 National Family Violence Prevention Legal Services, Submission, 6 May 2015.
272 Family Law Practitioners Association of Queensland, Submission, 30 April 2015, 3.
273 Family Law Practitioners Association of Tasmania, Submission, 8 May 2015, [3.1].
274 New South Wales Department of Justice, Submission, 24 April 2015; Legal Aid Commission of Tasmania, Submission, 30 April 2015.
275 *Family Law Act 1975* (Cth), s 60CI
276 Law Society of South Australia, Submission, 30 April 2015.
277 Family Law Practitioners Association of Queensland, Submission, 30 April 2015.
278 *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 245A.
279 *Family Law Act 1975* (Cth), s 68R(1).
280 Legal Aid Western Australia, Submission, 8 May 2015, 23.
282 Victoria Legal Aid, Submission, 30 April 2015. See also Australian and New South Wales Law Reform Commissions, 2010, above n 5, [16.25].
284 Ibid at [16.30].
285 Legal Aid Western Australia, Submission, 8 May 2015, 23.
286 David Lewis, Submission, 30 April 2015; Professor Heather Douglas et al, Submission, 30 April 2015; Legal Aid Commission of Tasmania, Submission, 30 April 2015; NSW Department of Family and Community Services, Submission, 6 May 2015; Family Law Practitioners Association of Queensland, Submission, 30 April 2015; Women's Legal Services NSW, Submission, 4 May 2015; Northern Territory Legal Aid Commission, Submission, 6 May 2015.
287 Legal Aid Commission of Tasmania, Submission, 30 April 2015.
288 Northern Territory Legal Aid Commission, Submission, 6 May 2015, 2.
289 Family Law Practitioners Association of Queensland, Submission, 30 April 2015, 2.
290 NSW Department of Family and Community Services, Submission, 6 May 2015; NSW Legal Aid, Submission, 7 May 2015.
290 NSW Legal Aid, Submission, 7 May 2015, 5.
290 Family Law Practitioners Association of Queensland, Submission, 30 April 2015; Victorian Commission for Children and Young People, Submission, 4 May 2015; Aboriginal Legal Service of Western Australia (ALSWA), Submission, 12 May 2015, 8.
290 Professor Heather Douglas et al, Submission, 30 April 2015; Women's Legal Service Queensland, Submission, 6 May 2015; Women's Legal Services NSW, Submission, 4 May 2015; Aboriginal Legal Service of Western Australia (ALSWA), Submission, 12 May 2015, 7.
290 Victims of Crime Assistance League (NSW), Submission, 30 April 2015, 10; Women's Legal Service Queensland, Submission, 6 May 2015.
290 Queensland Taskforce Report 2015, above n 200, 239.
290 Grandparents report, above n 241, Chapter 8, Recommendation 18.
290 With the exception of certain trade practices legislation.
290 Western Australia is the only State with a state Family Court.
290 Under s 8 of the relevant state or territory cross-vesting legislation. See e.g. *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NSW) s 8.
Family Law Act 1975 (Cth), ss 69J and 69N.

This restriction does not apply to the Family Court of Western Australia: Jurisdiction of Courts (Cross-Vesting) Act 1987 (WA) s 5(3).

Senate, Jurisdiction of Courts (Cross-Vesting) Bill 1987, Explanatory Memorandum, [3].

Re Wakim; Ex parte McNally & Anor (1999) 198 CLR 511; [1999] HCA 27.

Commonwealth of Australia Constitution Act 1900 ss 71 & 77(iii). Section 77 (iii) provides: ‘[w]ith respect to any of the matters mentioned in the last two sections the Parliament may make laws: ... investing any court of a State with federal jurisdiction’. See the decision of Gummow and Hayne J: Re Wakim; Ex parte McNally & Anor (1999) HCA 27, [121].


See Chapter 4 on this point.

Commonwealth Powers (Family Law – Children) Act 1986 (NSW), 1986 (Vic), 1986 (SA), 1987 (Tas), 1990 (Qld). The referrals were adopted by the Commonwealth and enacted in the Family Law Amendment Act 1987 (Cth), which commenced operation on 1 April 1988.


Since the states did not refer power on this point, only children of marriages fall within the ambit of the welfare power due to constitutional constraints: Secretary, Department of Health and Community Services v JWB and SMB (‘Marion’s Case’) (1992) 175 CLR 218.

See e.g. Re Alex [2009] FamCA 1292; Re: Jamie (Special medical procedure) [2011] FamCA 248; Re Rosie (Special medical procedure) [2011] FamCA 63; Re Dylan [2014] FamCA 969.

Secretary, Department of Health and Community Services v JWB and SMB (‘Marion’s Case’) (1992) 175 CLR 218.

Secretary, Department of Health and Community Services v JWB and SMB (‘Marion’s Case’) (1992) 175 CLR 218, 256 per Mason CJ, Dawson, Toohey and Gaudron JJ.


See also Secretary of the Department of Human Services v Ray & Ors (‘Ray’s case’) (2010) 45 Fam LR 1.


