

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

December 2009

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EXECUTIVE SUMMARY AND RECOMMENDATIONS

This report to the Federal Attorney-General focuses on family violence if and when it becomes visible in the Family Law system in Australia.

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

The Family Law Council report is only one of the multiple studies in progress at present on the causes, effects and responses to family violence in Australia.

The report recommends:

- The definition of “family violence” in the *Family Law Act* be widened to include a range of threatening behaviour.
- That the Attorney General establish an expert panel under the direction of the Australian Institute of Family Studies to create an easy-to-understand “common knowledge base” on the known patterns and effects of family violence. This easily accessible information will assist to provide common and up-to-date information to all those involved in the family relationship and legal systems, including parents, relatives, counsellors, mediators, FRCS, legal aid officers, lawyers and courts.
- The Law Council of Australia and the Family Law Council co-operate to revise the booklet “Best Practice Guidelines for Lawyers Doing Family Law Work” to incorporate detailed information on family violence.
- A number of reforms take place to improve co-ordination and collaboration between the state and territory child protection agencies, and the federal *Family Law Act*, including: the transportability of state family violence injunctive orders; the establishment of a national register of family and violence orders ; and the establishment of a network data base which records family violence orders, and a residual family court power to require state Child Protection Agencies to become parties to Family Law Court proceedings about children.
- A further report be prepared on whether FDRP should be required to provide a report to the Family Law Courts or other bodies in some or all structure where family violence is admitted or suspected.
- The forms notifying the Family Law Courts about family violence be simplified.
- Consideration be given on how to educate the Australian public about certain widespread misunderstandings of the *Family Law Act* including:

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- Recurrent gossip that notification of family violence may lead to a judicial perception that the notifier is an “unfriendly parent”
- Widespread perception that each parent now has a “starting right” to equal time (50/50) with children
- Common belief that a parent will receive *both* substantial time with a child, and equal shared parental responsibility, (similar to historic “guardianship”), *despite* a history of poor communication and hostility between parents; and *despite* the long term health and emotional consequences for children as casualties on such parental battlefields.

These recommendations of the Family Law Council will need to be amalgamated with the various reports on family violence emerging in the next year.

RECOMMENDATIONS

Recommendation 1

3. Definitions of family violence

Legal

3.1 The Attorney-General propose an amendment to *section 4 of the Family Law Act 1975* to define family violence as in *section 5 of the Family Violence Protection Act 2008 (Vic)*.

s5. Meaning of family violence

- 1) For the purposes of this Act, family violence is -
 - (a) behaviour by a person towards a family member of that person if that behaviour -
 - is physically or sexually abusive; or
 - is emotionally or psychologically abusive; or
 - is economically abusive; or
 - is threatening; or
 - is coercive; or
 - in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person; or
 - (b) behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).

Recommendation 2

6. The need for a common understanding that is evidence based

Common knowledge base

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- 6.1** The Attorney-General facilitate the establishment of an expert panel and reference group, both chaired by the Australian Institute of Family Studies, to develop, maintain and promote a family violence common knowledge base for those involved in the family relationship and family law system.
- 6.2** The Attorney-General propose an amendment to *section 69ZX(3)* of the *Family Law Act 1975* to enable judicial officers to take judicial notice of the family violence common knowledge base
- 6.3** The expert panel
- a. Review Australian and international research findings to ensure that the common knowledge base is evidence based and remains current;
 - b. Advise the Government on its research agenda in the area of family violence.
- 6.4** The reference group include representatives from the Violence Against Women Advisory Group, Family Relationship Services Australia, the Family Law Section of the Law Council, the Australian Medical Association, the Royal Australian and New Zealand College of Psychiatrists, the Australian Psychological Society, the Australian Association of Social Workers, the Australian Institute of Judicial Administration, the federal family courts, the Family Law Council and the Office of Indigenous Policy Coordination.
- 6.5** The family violence common knowledge base include resources and materials endorsed by the expert panel and adopted by the reference group including:
- a. Research
 - b. Frameworks
 - c. Tools
 - d. Referral links, including to Indigenous agencies
 - e. Information resources
 - f. Training materials
- 6.6** The Attorney-General facilitate the development of the Domestic and Family Violence Clearinghouse database to house and disseminate the family violence common knowledge base.
- 6.7** Professional and peak bodies utilise the family violence common knowledge base to:
- a. Guide good practice in all relevant disciplines and disseminate resources and materials from the common knowledge base.

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- b. Underpin training programs and professional development that are regularly delivered across the family relationship and family law system, including Indigenous cross-cultural training.

Recommendation 3

Training and professional development

6.8 The Family Law Section of the Law Council of Australia in conjunction with the Family Law Council revise *'Best Practice Guidelines for lawyers doing family law work'* to incorporate

- a. the application of screening and risk assessment tools
- b. obtaining full instructions on family violence
- c. advice on personal protection orders, parenting orders to ensure the physical and emotional security of children, and on appropriate referrals
- d. a safety plan developed for the client in appropriate cases
- e. properly particularised material being placed before the court
- f. identification of any collateral supporting or corroborative evidence, and proper adducing of this evidence to the court

and update the Guidelines from time to time in accordance with the common knowledge base.

Recommendation 4

Multi-disciplinary understanding and approaches

6.9 The Attorney-General's Department

- a. facilitate the expansion Australia-wide of family pathways networks to support cooperation and referrals across the family relationship and family law system
- b. ensure that family pathways networks are aware of and disseminate information from the family violence common knowledge base.

Recommendation 5

7. Jurisdictional framework impacting on family violence and child abuse

- 7.1** The Attorney-General propose an amendment to the *FLA* to place a positive obligation on the parties to inform the court about any relevant orders or arrangements in place under child welfare laws. **7.3.6**
- 7.2** The Attorney General through SCAG develop protocols to encourage a co-operative working relationship between the respective State and Territory child protection agencies and the federal family courts so that those agencies participate in proceedings when invited to do so. However in order to ensure that in those minority of cases where there is no party with the capacity to protect a child from violent or abusive living arrangements, the federal family courts should retain a residual power of last resort to require the State protection agency to become a party to proceedings. **7.3.1**
- 7.3** The Attorney-General as a member of SCAG address the overlap between jurisdictions and in particular examine:
- 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. **7.3.4**
 - 7.3.2 The current legislative provisions in respect of the competing priority of orders made by different courts in respect of family violence or child protection which do not provide a complete answer to the problem of inconsistent orders. This issue requires further consideration. **7.3.5**
 - 7.3.3 Family violence injunctive orders made being transportable across jurisdictions, and capable of registration, by filing the orders in the relevant State or Territory court, and having those orders enforced by the relevant State and Territory police services. **7.4**
- National register of family violence orders**
- 7.3.4 Through his Department examine the feasibility of establishing a national register of family violence orders and in doing so consider the viability of using existing systems e.g. Crim trac. **7.5**
 - 7.3.5 The database being accessible to authorised persons and agencies including courts exercising family law and protection orders jurisdiction, child protection

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agencies, police services and mental health agencies.
7.5

Recommendation 6

Information Sheets

7.4 The Attorney General's Department develop an information sheet to be served with all family violence or protection orders about the interaction of protection orders and family law orders.

Recommendation 7

Concurrent jurisdiction

7.5 The Attorney-General as a member of SCAG address the referral of powers to federal family courts so that in determining a parenting application federal family courts have concurrent jurisdiction with that of State Courts to deal with all matters in relation to children including where relevant family violence, child protection and parenting orders. **7.7**

Recommendation 8

8. Adducing Evidence in Court

8.1 The current use of Section 60I certificates is limited. An options paper should be prepared to consider the advantages and disadvantages of Family Relationship Centres and Family Dispute Resolution Practitioners having some responsibility to provide to the federal family courts any information about family violence or any other related issue disclosed during an intervention. **8.2.1**

Recommendation 9

Legislation

8.2 The Attorney-General propose amendments to the *FLA as follows:*

8.2.1Section 10E (2) be amended to exclude the operation of s.10E (1) when an adult or

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child discloses that a child has been exposed to family violence. **8.2.2**

8.2.2 Section 60K (2) be amended to require the courts to consider as one of the options available, referring a party (or parties) alleging family violence for a risk assessment. If the risk assessments are to be undertaken by Court-based family consultants, the federal family courts be appropriately resourced to do so. **8.2.2**

Recommendation 10

Use of forms to notify alleged abuse and family violence

8.3 The Attorney General propose Section 67Z be amended to require a party to parenting proceedings to file a Notice of Family Violence in all cases in which a party claims family violence is a factor to which the court should have regard in determining a parenting case.

8.4 Council recommends that the federal family courts give consideration to the following:

8.4.1 The *Notice of Child Abuse or Family Violence* (Form 4) being revised to make it more user friendly or alternatively that there be two individual forms to allow the notification of either *Notification of Child Abuse*, and/or *Notification of Family Violence*. The notification of child abuse will trigger information about the matter being sent to the relevant child welfare authority.

8.4.2 The *Notification of Family Violence* form require a party to file and serve an affidavit setting out the particulars of the violence alleged including: the person(s) alleged to have committed the violence; the person(s) against whom the violence was perpetrated; the dates on which the events alleged occurred; briefly what occurred; the frequency of the alleged acts of violence; the nature and severity of the violence alleged; whether children were present or in the vicinity when the violence occurred.

8.4.3 When a party claims that family violence is a factor to which the court should have regard when determining that application, the Initiating Application and the Response should include 2 – 3 additional questions addressing family violence – similar to those questions used in the Family Court’s Parenting Questionnaire. These forms should also require a party to tick a box and complete an Annexure about family violence allegations. **8.2.2**

8.5 The FMC give consideration to including in their Rules a provision that requires that where there are allegations of child abuse, physical or sexual, or family violence that an explanation is provided to the court as to how the order attempts to deal with the allegation. **8.2.2**

Recommendation 11

Costs provisions

8.6 The Attorney-General give consideration to clarifying either through legislative amendment or public education the intention of Section 117AB. This section provides for cost orders to be made where a party knowingly makes a false allegation or statement. There is no evidence that this section has achieved its purpose in relation to false allegations of family violence. **8.2.3.**

Recommendation 12

9. Communication between States, Territories and Federal Authorities

Information sharing

9.1 The Attorney General give consideration to amending s 69ZW to remove any ambiguity as to its requirement for the production of documents or reports so that information held by the respective agency which is relevant to the issue for determination is made available to the federal family courts. **9.1**

9.2 The Attorney General through his Department facilitate an appropriate response by child protection authorities and law enforcement agencies to orders made pursuant to s 69ZW for the production of reports or the provision of information. **9.2**

9.3 The Attorney General through his Department, facilitate the development of protocols for the collaborative exchange and sharing of information between the federal family courts, the State and Territory child protection agencies, Legal Aid, Police services and Mental Health in respect of those families that are mutual clients. **9.3.4**

9.4 The protocols should:

9.4.1 Outline the circumstances which support the intervention of welfare authorities in child related proceedings in response to orders made pursuant to s 91B so that there is clear understanding as to when such orders will be made, and under what circumstances the protection agency will intervene, including where appropriate a police response.