The parens patriae jurisdiction has been described as ‘a power of the Sovereign to protect persons who from their legal disability stand in need of protection’: Director General, New South Wales Department of Community Services v Services v Y [1999] NSWSC 644 [88]–[89]. See for a discussion of its origins, J Seymour, ‘Parens Patriae and Wardship Powers: Their Nature and Origins’ (1994) 14(2) Oxford Journal of Legal Studies 159.

Secretary, Department of Health and Community Services and JWB & Anor (‘Marion’s case’) [1992] HCA 15 (6 May 1992), [30].


PVS v Chief Executive Officer, Department for Child Protection [2010] WASC 172, [21].


Re Madison [2014] NSWSC 1874, [94].

Re Madison [2014] NSWSC 1874, [103]. Note that s 247 of the Children and Young Persons (Care and Protection) Act 1998 (NSW) provides that ‘[n]othing in this Act limits the jurisdiction of the Supreme Court’.


Re Beth [2013] VSC 189 (23 April 2013), [124].

See also Docs v Y [1999] NSWSC 644.

The parens patriae jurisdiction is used for a wide range of purposes. Seymour, following a survey of international cases summarises that in addition to wardship, it has been used in relation to medical
treatment of children (see, for example, *Royal Alexandra Hospital v Joseph and Ors* [2005] NSWSC 422 ordering that a child have a blood transfusion against the child and the parents wishes), preventing ‘undesirable associations’ that may be harmful to the child and controlling the publication of material where that may lead to harm to the child: Seymour, above n 321, 180.


334 Australian and NSW Law Reform Commissions, 2010, above n 5, [19.48].

335 Kelly and Fehlberg 2002, above n 199.

336 With the exception of ‘leave to adopt’ orders under s 60G.

337 *Family Law Act 1975* (Cth) s 69N.

338 *Acts Interpretation Act 1901* (Cth) s 2B.

339 A separate Youth Justice Court hears charges against young offenders.

340 *Family Law Act 1975* (Cth) s 69N.

341 Acts Interpretation Act 1901 (Cth) s 2B.


344 Department of Family and Community Services NSW, Submission, 5 May 2015, 9.


346 See also Department for Child Protection and Family Support Western Australia, Submission, 5 May 2015.

347 See also National Child Protection Alliance, Submission, 27 April 2015.


350 Queensland Family and Child Commission, Submission, 29 April 2015, 5. See also Victims of Crime Assistance League, Submission, 30 April 2015.

351 Family Law Practitioner’s Association of Queensland, Submission, 30 April 2015; Children’s Court of Victoria, Submission, 29 May 2015.


353 Legal Aid New South Wales, Submission, 7 May 2015.


355 Family Law Practitioners Association of Tasmania, Submission, 8 May 2015; Central Australia Women’s Legal Service, Submission, 6 May 2015.

356 Tasmanian Department of Health and Human Services, Submission, 30 April 2015; Department of Family and Community Services NSW, Submission, 5 May 2015; ACT Department of Justice and Community safety, Submission, 25 May 2015.


360 Australian and New South Wales Law Reform Commissions 2010, above n 10, 927.

361 In addition, several submissions suggested the potential benefits for children’s courts of the jurisdiction to make location and recovery orders: see Children’s Court of New South Wales, Submission,
24 April 2015; Department of Family and Community Services NSW, Submission, 5 May 2015; Legal Aid
NSW, Submission, 7 May 2015.

362 Women's Legal Service NSW, Submission; Legal Aid New South Wales, Submission, 7 May 2015;
Western Australia Commissioner for Children and Young People, Submission, 20 May 2015; Children’s
Court of Victoria, Submission, 29 May 2015.


364 Children’s Court of New South Wales, Submission, 24 April 2015; Victoria Legal Aid, Submission, 30
April 2015; Federal Circuit Court, Submission, 4 May 2015; Law Institute of Victoria, Submission, 6 May
2015.


366 Department of Health and Human Services Tasmania, Submission, 30 April 2015; Bar Association of
Queensland, Submission, 1 May 2015; Family Law Section Law Council of Australia, Submission, 14 May
2015; Professor Heather Douglas et al, Submission, 30 April 2015; Legal Services Commission of South
Australia, Submission, 30 April 2015; Central Australia Women’s Legal Service, Submission, 6 May 2015.
See also: Higgins and Kaspiew 2011, above n 10.

367 Children’s Court of New South Wales, Submission, 24 April 2015; Victorian Commission for Children
and Young People, Submission, 4 May 2015.

368 Family Law Act 1975 (Cth), ss 60CC(2)(a) and (b).

369 Family Law Act 1975 (Cth), s 60CC(2A).

370 Department of Family and Community Services NSW, Submission, 5 May 2015; Professor Belinda
Fehlberg, Submission, 20 February 2015; National Family Violence Prevention Legal Services,
Submission, 6 May 2015; Central Australia Women’s Legal Service, Submission, 6 May 2015; Professor
Richard Chisholm, Consultation Canberra, 20 March 2015.

371 Family Law Practitioner’s Association of Queensland, Submission, 30 April 2015; Victims of Crime
Assistance League, Submission, 30 April 2015; Victoria Legal Aid, Submission, 30 April 2015; Legal Aid
NSW, Submission, 7 May 2015; Federal Circuit Court, Submission, 4 May 2015; Law Society of South
Australia, Submission, 30 April 2015; Northern Territory Legal Aid Commission, Submission, 6 May 2015.

372 Legal Aid NSW, Submission, 7 May 2015.

373 For example, Victoria Legal Aid, Submission, 30 April 2015; Legal Aid Western Australia, Submission, 8
May 2015; Queensland Family and Child Commission, Submission, 29 April 2015; Western Australia
Department for Child Protection and Family Support, Submission, 5 May 2015; National Family Violence
Prevention Legal Services, Submission, 6 May 2015; Children’s Court of Victoria, Submission, 29 May
2015.

374 Aboriginal Family Law Services Western Australia, Submission, 11 May 2015.

375 Western Australia Department for Child Protection and Family Support, Submission, 5 May 2015.

376 Queensland Family and Child Commission, Submission, 29 April 2015.

377 For example, Victoria Legal Aid, Submission, 30 April 2015; Legal Aid Western Australia, Submission, 8
May 2015; Queensland Family and Child Commission, Submission, 29 April 2015; Western Australia
Department for Child Protection and Family Support, Submission, 5 May 2015; National Family Violence
Prevention Legal Services, Submission, 6 May 2015; Children’s Court of Victoria, Submission, 29 May
2015.

378 National Family Violence Prevention Legal Services, Submission, 6 May 2015.

379 Professor Heather Douglas et al, Submission, 30 April 2015; New South Wales Department of Family
and Community Services, Submission, 5 May 2015.

380 For example, Bar Association of Queensland, Submission, 30 April 2015; Family Law Section, Law
Council of Australia, Submission, 14 May 2015; Children’s Court of New South Wales, Submission, 24
April 2015.

381 Legal Services Commission of South Australia, Submission, 30 April 2015; National Child Protection
Alliance, Submission, 27 April 2015; Law Institute of Victoria, Submission, 6 May 2015.

382 Federal Circuit Court, Submission, 4 May 2015.

383 New South Wales Department of Family and Community Services, Submission, 5 May 2015, 2-3.
A total of 12 submissions commented on the benefits and challenges for family courts exercising children's courts powers but did not take a position on whether this should occur: Professor Belinda Fehlberg, Submission, 18 February 2015; Queensland Family and Child Commission, Submission, 29 April 2015; Victims of Crime Assistance League, Submission, 30 April 2015; Family Law Practitioners’ Association of Queensland, Submission, 30 April 2015; Bar Association of Queensland, Submission, 30 April 2015; Federal Circuit Court, Submission, 4 May 2015; Western Australia Department for Child Protection and Family Support, Submission, 5 May 2015; Women’s Legal Service Queensland, Submission, 6 May 2015; Central Australia Women’s Legal Service, Submission, 6 May 2015; Aboriginal Family Law Services Western Australia, Submission, 11 May 2015; Family Law Section, Law Council of Australia, Submission, 14 May 2015; Women’s Legal Service New South Wales, Submission, 4 May 2015.

Legal Aid Commission of Tasmania, Submission, 30 April 2015.

404 Australian and New South Wales Law Reform Commissions 2010, above n 10, [19.94].

405 Children’s Court of New South Wales, Submission, 24 April 2015.

406 For example, National Child Protection Alliance, Submission 27 April 2015.
122

417 R v Public Vehicles Licensing Tribunal (Tas) & Ors, Ex parte Australian National Airways Pty Ltd (‘Public Vehicles Licensing’) (1964) 113 CLR 207, 226.


420 Graham v Paterson (1950) 81 CLR 1, 19–20 per Latham CJ.


422 Commonwealth of Australia Constitution Act 1900, s 109.


426 There has also been a referral of power by all states excluding South Australia to ‘enable the family courts to make stand-alone declarations of parentage for the purposes of all Commonwealth laws,’ although this has not yet been acted upon by the Commonwealth. In the Council’s 2013 report, the Council recommended that the Australian Government seek a referral from South Australia then amend s 69VA of the Family Law Act to reflect these referrals: Family Law Council, Report on Parentage and the Family Law Act (December 2013), 60–1.

427 Fehlberg et al 2015, above n 423, 19; Australian and New South Wales Law Reform Commission 2010, above n 10, [2.51].

428 Commonwealth of Australia Constitution Act 1900, s 51(xxii).


430 Ibid, 177 per Gibbs CJ.


432 Fehlberg et al 2015, above n 423, 21: New South Wales was the first referring jurisdiction in 2003, while South Australia was the last in 2010.

433 Western Australia referred narrower powers relating to relationship breakdown to the Commonwealth, limited to the distribution of superannuation between de facto couples on relationship breakdown. The Commonwealth did not take up the powers referred by Western Australia.


436 Ibid.

437 See e.g. Commonwealth Powers (Family Law – Children) 1986 (NSW) s 4; Commonwealth Powers (De Facto Relationships) Act 2003 (NSW) s 5.

438 Lynch, above n 419, 365.

439 Fehlberg et al 2015, above n 423, 19.

440 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), Recommendation 7.5.