9.4.2 Be premised on the understanding that federal family courts have

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access to the information obtained by the State agencies as a result of investigations undertaken by or caused to be undertaken by the State agencies.

9.4.3 Set out in clear unambiguous terms, the process for information sharing and an acknowledgement and acceptance of the different roles and priorities for each agency. **9.3.5**

9.5 Current memoranda of understanding and protocols focus primarily on child protection rather than family violence more generally. The focus of the protocols should be expanded to include the sharing of information in respect of family violence. The federal family courts and legal aid agencies be resourced to undertake the additional workload generated by these families. **9.3.5**

9.6 Prior to embarking on this facilitation the Attorney-General's Department should ensure that the current level of information sharing exhausts the current limits of the legislation imposed by the Privacy Act and legislative provisions around confidentiality. This issue should be revisited as part of any legislative reform introduced in response to the ALRC report on Privacy. **9.4**

Recommendation 13

10. Further legislative amendments to address issues of family violence

10.1 The Attorney-General give consideration to clarifying either through legislative amendment or public education the intention of the following provisions:

10.1.1 Section 60CC(4)(b) often referred to as the "friendly parent" provisions may impede the disclosure of family violence in cases where a vulnerable parent's allegations of family violence are not able to be corroborated by reliable evidence. **10.1**

10.1.2 Section 61DA - there remains a perception in the community that equal shared parental responsibility equates to equal time (50/50) and that the onus rests on the parent seeking different orders to convince the court that equal time is not appropriate. **10.1**

10.1.3 Section 65DAA(5) sets out the factors a court must have regard to in determining whether a child spending equal time, or substantial and significant time with a parent is "reasonably practical". The consideration of reasonable practicability should extend to orders for equal shared parental responsibility and in doing so the Court should have regard to the following factors

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including:

- The parties capacity and / or willingness to communicate co-operatively;
- The extent of any family violence;
- The impact such an order would have on a child. **10.2**

1 Introduction

In May 2008, the Attorney-General indicated that the Family Law Council should provide advice on practical strategies to improve the coordination between the family law and the State and Territory family violence systems, with particular emphasis on court related services.

Council identified these key questions:

1. How can the broader family law system better identify and address issues of violence that affect children and other family members?
2. How can the family law system better address allegations of family violence?
3. How can the federal family law system and State and Territory authorities share information and assessments to ensure the protection of children and other family members?
4. How can federal family courts better ensure family consultants, registrars and judicial officers are aware of family violence issues in each case and have regard to those issues?

Council's considerations in preparing this advice have been informed by a vast amount of research and a number of reports by social scientists, academics and lawyers on family violence and its impacts; by reference to practice guidelines and wisdom of social scientists and lawyers; by current legislative frameworks; and by case law. In particular, Council has taken account of the consultations it has conducted with community workers, legal practitioners, social scientists, academics, judicial officers and others since mid-2006¹.

The broad topic of family violence is currently being studied by many bodies in Australia and elsewhere. This report does not address the following key topics:

- measures to change the Australian culture and apparent acceptance of family violence;
- structural causes of family violence in Australia;
- measures to prevent violent patterns of behaviour in a significant proportion of Australian households; or
- measures to respond to, or protect people, who do not become visible to the legal system.

¹ Melbourne, Parramatta, Perth, Wollongong, Brisbane, Darwin, Canberra, Sydney, Hobart, Newcastle, Adelaide.

1.1 Why is the issue of family violence important?

Family violence is widespread in Australia. It impacts on the adults and children who experience it, and live in fear of it².

Sexual assault and domestic and family violence are crimes most often perpetrated by men against women. This violence is usually perpetrated by men whom women know, in their own home and often repeatedly.

About one in three Australian women experience physical violence and almost one in five women experience sexual violence over their lifetime³.

In 2005⁴ 31% of the women who reported they were physically assaulted in a 12 month period were assaulted by a current or previous partner, compared to 4.4% of men who were assaulted by a current or previous partner⁵.

Children were reported to be present in 49% of cases of violence by a current partner, and 27% of victims reported that their children had witnessed the violence. 61% of people who had experienced violence from a previous partner reported they had children in their care at some time during the relationship, and 36% said their children had witnessed the violence⁶.

23% of young people between the ages of 12 and 20 years had witnessed an incident of physical violence against their mother/stepmother⁷.

There are certain groups of women who experience higher rates of violence. These include Indigenous women, women with disabilities, women from culturally and linguistically diverse backgrounds, younger women and older women⁸.

Research indicates that victims of domestic violence receive more psychiatric treatment and have an increased incidence of attempted suicide and alcohol abuse than the general population⁹.

Family violence is a significant cause of homelessness among women in Australia¹⁰.

² Renata Alexander, *Domestic Violence in Australia*, Third Edition, 2002.

³ Australian Bureau of Statistics 2006, *Personal Safety Survey 2005*, Cat. 4906.0. Commonwealth of Australia, Canberra.

⁴ *ibid*

⁵ *ibid*.

⁶ *ibid*.

⁷ Dr David Indermaur, *Young Australians and Domestic Violence*, Australian Institute of Criminology No. 195, 2000.

⁸ See 3.

⁹ Gwenneth Lilian Roberts, Joan M. Lawrence, Brian I. O'Toole, Beverley Raphael, *Two Case Control Studies of Domestic Violence in the Emergency Department*, *General Hospital Psychiatry*, Volume 19, Issue 1, January 1997, Pages 5-11

¹⁰ Australian Institute of Health and Welfare *'Homeless people in SAAP: SAAP National Data Collection and Annual Report*, 2008.

Separation of partners does not mean that family violence will stop. In some cases separation can exacerbate abusive behaviour¹¹.

1.2 Context of this advice

This advice should be read in the light of the following reports:

*'Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings'*¹² - a research report on how allegations of family violence were raised in the family law courts prior to the 2006 family law reform package.

*'Time for Action'*¹³ - the report of the National Council to Reduce Violence against Women and their Children which aimed to produce a plan to reduce the incidence and the impact of sexual assault and domestic and family violence perpetrated against women and their children.

*'The National Plan to Reduce Violence against Women: Immediate Government Actions'*¹⁴ - the Commonwealth Government's initial response to *'Time for Action'*.

*'Protecting Children is Everyone's Business'*¹⁵ - an initiative of the Council of Australian Governments for a long-term, national approach to help protect all Australian children.

This advice has been prepared in the knowledge that government commissioned research and reports are being undertaken for release in late 2009 and 2010 including:

*'Review of legislation, practice and procedures relating to family violence in the Family Courts'*¹⁶ - an assessment of the legislation, practices and procedures before the federal family courts where issues of family violence arise with recommendations for improvement.

*'Evaluation of family law reforms'*¹⁷ - a research report that examines the impact of the 2006 changes to family law and legal processes and support services and the effects on families.

¹¹ Miranda Kaye, Julie Stubbs and Julia Tolmie, *Negotiating child residence and contact arrangements against a backdrop of domestic violence* (Research Report No. 1). 2003, Brisbane: Families, Law and Social Policy Research Unit, Socio-Legal Research Centre, School of Law, Griffith University.

¹² Lawrie Moloney, Bruce Smyth, Ruth Weston, Nicholas Richardson, Lixia Qu and Matthew Gray, *'Allegations of family violence and child abuse in family law children's proceedings: a pre-reform exploratory study'*, Research Paper No 15, Australian Institute of Family Studies, 2007..

¹³ The National Council to Reduce Violence Against Women and their Children *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021*, March 2009.

¹⁴ Australian Government, *The National Plan to Reduce Violence against Women - Immediate Government Actions*, April 2009.

¹⁵ Council of Australian Governments, *National Framework for Protecting Australia's Children 2009-2020*, 2009.

¹⁶ Professor Richard Chisholm, to report by 27 November 2009.

¹⁷ Australian Institute of Family Studies, to report by the end of December 2009

Introduction

*'Family Violence Inquiry'*¹⁸ – an inquiry and report on the interaction in practice of family/domestic violence and child protection laws with family law and criminal laws, including sexual assault in a family/domestic violence context.

This advice considers family violence in the context of family law. It examines how there can be wider dissemination of generally accepted expert opinion about family violence and its impact in the broad family relationship and family law systems. It examines how family violence is dealt with in family law disputes and makes recommendations on how the family law system's responses to family violence can be improved, including the early identification of family violence. It further considers the practical application of this knowledge to promote better outcomes for people affected by family violence.

The 2007 Australian Institute of Family Studies report on allegations of family violence has been a key piece of research that has fundamentally informed the thinking and recommendations of this advice.

It is also important to place this microcosm in the context of the high incidence of violence in Australian society. It is not clear whether the daily patterns of family violence are greater or lesser than at other times in history. The questions posed mean this is a very limited reactive response. This advice touches the tip of a huge iceberg of family violence in Australia. A significant proportion of Australian adults in intimate relationships use violence occasionally or often. A similar proportion of children and young people under 18 years of age are waiting in the wings already "trained" to do likewise.

Only a small percentage of these people become visible to the traditional "legal system" of counsellors, police, lawyers and courts. The considerable majority of violent family situations in Australia remain invisible to the traditional legal system. They may appear, occasionally or momentarily to the friends of victims or local organisations, and then disappear off the radar.

This advice deals with better reactions to the proportionately small number of families affected by violence who become visible in the family relationship and family law system.