441 Australian and New South Wales Law Reform Commissions, above n 10, Rec 19-2.

442 French 2003, above n 413, 34.

443 Lynch, above n 419, 372

444 See e.g. French 2003, above n 413; Lynch, above n 419.

445 See e.g. Commonwealth Powers (Family Law – Children) 1986 (NSW) s 4; Commonwealth Powers (De Facto Relationships) Act 2003 (NSW) s 5.

446 Commonwealth of Australia Constitution Act 1900, s 96.


449 Ibid, 10–11.


452 Sankaran, above n 450, 23.
453 National Commission of Audit, above n 447, xxxvi (Recommendation 10).
454 Fehlberg et al 2015, above n 423, 49.
458 Ibid.
460 Ibid, 474 per Barcwick CJ; Australian Securities and Investment Commission v Edensor Nominees Pty Ltd (2001) 204 CLR 559, 571 per Gleeson CJ, Gaudron and Gummow JJ.
461 (2001) 28 Fam LR 443.
462 Warby v Warby (2001) 28 Fam LR 443, [29].
463 Re Wakim; Ex parte McNally (1999) 198 CLR 511, 588 per Gummow and Hayne JJ.
464 Kenny, above n 456.
465 Warby v Warby (2001) 28 Fam LR 443, [36].
466 Ibid, [95].
467 See e.g. Gallieni v Gallieni [2012] FamCA 54; Liquidator, S Pty Ltd v Rand [2010] FamCA 646; In the Marriage of Bishop (2003) 175 FLR 10.
468 Fehlberg et al 2015, above n 423, 51.
470 Ibid, [1].
471 Ibid, [93]–[94].
475 Australian and New South Wales Law Reform Commissions 2010, above n 10, [2.68].
477 French 2006, above n 474, 150.
479 Australian and New South Wales Law Reform Commissions 2010, above n 10, [2.56]; Family Court Act 1997 (WA) s 36.
480 Ibid, 2.64–2.65.
481 Australian and New South Wales Law Reform Commissions 2010, above n 10, [2.68].
484 Ibid, 294.
485 See e.g. Momcilovic v The Queen (2011) 245 CLR 1.
486 Murray, above n 482, 295.
487 Australian and New South Wales Law Reform Commissions 2010, above n 10, [2.68].
489 Commonwealth of Australia Constitution Act 1900, s 51(xxix).
however, the creation of a federal unified court was supported by Legal Aid NSW. The submission from Domestic and family violence in Queensland leader (SA) s 5(a); Family Violence Protection Act 2012 <http://www.aec.gov.au/elections/referendums/Referendum_Dates_and_Results.htm> ‘state-based integrated courts are the only way forward’: Consultation, 25 March 2015 (Canberra). Note, 517 516 The Magistrates’ Court of Victoria, 515 Queensland Special Taskforce on Domestic and Family Violence, 514 See eg., Victoria Police, 513 See eg., Queensland Taskforce Report, above n 200, Recommendations 96 and 98. 512 Note however that in Tasmania only (former) spouses and other forms of (former) intimate relationships are covered by the Act: Family Violence Act 2004 (Tas) s 3. 511 Domestic Violence and Protection Orders Act 2008 (NT) s 3(1)(b); Domestic and Family Violence Protection Act 2012 (Qld) s 3(1)(c); Family Violence Protection Act 2008 (Vic) s 1(c). 510 Note however that in Tasmania only (former) spouses and other forms of (former) intimate relationships are covered by the Act: Family Violence Act 2004 (Tas) s 4 interpretation of ‘family relationship’. In South Australia, only (former) spouses, other forms of (former) intimate relationships and certain children are covered by the definition of ‘domestic abuse’: Intervention Orders (Prevention of Abuse) Act 2009 (SA) s 8(8), however the Act also provides for non-domestic abuse. 513 See eg., Family Violence Protection Act 2008 (Vic) s 5(1)(a)(iii). 514 See eg., Victoria Police, Code of Practice for the Investigation of Family Violence, 3rd Edition (2014). 515 Queensland Special Taskforce on Domestic and Family Violence, Not Now, Not Ever: Putting an End to Domestic and family violence in Queensland (2015), 47. 516 The Magistrates’ Court of Victoria, Annual Report 2013/14 (September 2014), 3. This figure includes interim orders. 517 Domestic Violence and Protection Orders Act 2008 (ACT) s 18; Domestic and Family Violence Act 2007 (NT) s 28(1); Domestic and Family Violence Protection Act 2012 (Qld) s 32(1); Intervention Orders
518 E.g.: Crimes (Domestic and Personal Violence) Act 2007 (NSW) s 49; Domestic and Family Violence Act 2007 (NT) s 29; where the aggrieved person is a child. In some circumstances, a police officer may also apply for or issue a form of emergency protection order where it is not possible to approach a court: See eg., Domestic Violence and Protection Orders Act 2008 (ACT) s 68; Crimes (Domestic and Personal Violence) Act 2007 (NSW) s 25(3); Domestic and Family Violence Act 2007 (NT) s 41(2); Domestic and Family Violence Protection Act 2012 (Qld) s 102.

519 Emotional abuse does not fall within the definition of domestic abuse in the ACT, New South Wales or the NT, but is recognised in all other jurisdictions.

520 Economic abuse does not fall within the definition of domestic abuse in the ACT, New South Wales or Western Australia, but is recognised in all other jurisdictions.

521 See eg., Family Violence Protection Act 2008 (Vic) s 80; Crimes (Domestic and Personal Violence) Act 2007 (NSW) s 17(1); Domestic and Family Violence Protection Act 2012 (Qld) s 4(1); Domestic Violence and Protection Orders Act 2008 (ACT) s 7(1).

522 See Crimes (Domestic and Personal Violence) Act 2007 (NSW) s 17(2).

523 See Domestic and Family Violence Protection Act 2012 (Qld) s 4(2).

524 Domestic Violence and Protection Orders Act 2008 (ACT) s 7(2).

525 Domestic Violence and Protection Orders Act 2008 (ACT), s 55(2); Domestic and Family Violence Protection Act 2012 (Qld) s 97(2).

526 In New South Wales, the Northern Territory, Tasmania, Victoria and Western Australia there is no maximum duration of the order: Crimes (Domestic and Personal Violence) Act 2007 (NSW) s 79; Domestic and Family Violence Act 2007 (NT) s 27; Family Violence Act 2004 (Tas) s 19; Family Violence Protection Act 2008 (Vic) s 99; Restraining Orders Act 1997 (WA) s 16.

527 Domestic Violence and Protection Orders Act 2008 (ACT) s 11(2).

530 See, for example, R v Bouras [2012] VSC 7.
545 Schneller, above n 536, 5.
546 Australian and New South Wales Law Reform Commissions 2010, [32.22].
547 Stewart, above n 535, 3-4.
548 Centre for Innovative Justice 2015, above n 540, 66.
549 Note however, that a recent evaluation of two specialist family violence courts in WA showed re-offending rates were not significantly different to that of mainstream courts: Government of Western Australia Department of the Attorney-General, Evaluation of the Metropolitan Family Violence Court and Evaluation of the Barndimalgu Court (December 2014), 13.
550 Government of Western Australia Department of the Attorney-General, Evaluation of the Metropolitan Family Violence Court and Evaluation of the Barndimalgu Court (December 2014), 14.
552 Stewart, above n 535.
553 Australian and New South Wales Law Reform Commissions 2010, [32.23].
554 Australian and New South Wales Law Reform Commissions 2010, [32.1].
556 Queensland Taskforce Report 2015, above n 200, Recs 96, 97 and 98.
558 Magistrates’ Court of Victoria, Submission, 29 May 2015, 5.
559 Centre for Innovative Justice 2015, above n 540, Rec 7(l). Like the Australian and New South Wales Law Reform Commissions, this report also recommended that all Victorian magistrates ‘receive specialist family violence training’: Rec 7(d).
560 Family Law Act 1975 (Cth), ss 69J and 69N.
562 Department of Family and Community Services NSW, Submission, 5 May 2015.
563 Family Law Practitioners Association of Queensland, Submission, 30 April 2015; Dr. Becky Batagol, Law Faculty, Monash University, Consultation, 19 March 2015.
565 Victoria Legal Aid, Submission, 30 April 2015. See also Jackson, above n 189.
566 Professor Heather Douglas et al, Submission, 30 April 2015; Women’s Legal Services Victoria, Consultation, 12 February 2015; Dr. Becky Batagol, Law Faculty, Monash University, Consultation, 19 March 2015.
581 National Family Violence Prevention Legal Services, Submission, 6 May 2015.
582 Magistrates’ Court of Victoria. Submission, 29 May 2015.
583 Professor Heather Douglas et al, Submission, 30 April 2015.
584 Women’s Legal Services Victoria, Consultation, 12 February 2015; Professor Cathy Humphries, School of Social Work, University of Melbourne, Confidential Submission, 28 April 2015; Amanda Nuttall, Registrar ACT Magistrates Court, Consultation, 26 March 2015.
586 Family Law Act 1975 (Cth), s 121(5).
587 Family Law Act 1975 (Cth), s 121(9)(g).
588 Bar Association of Qld, Submission, 30 April 2015; Legal Services Commission of South Australia, Submission, 30 April 2015.
590 See eg., Children Youth and Families Act 2005 (Cth), s 534; Children and Young Persons (Care and Protection) Act 1998, s 105.
591 NSW Department of Justice, Submission, 25 April 2015; NSW Department of Family and Community Services, Submission, 5 May 2015.
593 Victoria Legal Aid, Submission, 30 April 2015; Northern Territory Legal Aid Commission, Submission, 6 May 2015.
594 Eg, Chief Justice Bryant, Submission, 15 May 2015
595 Eg, Central Australian Women’s Legal Service, Submission, 6 May 2015; Women’s Legal Service Queensland, Submission, 6 May 2015; Family Law Section of the Law Council of Australia, Submission, 14 May 2015.
596 Women’s Legal Services NSW, Submission, 4 May 2015
597 National Family Violence Prevention Legal Services, Submission, 6 May 2015.
598 Family Law Practitioner’s Association of Queensland, Submission, 30 April 2015.
599 Women’s Legal Service Queensland, Submission, 6 May 2015
600 Domestic Violence Interim Report 2015, above n 499, [1.52].
602 Federal Circuit Court of Australia, Submission, 4 May 2015; Western Australian Department of Child Protection and Family Support, Submission, 5 May 2015.
603 Anna Sandt, Child Protection Practice Leader (Family Law Liaison), Department of Health and Human Services (Victoria), Consultation, 3 February 2015.
604 Northern Territory Legal Aid Commission, Submission, 6 May 2015.
605 Professor Heather Douglas et al, Submission, 30 April 2015.
606 National Family Violence Prevention Legal Services, Submission, 6 May 2015.
607 Legal Aid New South Wales, Submission, 7 May 2015.
608 Magistrates’ Court of Victoria, Submission, 29 May 2015.
610 Northern Territory Legal Aid Commission, Submission, 6 May 2015.
611 Women’s Legal Services NSW, Submission, 4 May 2015.
612 National Family Violence Prevention Legal Services, Submission, 6 May 2015; Aboriginal Legal Service of Western Australia (ALSWA), Submission, 12 May 2015; Law Institute of Victoria, Submission, 6 May 2015.
614 Family Law Practitioner’s Association of Queensland, Submission, 30 April 2015; Victoria Legal Aid, Submission, 30 April 2015; Chief Justice Bryant, Submission, 15 May 2015.
615 Women’s Legal Services NSW, Submission, 4 May 2015; Women’s Legal Service Queensland, Submission, 6 May 2015.
References