¹⁸ Australian Law Reform Commission, to report by 31 July 2010

2 Impacts of family violence on children and parenting

Children are impacted adversely by experiencing or being aware of violence toward a parent. The impacts can be physical, emotional or psychological, which can be both short and long term. Children exposed to violence have higher levels of aggression, behavioural problems and anxiety, and lower self esteem. Exposure to family violence affects a child's relationships, social and cognitive development, education and mental health.

Early childhood adversity and abuse lead to enduring consequences that extend into adult life. Consequences can include mental health problems in adulthood¹⁹. When predicting levels of depression in adults, the greatest contributing factors include neglect, excessive physical punishment and family conflict. Among the strongest predictors of problems related to alcohol use is physical and verbal abuse²⁰.

A violent relationship is a poor role model that risks future perpetration of violence, and a propensity to being victimised. The best predictor of perpetration of violence or victimisation in young peoples' relationships is witnessing male to female violence in the home²¹.

Victims of family violence will be negatively impacted, physically, emotionally and psychologically. Many victims experience depression and low self-esteem which will affect a person's ability to parent.

In 2004 English and her colleagues, in a study of children who had been abused or neglected concluded:

There is a pronounced impact of domestic violence on family functioning, the caregiver's general health and wellbeing, and the quality of the caregiver's interaction with the child, which in turn are significantly associated with decrements of child functioning related to behaviour problems and health.²²

¹⁹ Brian Rodgers, Kelly Blewitt, Patricia Jacomb, Stephen Rosenman, *Childhood Adversity and Abuse and Mental Health in Adult Life*, Centre for Mental Health Research, Australian National University, 2003.

²⁰ *ibid.*

²¹ Dr David Indermaur, *Young Australians and Domestic Violence*, Australian Institute of Criminology No. 195, 2000.

²² Diana J. English, David B Marshall and Angela J. Stewart, *Effects of Family Violence on Child Behaviour and Health During Early Childhood*, Journal of Family Violence, 2004.

3 Definitions of family violence

Family violence research is permeated by fundamental definitional issues about what is meant by violence and abuse. For example, there is a tension between a general recognition that all violence and abuse is unacceptable, and an acknowledgement that not all violence and abuse is the same²³.

The definitions and typologies of family violence are discussed at 6.10.1 of this report.

Definitions differ as to the types of activity contemplated as potentially abusive, including the relevant intention and the impact of the violence on the victim.

Gender-neutral laws have been enacted that identify any act of violence by one partner against another partner as family violence. For many social scientists the term refers to any violence between intimate partners. For others family violence describes a coercive pattern of men's physical violence, intimidation, and control of their female partners.

3.1 Medical

The Australian Medical Association adopts a definition with an emphasis on abuse of power and goes on to list the specific relationships within which family violence can occur. It is the domination, coercion, intimidation and victimisation of one person by another by physical, sexual or emotional means within intimate relationships. Such intimate relationships include adult to adult, parent to child, child to parent, and child to child. Child abuse, elder abuse and, in particular, abuse of a woman by her partner, are common forms of domestic violence. The definition also extends to family members other than the person who is the direct recipient of violence who may also be victims of family violence²⁴.

3.2 Social science

Social science definitions have often focused on issues of power and domination and on the wide variety of activities which might be employed by an abuser. Other definitions focus on domestic terrorism, whilst others are broad enough to cover reciprocal or less controlling forms of violence.

According to Johnson's analysis, generally the most persistent and controlling forms of violence, such as 'intimate terrorism', are perpetrated by men, whereas more situational forms of violence are instigated by both men and women²⁵.

²³Lawrie Maloney, *Violence Allegations in parenting disputes: Reflections on court-based decision making before and after the 2006 Australian family law reforms*, 2008, *Journal of Family Studies*, Vol. 14 Issue 2-3.

²⁴Australian Medical Association, *AMA Position Statement: Domestic Violence*, 1998.

²⁵Joan B Kelly and Michael P Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, *Family Court Review*, Vol. 46 No. 3, July 2008 476 -499.

Definitions of family violence

The Commonwealth Partnerships Against Domestic Violence definition embraces a gendered approach by specifically identifying men as the main perpetrators. The definition states:

Domestic violence is an abuse of power perpetrated mainly by men against women both in relationships and after separation. It occurs when one partner attempts physically or psychologically to dominate and control the other. Domestic violence takes a number of forms. The most commonly acknowledged forms are physical and sexual violence, threats and intimidation, emotional and social abuse and economic deprivation. Many forms of domestic violence are against the law. For many indigenous people the term family violence is preferred as it encompasses all forms of violence in intimate, family and other relationships of mutual obligation and support.²⁶

This definition is broader in its reach than some other definitions as it includes 'economic deprivation' and 'emotional and social abuse' as forms of domestic violence. Council is of the view that these would commonly be accepted by the community as abusive behaviours.

3.3 Legal

Numerous definitions of family and domestic violence exist in legislation in Australia. There are further definitions in legislation around the world.

Legislation designed to protect individuals from family and domestic violence is the responsibility of the States and Territories. A schedule of definitions from State and Territory legislation, the Family Law Act and New Zealand legislation is contained in Appendix A.

The *Family Law Act's* definition of family violence in *section 4(1)* is:

...conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety.

Note: A person reasonably fears for, or reasonably is apprehensive about, his or her personal wellbeing or safety in particular circumstances if a reasonable person in those circumstances would fear for, or be apprehensive about, his or her personal wellbeing or safety.

The Family Law Act definition is conservative in its drafting. It is in some ways reminiscent of the common law definition of assault²⁷. It is questionable whether the definition encompasses the debilitating psychological abuse occasioned by controlling conduct.

²⁶Catherine Humphreys, *Domestic Violence and Child Protection: Challenging Directions for Practice*, Australian Domestic & Family Violence Clearinghouse, UNSW, 2007. p.24.

²⁷ In *Fagan v Metropolitan Police Commissioner*, assault was found to encompass "...any act which intentionally – or possibly recklessly – causes another person to apprehend immediate and unlawful personal violence": [1969] 1 QB 439 at 444.

Definitions of family violence

The definition in the Family Law Act applies whenever the court needs to consider the relevance of violence, particularly for parenting orders under Part VII²⁸. The definition is semi-objective, requiring reasonableness and also requiring the decision maker to consider the situation from the perspective of the victim²⁹.

The amendment to the definition introduced in 2006 removed the nexus between the alleged victim and their apprehension of violence and introduced a degree of remoteness and objectivity in the assessment of family violence by requiring a person “reasonably to fear.....or reasonably to be apprehensive about....his or her well being”.

The Family Court in its Family Violence Strategy acknowledges the narrowness of this definition and adopts a wider definition in its Strategy.

The definition could encompass ‘child abuse’. However, the terms are often used together in the legislation, suggesting that there is a distinction.

Council considers that the definition of family violence in the Family Law Act is too narrow as it does not reflect current understanding of what constitutes family violence. Consideration should be given to amending the definition in the Family Law Act to reflect more accurately those forms of communication and conduct between partners who for the purposes of State legislation would support the making of a protection order.

Recommendation 1

3. Definitions of family violence

3.1 The Attorney-General propose an amendment to *section 4* of the *Family Law Act 1975* to define family violence as in *section 5* of the *Family Violence Protection Act 2008 (Vic)*.

s5. Meaning of family violence

- 1) For the purposes of this Act, family violence is -
 - (a) behaviour by a person towards a family member of that person if that behaviour -
 - is physically or sexually abusive; or
 - is emotionally or psychologically abusive; or
 - is economically abusive; or
 - is threatening; or

²⁸ Belinda Fehlberg and Juliet Behrens, ‘*Australian Family Law, The Contemporary Context*’ Oxford University Press, 2008.

²⁹ *ibid*

Definitions of family violence

- is coercive; or
 - in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person; or
- (b) behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).

3.3.1 Impacts on the *Family Law Act 1975* of an amended definition of family violence

Council notes that the adoption of this definition would remove the objective element contained in the definition in section 4 of the Family Law Act. The “reasonableness” requirement cannot be tested in any meaningful way in any purported application of section 60I(b)(iii) and (iv).

If a parent should be found to have a genuine fear or apprehension, which for whatever reason may be found to be unreasonable, there should not be a presumption of equal shared parental responsibility.

If the extended definition should cause the invoking of section 60K the primary consequence would be an earlier consideration of the matter by a court than otherwise. This could be regarded as “queue jumping” but this can be corrected by the judicial officer at an early point.

Council suggests that further consideration be given to the possible legislative side effects of broadening the definition.

4 Family violence and specific issues

4.1 MENTAL HEALTH

It is recognised increasingly that separation and divorce contribute to mental health problems and suicide and vice versa.

Mental health may be a causal factor contributing to family violence and separation. It may continue to be an issue for the users of violence and may be a consequence for the victims. This is further discussed at 6.9.7 of this report.

People suffering severe depression and at risk of suicide are unlikely to be able to effectively participate in mediation or in litigation until they have accessed helpful and specific services³⁰.

Over the past decade allegations of violence in the Family Court are often accompanied by allegations of substance abuse and poor mental health³¹.

A 2006 study on familicide found significant common issues including a history of domestic violence, underreporting of violence by women, and evidence of untreated mental health issues in the violent partner³². The perpetrator of violence often had a history of obsessive behaviour, egocentricity, pathological jealousy and a proprietorial view of the partner and children.

In studies of offender characteristics that increase the likelihood of assault in the context of family violence, psychological and psychosocial characteristics are associated factors. Mental health is an indicator of risk of family violence³³.

4.2 ALCOHOL AND SUBSTANCE ABUSE

The capacity of a parent to care for their child is directly compromised by the effects of alcohol and substance abuse.

Alcohol and substance abuse by parents frequently occurs with other problems, including family violence, the combination of which place children at heightened risk

³⁰Dr Gail Winkworth and Dr Morag McArthur, *Framework for Screening, Assessment and Referrals in Family Relationship Centres and the Family Relationship Advice Line*, Australian Government, 2008.

³¹Chief Justice Diana Bryant *Family Violence, Mental Health and Risk Assessment in the Family Law System*, QUT Public Lecture Series, April 2009.

³²Caroline Harris Johnson, *Familicide and Family Law: a study of filicide-suicide following separation*, 2006, *Family Court Review*, Vol 44, Issue 3, 448-463.