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Hannan, Jennifer (2013) ‘Child Protection in Family Relationship Centre: Innovations in Western Australia’ 51 *Family Court Review* 268

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Higgins, Daryl and Rae Kaspiew (2011) ‘Child protection and family law … Joining the dots’ *National Child Protection Clearinghouse Issues No 34*


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Appendix A - Consultations

ORGANISATIONS

ACT Magistrates Court
Amanda Nuttall, Registrar

Children’s Court of New South Wales
Judge Peter Johnstone, President

Children’s Court of Victoria
Gregory Levine, Magistrate
Elisa Buggy, Project Manager, Family Drug Treatment Court

Department for Child Protection and Family Support (WA)
Michele Cohen, Child Protection Consultant

Department of Communities, Child Safety and Disability Services (Queensland)
Megan Giles, Director Child and Family Strategic Policy and Design

Department for Education and Child Development (South Australia), Families SA
Pam Hemphill, Executive Director Families SA, Country Operations & Statewide Services

Department of Family and Community Services (NSW)
Derek Smith, Assistant Director Care Litigation and Support, Legal Services

Department of Health and Human Services (Victoria)
David Soanes, Practice Leader Strategic Projects, Office of Professional Practice
Anna Sandt, Child Protection Practice Leader (Family Law Liaison)
Nathan Fenelon, Senior Cultural Program Advisor, Office of Professional Practice

Family Court of Australia
Chief Justice Bryant
Justice Ryan
Justice Finn
Justice Austin
Justice Ainslie-Wallace
Justice Forrest
Richard Foster, Chief Executive Officer

Family Court of New Zealand
Judge Ryan, Principal Family Court Judge

Family Court of Western Australia
Chief Judge Thackray

Federal Circuit Court
Chief Judge Pascoe
Legal Aid Western Australia
Julie Jackson, Director, Family Division

Legal Aid Queensland
Nicky Davies, Director, Family Law and Civil Justice Services

Magistrates’ Court of Victoria
Peter Lauritsen, Chief Magistrate
Felicity Broughton, Deputy Chief Magistrate
Anne Goldsbrough, Magistrate
David Fanning, Magistrate (Neighbourhood Justice Centre)

Northern Territory Office of the Attorney-General and Minister for Justice
The Hon. John Elferink, Attorney-General

Office of the Minister for Families and Children Victoria
The Hon. Jenny Mikakos, Minister for Families and Children

Victoria Legal Aid
Bevan Warner, Managing Director
Nicole Rich, Director Family Youth and Children’s Law

Women’s Legal Service Victoria
Joanna Fletcher, Chief Executive Officer
Pasanna Mutha, Policy and Campaigns Manager

INDIVIDUALS

Dr Becky Batagol, Law Faculty, Monash University

The Hon. Justice Jennifer Coate, Family Court of Australia, former President of the Children's Court of Victoria

The Hon. Professor Richard Chisholm AM, Adjunct Professor, ANU College of Law

Professor Belinda Fehlberg, Melbourne Law School, University of Melbourne

Professor Cathy Humphreys, Department of Social Work, University of Melbourne

The Hon. Alastair Nicholson AO, former Chief Justice of the Family Court of Australia

Professor Patrick Parkinson AM, Law Faculty, University of Sydney

Assoc. Professor Rosemary Sheehan AM, Department of Social Work, Monash University

Professor Clare Tilbury, School of Human Services and Social Work, Griffith University
FORUMS

Perth 31 March 2015

Family Court of Western Australia
   Chief Judge Thackray
   Principal Registrar Monaghan

Children’s Court of Western Australia
   Judge Reynolds, President

Legal Aid Western Australia
   George Turnbull, Director
   Julie Jackson, Director Family Division

Community Legal Services Australia
   Helen Creed

Aboriginal Family Law Services
   Corina Martin
   Brad Ferguson

Women’s Law Centre (WA)
   Penny Robbins

Department for Child Protection and Family Support
   Kay Benham
   Max Lewington

Department of the Attorney General
   Yvonne Patterson
   Suzanne Taylor

Melbourne 26 February 2015

Family Court of Australia
   The Hon. Justice Bennett
   Manuela Galvao (Regional Co-ordinator Child Dispute Services)

Magistrates’ Court of Victoria
   Anne Goldsbrough, Magistrate

Department of Health and Human Services
   David Soanes (Practice Leader, Office of Professional Practice)
   Anna Sandt (Child Protection Practice Leader)
   Nathan Fenelon (Senior Cultural Program Advisor, Office of Professional Practice)
   Leng Phang
   Sascha Gelford
   Rebecca Sharpe
Victoria Legal Aid
  Bevan Warner (Managing Director)
Nicole Rich (Director Family Youth and Children’s Law)
Freia Carlton (Manager Family Dispute Resolution Service)
Emma Smallwood
Caroline Smith
Brigid Jenkins
Marika Ruzyla
Andrew McKay
Alla Epelboym
Siobhan Mansfield
Amy Schwebel
Daniel Piekarski
Lucia Danek
Louise Akenson

Family Law Pathways Network (Melbourne)
  Jill Raby

Women’s Legal Service Victoria
  Helen Matthews
  Henrietta Barclay

Relationships Australia Victoria
  Katrina Marwick
  Sue Yorston

Our Watch
  Selina Getley

Private Practice
  Jackie Campbell, Forte Family Lawyers
  Ian Kennedy, Kennedy Partners Lawyers
  Andrew McGregor, Dowling McGregor Pty Ltd Barristers and Solicitors
  Jason Walker, Gadens

La Trobe University
  Hannah Robert, Law Faculty

University of Melbourne
  Professor Cathy Humphreys, Department of Social Work
  Dr. Lucy Healey, Department of Social Work
  Professor Belinda Fehlberg, Melbourne Law School
  Professor John Tobin, Melbourne Law School
CHILD PROTECTION WORKING GROUP

Megan Giles, Director Child and Family Strategic Policy and Design
Department of Communities, Child Safety and Disability Services Queensland

Judge Peter Johnstone, President
Children’s Court of New South Wales

Andrew McGregor, Principal
Dowling McGregor Pty Ltd Barristers and Solicitors (Victoria)

David White, Executive Solicitor
Crown Solicitor’s Office (South Australia)
## Appendix B - Submissions

Submissions were received from the following persons and organisations in response to the Family Law Council’s terms of reference (in alphabetical order):

<table>
<thead>
<tr>
<th>Organization</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aboriginal Family Law Services Western Australia</td>
<td>11 May 2015</td>
</tr>
<tr>
<td>Aboriginal Family Violence Prevention &amp; Legal Service Victoria</td>
<td>7 May 2015</td>
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<tr>
<td>Aboriginal Legal Service of Western Australia</td>
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<tr>
<td>Aqua Dreaming Pty Ltd</td>
<td>18 May 2015</td>
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<tr>
<td>Bar Association of Queensland</td>
<td>30 April 2015</td>
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<tr>
<td>Bravehearts Inc</td>
<td>5 May 2015</td>
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<tr>
<td>The Honourable Chief Justice Diana Bryant AO (Family Court of Australia)</td>
<td>15 May 2015</td>
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<tr>
<td>Central Australia Women's Legal Service</td>
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<tr>
<td>Child Protection Practitioners Association of Queensland</td>
<td>24 April 2015</td>
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<td>Children's Court of New South Wales</td>
<td>24 April 2015</td>
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<td>Children's Court of Victoria</td>
<td>1 June 2015</td>
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<tr>
<td>David Fanning (Magistrate)</td>
<td>9 June 2015</td>
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<tr>
<td>Department for Child Protection and Family Support Western Australia</td>
<td>5 May 2015</td>
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<tr>
<td>Department of Children and Families Northern Territory</td>
<td>11 May 2015</td>
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<tr>
<td>Department for Education and Child Development South Australia [confidential]</td>
<td>7 May 2015</td>
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<tr>
<td>Department of Family and Community Services New South Wales</td>
<td>5 May 2015</td>
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<tr>
<td>Professor Heather Douglas, Assoc Professor Tamara Walsh and Ms Kathryn Thomas (University of Queensland)</td>
<td>30 April 2015</td>
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<tr>
<td>Eastern Suburbs Domestic Violence Network</td>
<td>1 May 2015</td>
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<td>Family Court of Western Australia</td>
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<td>Family Law Practitioner’s Association of Queensland</td>
<td>30 April 2015</td>
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<td>Organization</td>
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<tr>
<td>Family Law Practitioner’s Association of Tasmania Inc</td>
<td>8 May 2015</td>
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<td>Family Law Section, Law Council of Australia</td>
<td>14 May 2015</td>
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<td>Federal Circuit Court</td>
<td>4 May 2015</td>
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<tr>
<td>Professor Belinda Fehlberg (University of Melbourne)</td>
<td>18 February 2015</td>
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<tr>
<td>Professor Cathy Humphreys (University of Melbourne) [confidential]</td>
<td>29 April 2015</td>
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<td>Law Institute of Victoria</td>
<td>6 May 2015</td>
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<tr>
<td>Law Society of South Australia</td>
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<td>Legal Aid Commission of Tasmania</td>
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<td>Legal Services Commission of South Australia</td>
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<td>David Lewis (Barrister, Tasmania)</td>
<td>30 April 2015</td>
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<td>Magistrates’ Court of Victoria</td>
<td>1 June 2015</td>
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<tr>
<td>Dr Elspeth McInnes AM (University of South Australia)</td>
<td>28 April 2015</td>
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<tr>
<td>National Child Protection Alliance</td>
<td>27 April 2015</td>
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<td>National Family Violence Prevention Legal Services</td>
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<td>National Legal Aid</td>
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<td>New South Wales Department of Justice</td>
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<td>Northern Territory Legal Aid Commission</td>
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<td>Queensland Family and Child Commission</td>
<td>29 April 2015</td>
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<td>Tasmanian Department of Health and Human Services</td>
<td>30 April 2015</td>
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<tr>
<td>Victims of Crime Assistance League (Robyn Cotterell-Jones)</td>
<td>30 April 2015</td>
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<td>Victims of Crime Assistance League (Kassie Pitkin)</td>
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<td>Western Australia Commissioner for Children and Young People</td>
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<td>Women's Legal Services New South Wales</td>
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# Appendix C – Family Violence Legislation