³³Lesley Laing, *Risk Assessment in Domestic Violence*, Australian Domestic and Family Violence Clearing House, 2004.

of abuse and neglect.³⁴ Alcohol and substance abuse is incompatible with sensitive and responsive parenting and increases the risks to children.

Anecdotal evidence received by Council in consultations around the country with community based services, legal practitioners, judicial officers and other support services confirm the frequent and prevalent co-existence of alcohol and substance abuse with family violence.

4.3 INDIGENOUS ISSUES

Indigenous women are 35 times more likely to suffer family violence and sustain serious injury requiring hospitalisation, and 10 times more likely to die due to family violence, than non-Indigenous women³⁵.

The nature of violence from an Indigenous perspective is impacted by numerous systemic factors including dispossession from land and traditional culture, breakdown of community kinship systems, racism and vilification, entrenched poverty, overcrowding and inadequate housing, child removal policies and the loss of traditional Aboriginal female roles, male roles and status.³⁶

4.4 DIVERSE CULTURES

Women and children in some communities can face problems that exacerbate or enable violence³⁷. This is particularly so for some immigrant and refugee women. Factors that contribute to the vulnerability of these women include cultural or religious practices that subordinate women and cultural expectations that loyalty to family and community take precedence over personal safety.³⁸

4.5 CRIMINAL LAW

Many of the actions and behaviours that constitute family violence can be found in criminal offences. However, there is often a disconnection between criminal justice, personal protection and family law systems.

In some States and Territories there are a number of integrated responses between these systems. These tend to be in smaller centres of population, and are not

³⁴Sharon Dawe, Paul Harnett, Sally Frye, *Improving outcomes for children living in families with parental substance misuse: What do we know and what should we do*, Child Abuse Prevention Issue No 29, Australian Institute of Family Studies, National Child Protection Clearinghouse, 2008.

³⁵ 'The National Council to Reduce Violence Against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children*, 2009-2021, March 2009.

³⁶Queensland Government, *Aboriginal and Torres Strait Islander Women's Taskforce on Violence Report*, 2000 and Victorian Government, *Victorian Indigenous family violence taskforce – final report*, 2003.

³⁷ 'The National Council to Reduce Violence Against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children*, 2009-2021, March 2009

³⁸Susan Rees and Bob Pease, *Refugees settlement, safety and wellbeing: exploring domestic family violence in refugee communities*, 2006, Immigrant Women's Domestic Violence Service Inc., Victoria.

Family violence and specific issues

widespread in any of the larger geographical or more highly populated States and Territories.

The integrated responses include victim support services, criminal and personal protection processes, case management of matters and behaviour change programs for those who use violence.

5 Role of the Commonwealth Government

Protection of individuals from domestic and family violence and child protection are State and Territory responsibilities. The Commonwealth government has responsibility when family violence intersects with family law.

The Commonwealth Government has indirect constitutional power over family violence under section 51 (xxi) (the “marriage” power) and section 51(xxii) (the “divorce and matrimonial causes” power). This is discussed at Chapter 7 of this report.

5.1 THE IMPORTANCE OF FAMILY VIOLENCE IN THE 2006 FAMILY LAW REFORMS

On 1 July 2006 the *Family Law Amendment (Shared Parental Responsibility) Act 2006* amended the *Family Law Act 1975*. It implemented a significant number of recommendations made in the ‘*Every picture tells a story: Report on the inquiry into child custody arrangements in the event of family separation*’³⁹.

The amendments elevated the fundamental importance of family violence in decision-making about parenting arrangements. One of the objects in section 60B⁴⁰ relating to parenting orders and arrangements is to ensure that the best interests of children are met by protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

In deciding whether to make a particular parenting order a court must regard the best interests of the child as the paramount consideration – s.60CA.

The Act sets out numerous considerations that need to be canvassed when determining what is in a child’s best interests – s.60CC. The amendments highlighted the need to focus on two specific primary considerations in parenting cases. One primary consideration is the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence⁴¹. The other primary consideration is the benefit to the child of having a meaningful relationship with both of the child’s parents⁴². This has been characterised as the twin pillars of the best interests primary considerations.⁴³ The first pillar is the importance of a child having a meaningful relationship with both parents; the second pillar is the need to protect children from physical and emotional harm⁴⁴.

³⁹ House of Representatives Standing Committee on Family and Community Affairs, 2003.

⁴⁰ Section 60B(1)(b).

⁴¹ Section 60CC(2)(b).

⁴² Section 60CC(2)(a).

⁴³ *Mazorski and Albright* (2008) 37 Fam LR 518 per Brown J.

⁴⁴ *Moose and Moose* (2008) FLC 93-375 per Boland J.

Role of the Commonwealth Government

The Explanatory Memorandum to the amending legislation stated in relation to the two primary considerations:

the safety of the child is not intended to be subordinate to the child's meaningful relationship with both parents.

The additional considerations include any family violence involving the child or a member of the child's family and any family violence order that applies to the child or a member of their family if the order is final or the making of the order was contested.⁴⁵

In considering what parenting orders to make the court is to ensure orders are consistent with the child's best interests and with any family violence order and do not expose a person to an unacceptable risk of violence.⁴⁶

The court is to take prompt action in relation to allegations of child abuse or family violence.⁴⁷

The legislation created a rebuttable presumption that parents equally share parental responsibility for their children. The presumption does not apply if there are reasonable grounds to believe that a parent of the child has engaged in family violence or child abuse⁴⁸. If an order for equal shared parental responsibility is made the Court must consider making orders for the children to spend equal or substantial or significant periods of time with each parent if the court considers such an order would be in the best interests of the child and reasonably practicable.⁴⁹

The proved or likely or perceived presence or absence of family violence therefore significantly impacts on the framing of court-ordered parenting arrangements after separation.⁵⁰

Legislative duties are imposed on advisers to inform clients about certain things⁵¹. These include advice about parenting plans and what they might contain, the option of equal time between parents or substantial and significant time with a parent and what that would entail, and how they might resolve issues about children in the future. Advisers are defined as legal practitioners, family counsellors, family dispute resolution practitioners and family consultants.

The wide definition of adviser impacts on the whole family relationship and family law system, and those who make arrangements in the shadow of the law.

⁴⁵ Section 60CC(3)(j)(k).

⁴⁶ Section 60CG.

⁴⁷ Section 60K.

⁴⁸ Section 61DA(2).

⁴⁹ Section 61DAA(1)(2).

⁵⁰ *ibid.*, 10.

⁵¹ Section 63DA.

No legislative duty is imposed on professional advisers to canvass issues of family violence. No direction or guidance is given about what should be considered as parenting arrangements where issues of family violence are raised.

Courts are required to consider the question of costs with respect to parties who knowingly make a false allegation or statement. Questions have been posed as to the extent this might put pressure on victims to "stay silent" about violence or abuse⁵².

5.2 FEDERAL FAMILY COURTS CASE LAW

5.2.1 Relevance of family violence and its treatment by the court

Allegations of domestic violence have been accepted as relevant considerations in cases involving parenting arrangements since at least 1994⁵³. Trial judges should investigate allegations of family violence when hearing parenting disputes⁵⁴.

In a 1999 appeal case⁵⁵ Lindenmayer J stated that the relevance of the father's violence towards the mother was not only a risk that in later years when the children challenged the father's authority, he might become violent and cause them physical harm, but also:

A risk of at least equal if not greater significance is ... the risk to the children's emotional development arising from growing up in a violent household under the tutelage and influence of a violent parental role model.

The learned judge went on to say:

in cases such as this, where a case of sustained and severe domestic violence by one party is advanced by the other, the Court is obliged to give a clear indication whether it accepts or rejects that case and, in either event, to explain why it has reached that conclusion.

The importance of domestic violence as a factor for consideration in cases relating to parenting orders is now made very clear by ... the Act, and has been recognised by a number of judicial statements in relatively recent times.

5.2.2 Relevant legal principles

In 1994 the legal principles relevant to allegations of violence in the context of proceedings relating to parenting orders were summarised as follows⁵⁶:

⁵²The Hon. Diana Bryant QC, *Family violence, mental health and risk assessment in the family law system*, Speech to the Queensland University of Technology Public Lecture Series, April 2009.

⁵³ *Jaeger and Jaeger* (1994) FLC 92-492, Fogarty J.

⁵⁴ *Patsalou and Patsalou* 1995 FLC 92-580, Baker J.

⁵⁵ *Blanch and Blanch* (1999) FLC 92-837.

⁵⁶ *JG and BG* 1994 FLC 92-515, Chisholm J.

Role of the Commonwealth Government

- In proceedings relating to parenting orders, evidence of family violence is relevant insofar as it assists the Court in determining what orders will best promote the welfare of the children.
- The Court will have regard to the fact that family violence may be directly or indirectly relevant to children's welfare in a variety of ways, and may be relevant even where it is not directed at or witnessed by the children.
- So far as the evidence allows, the Court will attempt to understand the nature of any family violence that has occurred and its potential effect on the children.
- When the evidence permits the Court to make findings of contested allegations of family violence, and where such findings are necessary in order to determine what orders will promote the child's welfare, the Court will make the findings.
- When the Court is in a position to make findings on allegations of family violence which are relevant to the children's welfare, but does not need to do so in order to determine what orders will promote the welfare of the children, it may be open to the Court to refrain from making the findings. If such a discretion exists, the Court will exercise it on the basis of a consideration of whether the children's welfare is most likely to be promoted by making, or declining to make, findings.

5.2.3 Role models and capacity to parent

In 1995 an appeal case⁵⁷ confirmed that a father's conduct towards the mother did not establish him as a consistently desirable role model for the children. The conduct included physically assaulting the mother and making derogatory, denigrating remarks to her or about her to the children or to others within her circle of friends and acquaintances. The court opined it led to questions about the father's capacity to promote the children's relationship with their mother in the future and his capacity to contribute positively to their balanced development. This had important implications in an assessment of the father's capacity to effectively parent his children.

Even if the risk to a child's emotional development arising from a violent parental role model is not raised by the parties in their submissions, a judge of the Family Court ought to turn his or her mind to that risk in a case where the issue of domestic violence has been clearly raised by the evidence in the proceedings.

Probably the worst danger to children is the role model that a violent parent provides which can lead to children themselves coming to suffer the serious social disability of using violence in their dealings with other people including those they love. Such a disability can destroy the most intimate relationships and bring the person into conflict with other people, the police and the law. Abusive behaviour by way of putting down a child can also lead to

⁵⁷ *Patsalou and Patsalou* 1995 FLC 92-580.

serious long term emotional problems such as poor self esteem and lack of self confidence.⁵⁸

5.2.4 Dangers posed by violence for children

In 2000 Mullane J identified that family violence presents a multi faceted danger for children including a risk of violence and injury to the child personally; a risk of living with fear, insecurity and vigilance; the danger of ongoing fear that a parent perpetrating violence will emotionally or physically abuse the other parent they love.⁵⁹ Further the danger that a child will learn that abuse is part of life for females and become accepting of such behaviour and a danger that the child will come to believe from a father's abuse of their mother, that women are lesser beings. Mullane J went on to say that the greatest danger is that a child will learn from a parent perpetrating violence that physical and emotional abuse are acceptable ways of dealing with other persons and thus come to share the parent's disability.

In 2003 Moore J referred to research from social scientists about the highly detrimental effect upon young children of exposure to violence and the serious consequences such experiences have for their personality formation.⁶⁰ Terror, acceptance, exertion of control, emotional trauma, aggression, anxiety, behaviour problems and lower self-esteem were all identified as the flow on effects for a child living with violence.

5.3 WHAT IMPACT DOES FAMILY VIOLENCE AND ALLEGATIONS OF VIOLENCE HAVE ON FAMILY LAW CASES?

Allegations of family violence are a feature of many cases where court proceedings have been commenced. In 2003 the Family Court of Australia reported that in 74.7% of cases where a judge determined a parenting case there were allegations of family violence⁶¹.

In the AIFS report on allegations of family violence more than half the cases in both federal family courts contained allegations of family violence and/or child abuse. This report set out independent research on how allegations and denials of family violence and child abuse were raised and addressed in the family law system prior to the 2006 reforms. It examined the prevalence and nature of allegations of family violence and child abuse in family law children's proceedings filed in 2003.

A key finding of the report was that although allegations were common and often serious, they appeared to have only minimal impact on court sanctioned parenting outcomes⁶². However, the research indicated that when evidence of the existence of family violence was appropriately presented to the federal family courts, the judiciary

⁵⁸ *Blanch and Blanch* (1999) *supra*, Mullane J.

⁵⁹ *M and M* (2000) FLC 93-006.

⁶⁰ *T and N* (2003) FLC ¶93-172.

⁶¹ Submission of the Family Court of Australia to the Standing Committee on Family and Community Affairs Inquiry into Joint Custody Arrangements in the Event of Family Separation, September 2003.

⁶² Lawrie Maloney, *Violence Allegations in parenting disputes: Reflections on court-based decision making before and after the 2006 Australian family law reforms*, 2008, *Journal of Family Studies*, Vol. 14, Issue 2-3.

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made orders aimed at protecting the victims of that violence when framing parenting orders.

The authors found that in the majority of cases where allegations of family violence were made, proper evidence was not adduced to the court. Allegations were frequently not particularised. Allegations were rarely specifically responded to, except for cases in the Family Court requiring a judicial determination. Also, little corroborative or independent expert evidence was provided in support of the allegations.

The lack of supporting evidence suggested to the authors that legal decision-making was often taking place in the context of widespread factual uncertainty.

Consequently, the judicial determination was not always able to take the allegations of violence into account when making orders and dealing with the case. Potentially this left victims without protection and those who used violence were not provided with an opportunity to change their behaviour.

It is not clear why the pattern of vague written allegations exists. Council believes it is worthy of further study as to the reasons why. Potential reasons are the fear of escalation; desire to settle quickly; preserving peace for the future; providing a settlement lever; or whether violence of some variety is so endemic that it could be a standard paragraph in almost every marital history.

5.4 IMPLICATIONS OF LEGISLATIVE FRAMEWORK AND CASE LAW

In parenting cases where family violence is alleged, and it is contended that the allegations impact on the parenting orders that ought to be made, Council is of the view that the court must consider the risks posed by the allegations of family violence. In appropriate cases the court will make findings about family violence. The court must weigh the risks and any findings about family violence in determining the appropriate parenting arrangements that will meet the child's best interests.

If family violence is assessed to be a risk to the child, the court should take this into account in any determination about who should exercise parental responsibility, including whether such responsibility should be exercised equally or solely.

Assessments of risk and findings in relation to allegations of family violence should impact on whether an order for equal shared responsibility is practicable – see 10.2.

The need for a common understanding that is evidence based

6 The need for a common understanding that is evidence based

A range of professional disciplines and support workers are involved with families experiencing family breakdown and family violence. The system should properly support the families, parents, carers and children affected. It is becoming more and more apparent that there needs to be a common understanding between all involved as to the impact of family violence on child development, child health and parental capacity.

A number of good practices exist in the family relationship and family law system which should be supported and sustained. There is not necessarily one “best practice.”

Dissemination of consistent information about the impacts of family violence on children and parents across the community is required. Public education outlets, including television, radio, the internet, magazines and newspapers should be utilised. Education in schools about the impacts of family violence, respectful relationships and conflict resolution skills is essential.

6.1 COMMON KNOWLEDGE BASE

There needs to be an evidence base for understanding family violence and its impacts, and for interventions with people affected by family violence.

There is often a gap between expert knowledge about adult and child well-being, and what is known and readily accessible in the community. It is also clear that community understanding is assisted by case study “stories” as much as by statistics and concepts.

All sectors must be aware of research findings in the area of family violence, and the impacts of family violence on children and their carers. The research needs to be translated into practical applications for all professionals working with families.

Council is of the view that there needs to be a common knowledge base that can be accessed by those assisting people affected by family violence.

Council recommends that the common knowledge base be continually assessed, developed and updated to reflect ongoing research and experiences of those involved in the family law system.

For there to be universal acceptance and use of the common knowledge base, it must be available to the judiciary to inform determinations as to the best interests of a child. The Full Court in *McCall and Clark*⁶³ gave consideration to two relevant statutory provisions: section 144 of the *Evidence Act 1995* (Cth) and section 69ZX(3) of the Family Law Act. A judicial officer may inform themselves by relying on “well recognised

⁶³ *McCall and Clark* (2009) 41 Fam LR 483

The need for a common understanding that is evidence based

peer reviewed research”⁶⁴ but the type of research required does not have the indicia of “common knowledge” as envisaged by section 144(1) (a) of the Evidence Act.⁶⁵

The Council considers that the judiciary should be able to take judicial notice of the common knowledge base and that consideration be given to amend section 69ZX(3) accordingly.

The establishment, dissemination and support of a family violence common knowledge base is a key way for the Commonwealth Government to discharge its role in ensuring families and children are best protected in the family relationship and family law system, and to promote the best outcomes for children and their families.

6.2 ROLE OF THE AUSTRALIAN INSTITUTE OF FAMILY STUDIES UNDER THE FAMILY LAW ACT

The Australian Institute of Family Studies is established under the Family Law Act⁶⁶. It identifies and promotes an understanding of factors affecting marital and family stability in Australia. It does this through the conduct, encouragement and co-ordination of research. The object is to promote the protection of the family as the natural and fundamental unit in society.

6.3 REFERENCE GROUP FOR COMMON KNOWLEDGE BASE

The Council recommends the establishment of a reference group to oversee and lead the development, implementation and maintenance of a common knowledge base. The group should include respected experts and key stakeholders from all relevant disciplines and peak bodies to ensure all practitioners in the field approach matters from key common understandings.

The following stakeholders and organisations should be involved in the reference group: the Violence against Women Advisory Group, the Australian Institute of Judicial Administration, Family Relationship Services Australia, the Family Law Section of the Law Council, Family Law Council, the Australian Medical Association, the Royal Australian and New Zealand College of Psychiatrists, the Australian Psychological Society, the Australian Association of Social Workers, the federal family courts and the Office of Indigenous Policy Coordination.⁶⁷

The unique legislative position of the Australian Institute of Family Studies makes it an ideal body to oversee this work. Adequate resources would be necessary for the organisation to undertake this leading role.

The Council also recommends that the reference group be chaired by the Australian Institute of Family Studies with the aim of promoting an evidence-based understanding of family violence and its impacts.

⁶⁴ *ibid* 486

⁶⁵ See also *Maluka and Maluka* (*supra*)

⁶⁶ Family Law Act 1975 (Cth) s114B

⁶⁷ Part of the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA)

The need for a common understanding that is evidence based

6.4 EXPERT PANEL TO INFORM COMMON KNOWLEDGE BASE

The Council recommends that the reference group be advised by an expert panel that considers research, distils accepted opinions, and agrees on information that should be included in the common knowledge base. The expert panel should advise the government on its research agenda in the area of family violence.

The expert panel needs to undertake critical analysis of available material and views about family violence and its impacts in the Australian context.

Members of the panel should be drawn from all relevant social science and medical disciplines to ensure the comprehensive consideration of relevant materials.

As new research becomes available, the expert panel will review the common knowledge base to assess if amendments or additions are required.

Council recommends that the expert panel be chaired by the Australian Institute of Family Studies to review research findings and continually provide the reference group with an evidence-based understanding of family violence and its impacts in the Australian context.

6.5 ROLE OF THE DOMESTIC AND FAMILY VIOLENCE CLEARINGHOUSE

The Domestic and Family Violence Clearinghouse is a national organisation that provides information about domestic and family violence issues and practice.⁶⁸ Its primary goal is to prevent family violence. It supports specialist and generalist service providers, government agencies, researchers, advocates and activists through the dissemination of information and research, and through facilitating discussion.⁶⁹

The Clearinghouse has a database of publicly accessible examples of Australian family violence related programs, services and responses which reflect elements of good practice. It assists in information sharing and provides summaries of pilot programs. It enables agencies and service providers to keep up-to-date with service models, new initiatives and current standards of practice and assists with planning and development.⁷⁰

A listing on the database does not constitute endorsement by the Domestic and Family Violence Clearinghouse.

6.6 DATABASE TO SUPPORT USE OF COMMON KNOWLEDGE BASE

A fully endorsed database disseminating the common knowledge base should be developed and promoted by professional bodies with the support of government. The

⁶⁸ Funded by the Department of Families, Housing, Community Services and Indigenous Affairs and linked to the University of New South Wales.