<table>
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<tr>
<th>Jurisdiction</th>
<th>Relevant Statute</th>
<th>Type(s) of Orders</th>
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<td>ACT</td>
<td>Domestic Violence and Protection Orders Act 2008</td>
<td>Domestic Violence Order (DVO)</td>
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<td>NSW</td>
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<td>Apprehended Domestic Violence Order (ADVO)</td>
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<tr>
<td>NT</td>
<td>Domestic and Family Violence Act 2007</td>
<td>Domestic Violence Order (DVO)</td>
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<td>Queensland</td>
<td>Domestic and Family Violence Protection Act 2012</td>
<td>Domestic Violence Order (DVO)</td>
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<td>SA</td>
<td>Intervention Orders (Prevention of Abuse) Act 2009</td>
<td>Domestic Violence Restraining Order (DVRO)</td>
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<tr>
<td>Tasmania</td>
<td>Family Violence Act 2004</td>
<td>Family Violence Order (FVO) OR Police Family Violence Order (PFVO)</td>
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<td>Victoria</td>
<td>Family Violence Protection Act 2008</td>
<td>Family Violence Intervention Order (FVIO) OR Family Violence Safety Notice (FVSN)</td>
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<tr>
<td>WA</td>
<td>Restraining Orders Act 1997</td>
<td>Violence Restraining Order (VRO)</td>
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Appendix D - Function and membership of the Family Law Council

The Family Law Council is a statutory authority that was established by section 115 of the Family Law Act 1975. The functions of Council are set out in sub-section 115(3) of the Family Law Act 1975 which states:

It is the function of the Council to advise and make recommendations to the Attorney-General, either of its own motion or upon request made to it by the Attorney-General, concerning:

(a) the working of this Act and other legislation relating to family law;
(b) the working of legal aid in relation to family law; and
(c) any other matters relating to family law.

Members of the Family Law Council (as at 30 June 2015):

Professor Helen Rhoades (Chairperson) Ms Jennie Hannan
Ms Kylie Beckhouse Dr Rae Kaspiew
Justice Robert Benjamin AM Judge Kevin Lapthorn
Mr Jeremy Culshaw Ms Colleen Wall

Observers to the Family Law Council (as at 30 June 2015):

The following agencies and organisations have observer status on the Council (with names of attendees):

Australian Institute of Family Studies – Professor Lawrie Moloney
Australian Law Reform Commission – Dr Julie MacKenzie
Department for Education and Child Development – Families SA – Ms Pam Hemphill
Department of Human Services – Ms Sheree Tierney
Family & Relationships Services Australia – Ms Jackie Brady
Family Court of Australia – Principal Registrar Angela Filippello
Family Court of Western Australia – Magistrate & Principal Registrar David Monaghan
Family Law Section of the Law Council of Australia – Mr Geoff Sinclair
Federal Circuit Court – Ms Adele Byrne

Research Assistants:
Ms Nareeda Lewers - Research Fellow (Melbourne Law School)
Ms Jo O'Donohue – Research Fellow (Melbourne Law School)
Mr David Benady – Research Assistant (Melbourne Law School)
Ms Megan Driscoll – Research Assistant (Melbourne Law School)

Acknowledgement to Ms Anita Mackay for assisting Council in the early stages of the reference.

Secretariat:
Mrs Kim Howatson (Attorney-General's Department)