⁶⁹ Australian Domestic and Family Violence Clearinghouse (2007) <http://www.adfvc.unsw.edu.au> at 25 November 2009.

⁷⁰ *ibid*

The need for a common understanding that is evidence based

database would house, at the expert panel and reference group's direction, nationally and internationally recognised research, and approved tools and information accessible to the family law and family relationship sector, including judicial bench books.

The family relationship sector responding to family violence would be guided by the common knowledge base and be kept up to date and be consistent in their approaches and responses to family violence.

Council envisages the database providing the basis for dissemination of accepted views about family violence and its impacts that would inform practice responses. It would support an integrated family violence response system and ensure the practical application of the common knowledge base.

Specifically, Council recommends the database house national family violence resources that are developed, endorsed and adopted by the expert panel and reference group and be accepted by representative bodies of all relevant professions.

The existing infrastructure of DFVC could be built on to support the collection, dissemination and use of the common knowledge base and anchor the information and tools that flow from this.

The usefulness of the database would be enhanced if it included links to a referral database of practitioners, organisations and bodies who adopt in their work the common knowledge base, and the resources and tools available on its database.

The database should include referral links to practitioners, organisations and bodies who adopt the common knowledge base.

6.7 GOOD PRACTICE MODELS

The Council recommends that the common knowledge base be used to guide good practice in all relevant disciplines. It should underpin good practice across the family relationship sector.

The common knowledge base should inform good practice models and guidelines, protocols, memoranda of understanding, training and tools for people who work with families affected by violence. It should guide information available to assist the general community about family violence and its effects.

Council recommends that the expert panel and reference group endorse good practice guidelines, models and tools.

In the legal arena the common knowledge base would inform a range of guidelines and tools, including guidelines for good practice for lawyers, a framework for expert assessments, precedent orders and judicial bench books.

The Council recommends that good practice models and guidelines be disseminated by professional and peak bodies, relevant government websites, professional journals and publications.

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6.8 TRAINING AND PROFESSIONAL DEVELOPMENT

The Council recommends that the common knowledge base underpin training programs and professional development across the family relationship and family law system. Training in relation to family violence should be undertaken by all working in the family relationship and family law systems. Training and professional development should focus on the common knowledge base and good practice guidelines, models and tools.

The Attorney-General's Department is currently developing a multi-disciplinary training package about family violence for people working in the family relationship and family law system. It is important that family violence training is consistent within and across disciplines.

The Council recommends that the expert panel and reference group endorse the content of education and training on family violence for those involved in the system. The training would be undertaken by people working in family relationships services, including family dispute resolution practitioners, lawyers, independent children's lawyers, family consultants, experts who provide evidence to courts and judicial officers. All key players should undertake relevant ongoing training at least annually. For example, legal practitioners should undertake continuing legal education in family violence if they practice in the area of family violence.

The training and education would be conducted or auspiced by a wide range of bodies. In the legal field this would include the Family Law Section of the Law Council, state law societies and foundations, the Australian Institute of Judicial Administration, National Legal Aid and the federal family courts.

6.9 EXAMPLES OF INFORMATION AND TOOLS ON THE NATIONAL DATABASE

6.9.1 Opinions about family violence and definitions

Opinions about how family violence issues should be addressed have differed both within and across disciplines over many years.

Since the early 1990s a growing body of empirical research has convincingly demonstrated the existence of different types or patterns of intimate partner violence.⁷¹ In 2005, Michael Johnson stated:

⁷¹ See: Janet R Johnston and Linda E. Campbell, 'A Clinical Typology of Interparental Violence in Disputed-Custody Divorces' (1993) 63(2) *American Journal of Orthopsychiatry* 190; Michael P. Johnson, 'Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women in U.S. Families' (1995) 57 *Journal of Marriage and the Family* 283; Amy Holtzworth-Munroe, Jeffrey C Meehan, Katherine Herron, Uzma Rehman, and Gregory L. Stuart, 'Testing the Holtzworth-Munroe and Stuart (1994) Batterer Typology' (2000) 68(6) *Journal of Consulting and Clinical Psychology* 1000; Michael P. Johnson and Kathleen Ferraro, 'Research on Domestic Violence in the 1990s: Making Distinctions' (2000) 62 *Journal of Marriage and the Family* 948; John Archer and Nicola Graham-Kevan, 'Intimate Terrorism and Common Couple Violence: Test of Johnson's Predictions in Four British Samples' (2003) 18(11) *Journal of Interpersonal Violence* 1247; Janel M. Leone, Michael P. Johnson, Catherine M. Cohan, and Susan Lloyd, 'Consequences of Male Partner Violence for Low-Income Minority Women' (2004) 66 *Journal of Marriage and Family* 471; and Michael P. Johnson,

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It is no longer scientifically or ethically acceptable to speak of domestic violence without specifying loudly and clearly, the type of violence to which we refer.⁷²

In 2007, two peak organisations in the United States convened a multi-disciplinary conference to consider areas of agreement and challenges to possible agreed principles in the area of family violence.⁷³ This conference became known as the Wingspread Conference. Reports from the conference together with articles written by participants have been drawn together in a social issue of *Family Court Review*.⁷⁴ It is a milestone document outlining current views about family violence and its impacts, particularly in the context of family law cases.⁷⁵

An important article that developed this understanding in the Australian family law context was written by Dr Tom Altobelli, Federal Magistrate entitled '*Family Violence and Parenting: Future Directions in Practice*'⁷⁶.

Consideration and dissemination of these agreed opinions and developments has far-reaching implications for court processes, interventions, tools, educational programs for professionals and for social and legal policy.

6.9.2 Impacts of family violence on children and parenting

The impact of family violence on children may be dependent upon the type of intimate partner violence that the child is exposed to.⁷⁷ The typology of violence also affects the likelihood of a violent partner being violent to a child.⁷⁸

However, all forms and types of violence have the potential to have significant negative impacts and potentially to cause great trauma to those involved and the children around them.

6.9.3 Family violence and Indigenous families

All people involved in the family relationship and family law system should understand the particular experiences and needs of indigenous people. The history, effects and impacts of past government policy are documented in the 1997 report

'Conflict and Control: Gender, Symmetry, and Asymmetry in Domestic Violence' (2006) 12 *Violence Against Women* 1003.

⁷² Michael P Johnson, *Domestic violence: It's not about gender – or is it?*, 2005, 67 (5), *Journal of Marriage and Family*, 1126.

⁷³ The Association of Family and Conciliation Courts and the National Council of Juvenile and Family Court Judges.

⁷⁴ Nancy Ver Steegh and Clare Dalton, Report from the Wingspread Conference on Domestic Violence and Family Courts, 2008.

⁷⁵ *Family Court Review*, Volume 46 Number 3 July 2008.

⁷⁶ AIJA Family Violence Conference, Brisbane, 2009.

⁷⁷ Joan B Kelly and Michael P Johnson, *Differentiation amongst types of intimate partner violence: research update and implications for intervention*, 2008, 46 (3), *Family Court Review* 476.

⁷⁸ *ibid.*

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'Bringing Them Home'.⁷⁹ Indigenous clients need to be dealt with sensitively and appropriately. Services Australia-wide are required to provide specialist support and advocacy for Indigenous families.

Everyone in the system who has contact with indigenous clients needs to regularly undergo cross cultural training to inform them of current issues, equip them to deal correctly with indigenous families and refer to appropriate services.

The Council recommends that cross cultural Indigenous training be part of the training and professional development in relation to the common knowledge base and that the database have referral links to Indigenous services.

6.9.4 Diverse cultural issues

The consultations undertaken in the preparation of the '*Time for Action*' report highlighted barriers for immigrant and refugee women and children who experienced violence.⁸⁰ As well as cultural and religious practices and expectations⁸¹ there were practical impediments including lack of knowledge of the legal system, limited translated information about legal rights, and fear of interaction with the legal system based on pre-migration experiences.

The circumstances of individual communities must always be assessed and addressed.⁸² The needs of individuals from diverse cultures should be assessed and addressed, and all those working in the family relationship and family law system need to be equipped to do this.

6.9.5 Screening and assessment

It is essential that all involved in the family relationship and family law system screen for matters likely to impact on children and parenting. There must be screening for family violence, mental health issues, substance abuse and other risk factors for children and parents.

Proper assessments are essential so the person conducting the screening can best assist in the particular case, and ascertain what referrals they need to make to ensure all necessary steps are taken to promote positive outcomes for all involved in the case.

6.9.5.1 Family violence

Screening for family violence must be conducted by all involved in the family relationship and family law system. Once family violence is identified a risk

⁷⁹ Human Rights and Equal Opportunity Commission, *Bringing Them Home - National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, (1997) 2 (2) Australian Indigenous Law Reporter 286.

⁸⁰ The National Council to Reduce Violence Against Women and their Children *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children*, 2009-2021, March 2009.

⁸¹ See 4.4 supra

⁸² *ibid*

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assessment must be undertaken. Appropriate referrals are essential to respond to the risks presented by the violence and support those affected.

Family dispute resolution is mandatory in parenting cases, save for specified exceptions, including family violence. Appropriate training in screening for family violence issues is essential for family dispute resolution practitioners, and those who refer matters to them. It is essential that practitioners have appropriate responses and options to offer once family violence is identified.

The Attorney-General's Department has undertaken significant work in commissioning screening and risk assessment guidelines and frameworks for family relationship centres and others. A number of other organisations and agencies have screening and risk assessment frameworks and tools.

A common framework for screening and risk assessment is essential across the family relationship and family law system. The Council recommends that a consistent framework for screening and risk assessment be developed in accordance with principles adopted in the common knowledge base. Also, that frameworks, tools and materials be endorsed by the expert panel and reference group.

6.9.6 Family violence and court proceedings - lawyers

To competently assist clients, lawyers will need to be familiar with and understand the common knowledge base. Judicial officers will be able to rely on information in the common knowledge base.

Council recommends that good practice guidelines and education and training for lawyers address a number of required steps. It is imperative that screening and risk assessment tools are applied and full instructions on family violence are obtained. Advice should be given on personal protection orders and parenting orders to ensure the physical and emotional security of children. Lawyers must ensure a safety plan is developed for the client in appropriate cases.

Lawyers are obliged to ensure properly particularised material is placed before the court. They must also identify any collateral supporting or corroborative evidence, and properly adduce this evidence to the court.

The '*Best practice guidelines for lawyers doing family law work*'⁸³ prepared by the Family Law Council and the Family Law Section of the Law Council of Australia should be revised to incorporate these requirements, and be updated from time to time in accordance with the common knowledge base.

6.9.7 Family violence and mental health

The family relationship and family law sectors currently provide assistance and referrals to parties who may be suffering from mental health issues. It is not the role of community based workers, legal practitioners or others who work with families to diagnose or treat people with depression or suicidal intent. They do however, need to

⁸³ Family Law Council and Family Law Section of the Law Council of Australia, *Best practice guidelines for lawyers doing family law work*, 2004, <http://www.familylawsection.org.au> at 25 November 2009.

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be equipped to recognise those at risk, and to make appropriate referrals to mental health and other relevant services so that assessments can be carried out.

Council recommends that consistent risk assessment tools for identification of mental health issues be developed in accordance with the common knowledge base and that the tools be endorsed by the expert panel and reference group. Council also recommends that the database includes referral links to mental health and other relevant services.

6.10 MULTI-DISCIPLINARY UNDERSTANDING AND APPROACHES

Each discipline and sector must better understand and appreciate the role of others who support families through family violence and family relationship breakdown. In particular, there needs to be better cooperation between social scientists and support workers who help families, and legal practitioners and the courts. A shared approach is required by family dispute resolution practitioners, family relationship service providers, lawyers, family consultants, social workers, psychologists, medical practitioners, psychiatrists and judicial officers.

The 2001 report *'Out of the Maze: Pathways to the Future for Families Experiencing Separation'*,⁸⁴ identified the need to improve coordination within the family law system. Family Pathways Networks were established by the Commonwealth Government in response to this finding. Seed funding was offered by the Attorney-General's Department in 2003 to support 8 community based Family Pathways Networks and 17 more networks have requested funding support. There are now 25 funded networks across Australia⁸⁵.

An evaluation of the networks is currently being undertaken by the Attorney-General's Department.

These networks have assisted local understanding, cooperation and referrals but are limited in number and geographical reach.

A number of strategies are required to develop and enrich inter-disciplinary cooperation and collaboration, particularly between family dispute resolution practitioners and family lawyers⁸⁶. Some suggested strategies are:

⁸⁴ Family Law Pathways Advisory Group, *Out of the Maze: : Pathways to the Future for Families Experiencing Separation* (2001).

⁸⁵ Networks are located in Adelaide, Albury/Wodonga, Alice Springs, Barwon South West VIC, Brisbane, Canberra, Central West NSW, Coffs Harbour, Darwin, Gippsland VIC, Gosford, Hobart, Launceston, Lismore, Melbourne, Newcastle, Northern WA, Perth, South Coast NSW, Southern WA, Sunshine Coast, Sydney, Taree/Port Macquarie, Toowoomba and Wollongong.

⁸⁶Helen Rhoades, Ann Sanson, Hilary Astor, and Rae Kaspiew, *Working on their Relationships : Inter-Professional Practices in a Changing Family Law System* (2006); and Helen Rhoades, Hilary Astor, Ann Sanson, and Meredith O'Connor, *Enhancing Inter-Professional Relationships in a Changing Family Law System: Final Report* (2008) The University of Melbourne < <http://www.law.unimelb.edu.au/files/Inter-professionalRelationshipsStudyFinalReport.pdf>> at 25 November 2009.

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- building opportunities for positive personal contact;
- building understanding of roles and responsibilities;
- providing lawyers and judicial officers with information about funded community based programs;
- considering ways to improve communication and feedback about clients; and
- family violence training for both professions.

The Council recommends the expansion of Australia-wide Family Pathways Networks to support cooperation and referrals across the family relationship and family law system.

Recommendation 2

6. The need for a common understanding that is evidence based

Common knowledge base

6.10The Attorney-General facilitate the establishment of an expert panel and reference group, both chaired by the Australian Institute of Family Studies, to develop, maintain and promote a family violence common knowledge base for those involved in the family relationship and family law system.

6.11The Attorney-General propose an amendment to *section 69ZX(3)* of the *Family Law Act 1975* to enable judicial officers to take judicial notice of the family violence common knowledge base

6.12The expert panel

- c. Review Australian and international research findings to ensure that the common knowledge base is evidence based and remains current;
- d. Advise the Government on its research agenda in the area of family violence.

6.13The reference group include representatives from the Violence Against Women Advisory Group, Family Relationship Services Australia, the Family Law Section of the Law Council, the Australian Medical Association, the Royal Australian and New Zealand College of Psychiatrists, the Australian Psychological Society, the Australian Association of Social Workers, the Australian Institute of Judicial Administration, the federal family courts, the Family Law Council and the Office of Indigenous Policy Coordination.

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6.14 The family violence common knowledge base include resources and materials endorsed by the expert panel and adopted by the reference group including:

- g. Research
- h. Frameworks
- i. Tools
- j. Referral links, including to Indigenous agencies
- k. Information resources
- l. Training materials

6.15 The Attorney-General facilitate the development of the Domestic and Family Violence Clearinghouse database to house and disseminate the family violence common knowledge base.

6.16 Professional and peak bodies utilise the family violence common knowledge base to:

- c. Guide good practice in all relevant disciplines and disseminate resources and materials from the common knowledge base.
- d. Underpin training programs and professional development that are regularly delivered across the family relationship and family law system, including Indigenous cross-cultural training.

Recommendation 3

Training and professional development

6.17 The Family Law Section of the Law Council of Australia in conjunction with the Family Law Council revise *'Best Practice Guidelines for lawyers doing family law work'* to incorporate

- g. the application of screening and risk assessment tools
- h. obtaining full instructions on family violence
- i. advice on personal protection orders, parenting orders to ensure the physical and emotional security of children, and on appropriate referrals
- j. a safety plan developed for the client in appropriate cases
- k. properly particularised material being placed before the court
- l. identification of any collateral supporting or corroborative evidence, and proper adducing of this evidence to the court

and update the Guidelines from time to time in accordance with the common knowledge base.

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Recommendation 4

Multi-disciplinary understanding and approaches

6.18The Attorney-General's Department

- c. facilitate the expansion Australia-wide of family pathways networks to support cooperation and referrals across the family relationship and family law system
- d. ensure that family pathways networks are aware of and disseminate information from the family violence common knowledge base.

Jurisdictional framework impacting on family violence and child abuse

7 Jurisdictional framework impacting on family violence and child abuse

7.1 THE JURISDICTIONAL DIVIDE

State and Territory Courts have the primary responsibility for the legislative framework that protects individuals from violence, and children from harm. Where allegations of family violence or child abuse are raised in tandem with parenting disputes, there is an overlap between the administration of public and private laws with the latter being laws administered by federal family courts. State and Territory systems are supported by investigative and prosecutorial agencies (police, child protection departments). Courts exercising federal jurisdiction to determine parenting disputes in families are reliant upon the parties and court appointed experts to present the relevant evidence to inform their decision making. The federal family courts have devised innovative case management approaches to ensure they have access to the relevant evidence to assist them in making assessments as to “unacceptable risk” and delivering determinations which are in the best interest of the child. In particular, the Family Court of Australia in partnership with State agencies introduced Magellan⁸⁷ as a measure to bridge the gap between the information available to it through the parties, and the information held by State agencies.⁸⁸

7.2 THE FEDERAL JURISDICTION FRAMEWORK – FEDERAL FAMILY COURTS

The reality for a separating family experiencing contentious issues in respect of parenting capacity is that there is no single judicial forum that can provide them with a comprehensive response to address their disputes, particularly where there are underlying issues of family violence and/or child abuse.

The Family Court of Australia, the Family Court of Western Australia (as a State Court exercising federal jurisdiction), the Federal Magistrates Court of Australia and courts of summary jurisdiction carry the primary responsibility for the exercise of powers conferred under the Family Law Act.⁸⁹

The powers of the federal family courts are conferred by the marriage, divorce and “matrimonial causes” powers including “parental rights, and the custody and guardianship of infants” in section 51 of the Commonwealth Constitution.⁹⁰ Those powers have been supplemented by the referral of additional powers by the States to

⁸⁷ Refer to discussion in respect of the Magellan Program in Chapter 9.3.1

⁸⁸ Daryl J Higgins and Rae Kaspiew, “Mind the gap...”: *Protecting children in family law cases*, (2008) 22 Australian Journal of Family Law 235.

⁸⁹ See eg, s 69H which confers jurisdiction on those courts with respect to matters arising under Part VII the *Family Law Act 1975*.

⁹⁰ Sections 51(xxi) and (xxii).

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the Commonwealth initially in respect of parenting orders relating to exnuptial children, and more recently in respect of financial causes relating to de facto partners.⁹¹ The concept of a family member is no longer confined by the matrix that once defined the nuclear family – husband/father, wife/mother, child – but radiates out to include a myriad of other familial relationships.⁹²

The Family Court of Australia and the Federal Magistrates Court of Australia (the federal family courts) have largely concurrent jurisdiction in relation to family law.⁹³ The Family Court of Australia has appellate jurisdiction in respect of courts of summary jurisdiction and the Federal Magistrates Court. The Federal Magistrates Court was intended to provide a faster, cheaper and simpler forum for the determination of family and federal law disputes and to deal with less complex matters.⁹⁴

In the family law context, the Family Court of Australia deals with the most intractable disputes and in particular with those parenting applications where there are extremely serious allegations of child abuse or physical abuse which often involve allegations of substance abuse and mental health issues. However, issues of child abuse, substance abuse, mental health and family violence are also highly prevalent issues in parenting applications dealt with by the Federal Magistrates Court.⁹⁵

7.2.1 Injunctive orders for personal protection

The federal family courts have power to issue injunctions and orders for the protection of a party in respect of circumstances arising out of a marital or de facto relationship. The injunctive provisions in section 114 of the Family Law Act are quite extensive and include the protection of property. In practice, although issues of family violence and child abuse may be raised in respect of other areas that fall within the federal family courts' jurisdiction, these issues are predominately raised in parenting applications.

Section 68B of the Family Law Act provides for injunctions or orders to be made for the personal protection of a child, a parent of a child, a person with responsibility for a child or a person who has the benefit of a parenting order. In practice, injunctive

⁹¹ Western Australia is an exception as it has not referred power to the Commonwealth to legislate with respect to ex-nuptial children or property rights of de facto couples. South Australia has not referred power with respect to property rights of de facto couples. See generally, *Commonwealth Powers (Family Law – Children) Acts 1986* of New South Wales, Victoria, Tasmania, and Queensland; and *Commonwealth Powers (Family Law) Act 1986* (SA). See also the *Commonwealth Powers (De Facto Relationships) Acts 2003* of New South Wales, Victoria, Queensland and Tasmania.

⁹² See s 4(1AC) which defines 'relative of a person' to include, for example, a father, mother, grandfather, grandmother, step-father or step-mother, son, daughter, grandson, grand-daughter, step-son or step-daughter, brother, sister, half-brother, half-sister, step-brother, step-sister, uncle, aunt, nephew, niece or a cousin of the person.

⁹³ The Family Court of Australia determines matters in specialised areas such as the Hague Convention, medical procedures, serious cases of child abuse and international relocation.

⁹⁴ See s 69L (Jurisdiction in relation to transferred matters under other Commonwealth laws), section 69MA (Transfer of proceedings from the Federal Magistrates Court – Residence orders), section 69N (Transfer of proceeding from courts of summary jurisdiction in certain cases).

⁹⁵ Lawrie Moloney, Bruce Smyth, Ruth Weston, Nicholas Richardson, Lixia Qu and Matthew Gray, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-Reform Exploratory Study*, Research Report No 15, Australian Institute of Family Studies, Melbourne, 2007.

Jurisdictional framework impacting on family violence and child abuse

orders save for Passenger Analysis Clearance and Evaluation alert orders,⁹⁶ do not provide the immediate access to justice and enforcement remedies delivered by the protection orders available in the State and Territory jurisdictions.

The federal family courts in exercising their jurisdiction are tasked with not only the determination of disputes but also the resolution of disputes through the use of dispute resolution services and conciliation services. Both family violence orders and child protection orders are largely public law disputes with a focus on protecting family members from harm rather than resolving disputes between parties.

In the making of injunctive orders the federal family courts are guided by objectives and principles that are espoused in the Family Law Act, including for example the “need to ensure individuals are safe from family violence”.⁹⁷ In determining parenting applications, the courts must regard the best interests of the child as paramount and to do so by having regard to the primary and secondary considerations prescribed in the legislation.⁹⁸

7.2.2 Shared parental responsibility reforms

The shared parental responsibility amendments⁹⁹ fortified the provisions to support the principle that it is in the child’s best interests to have a meaningful relationship with both parents. Of equal importance is the need to protect the child from harm.¹⁰⁰ While noting that the explanatory memorandum states that the safety of the child is not intended to be subordinate to the child’s meaningful relationship with their parents, the query is raised as to whether the converse should apply, that is that the child’s safety is the more important consideration.

Allegations of child abuse and/or family violence trigger a ripple effect in family law proceedings. Child abuse allegations invoke the mandatory reporting procedures¹⁰¹ requiring notification to the State child protection authorities. In cases where there are reasonable grounds to believe that there has been or there is a risk of family violence or child abuse, there may be:

- grounds for an exception to the legislative requirement to attend dispute resolution services,
- grounds for not applying the presumption of equal shared parental responsibility,¹⁰² and

⁹⁶ Orders made by a federal family court that restrain a person or child from leaving Australia may be placed on the Passenger Analysis Clearance and Evaluation (PACE) System which is facilitated by Australian Federal Police and monitored at departure points by Customs.

⁹⁷ Section 43(ca)

⁹⁸ *Family Law Act 1975* (Cth) ss 60B & 60CC; see also discussion at para 5.1 The importance of Family Violence in the 2006 Family Law Reforms

⁹⁹ *Family Law Amendment (Shared Parental Responsibility) Act 2006*

¹⁰⁰ *Family Law Act* s 60CC(2)

¹⁰¹ *Family Law Act* s 67Z

¹⁰² *Family Law Act* s 61DA(2)

Jurisdictional framework impacting on family violence and child abuse

- impact on the time the child spends with, or communicates with, a parent.¹⁰³

The shared parental responsibility amendments introduced a number of reforms, some of which converged on family violence and has ramifications on decision making processes in the family law arena and on those individuals and agencies working with the legislation.

The AIFS Report revealed that more than half the cases in the courts contained allegations of family violence and/or child abuse.¹⁰⁴ The number of cases where there is family violence and child abuse, often at the serious end of the spectrum, is an issue.¹⁰⁵ AIFS concluded: "...allegations of violence appeared to be 'core business' in family law disputes that went on to litigate in the (Family Court) and such allegations of violence were largely of a serious nature."

In parallel fashion, families who have approached Family Relationship Centres around Australia over the last two years appear to be reporting family violence, often mixed with mental illness, alcoholism and drug use, in 60-90% of presenting cases, depending on the geographical areas serviced by each FRC.¹⁰⁶

It is the perception of the judiciary that, since the introduction of the shared parental responsibility amendments, the incidence of cases where there are allegations of family violence and/or child abuse, substance abuse and mental health issues has had an increased presence in cases requiring a judicial determination.¹⁰⁷ Often these issues are not amenable to resolution outside a judicial determination and that trend poses a significant dilemma for a jurisdiction that has the obligation to make decisions that are in the child's best interest but is at the same time reliant on agencies working outside the federal jurisdiction to assist it in providing the relevant information in respect of those important factors.

7.2.3 Impetus for legislative amendment

Federal family courts do not have an investigative role.¹⁰⁸ Evidence which is adduced is presented by the parties or the independent children's lawyer (if appointed and if able to be funded by Legal Aid). The Family Law Act does provide some legislative support to provide the judicial officer with access to the evidence required to assist in the decision making process in determining the best interest of the child and issues of unacceptable risk. However, when there are issues of parental capacity in respect of one or both of the parents often coupled with other factors such as substance or alcohol

¹⁰³ Family Law Act s 60CC

¹⁰⁴ Lawrie Moloney, Bruce Smyth, Ruth Weston, Nicholas Richardson, Lixia Qu and Matthew Gray, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-Reform Exploratory Study*, Research Report No 15, Australian Institute of Family Studies, Melbourne, 2007.

¹⁰⁵ Daryl J. Higgins, *Cooperation and coordination: an evaluation of the Family Court of Australia's Magellan case-management model*, Australian Institute of Family Studies, 2007, p 88.

¹⁰⁶ Anecdotal evidence collected from Family Relationship Centres at Family Law Council sittings around Australia

¹⁰⁷ Visitors to the Family Law Council's, quarterly meetings, particularly judicial officers, have provided anecdotal evidence to this effect.

¹⁰⁸ Family Law Council, *Family Law and Child Protection*, Final Report, 2002.

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abuse or mental health instability, then there may well be parallel issues in respect of child protection.

The reliance of the federal family courts on the provisions of the Family Law Act in obtaining the necessary assistance from State protective agencies has, when one considers the case law, proven to be contentious. The subpoena procedure is the courts method of requiring the production of documents and yet that process does not necessarily secure the production of documents held by State child protection agencies.¹⁰⁹ The 2006 amendments endeavoured to clarify the courts power to require production by inserting section 69ZW. However compliance by State child protection agencies with orders made pursuant to that section has proved to be a legal labyrinth.¹¹⁰

The federal family courts are able to request the intervention of the State child protection agency pursuant to section 91B of the Family Law Act. The experience has been that intervention rarely occurs. There are a number of reported cases where judges have expressed the dilemma that confronts a court when the relevant Minister elects not to intervene, and neither parent has the necessary parental capacity to care for the children.¹¹¹ As to what redress a judicial officer has in discharging their obligations under the Family Law Act to make decisions which are in the best interests of the child when there is no suitable carer presenting as a party is a challenge. Whether a federal family court judge may order that a Minister become a party is a matter which is to be determined by the Full Court of the Family Court in the near future.¹¹²

The reliance of the federal family courts on the resources of State agencies to fill evidentiary gaps not met by the parties and the dilemma the court faces when there is no suitable parent and no intervention, provide impetus for change. A legislative solution would be to provide for a single streamlined exchange of information between those agencies and the federal family courts and to ensure that the courts have recourse to State based foster care.

7.3 FAMILY COURT OF WESTERN AUSTRALIA: A STATE FAMILY COURT

Western Australia has a family court that is vested with both state and federal jurisdiction in matters of family law.¹¹³ It may deal with divorce, property of a marriage or de-facto relationship, parenting orders and all other matters relating to children, maintenance and adoption.

The Court also has power to exercise jurisdiction under the *Children and Community Services Act 2004* (WA).¹¹⁴ Unlike the federal family courts, it may issue child care or

¹⁰⁹ *Northern Territory of Australia and GPAO & Ors* (1999) 196 CLR 553.

¹¹⁰ *Fitzpatrick and Fitzpatrick* (2004) FamCA938.

¹¹¹ *Denny and Purdy* (2009) FamCA 547..

¹¹² *Ray and Anor and Males and ors* (2009) FamCa 219.

¹¹³ *Family Court Act 1997* (WA) ss 35-36.

¹¹⁴ *ibid* s 36.

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protection orders. In practice, the West Australian Children's Court exercises primary jurisdiction in this area in Western Australia. However, the absence of the impediment to the exercise of jurisdiction other than State based jurisdiction provides the Family Court of Western Australia with the potential to provide court users with a cohesive court system that provides a considered and integrated response to disputes.¹¹⁵

Family violence orders (referred to as Violence Restraining Orders) are usually issued in the Magistrates Courts under the *Restraining Orders Act 1997 (WA)*. There is however, pursuant to section 63(2) of that Act, the power given to a court hearing proceedings under the *Family Court Act 1997(WA)* or the Family Law Act, to make a restraining order against a party to those proceedings or any other person who gives evidence in those proceedings.

7.3.1 The State and Territories jurisdictional framework

The primary mechanism in State and Territory courts of relevance to parties experiencing family violence are protection orders.¹¹⁶ Legislation in each State and Territory enables magistrates/local courts to issue such orders when a person is in fear as to their safety¹¹⁷. These orders can be expeditiously obtained upon application by an individual or the police and may be framed to restrict a wide range of conduct. Breaching the terms of a family violence order is a criminal offence and the police may arrest an offender without a warrant. Protection orders are the most immediate and accessible response for victims of violence.

In the comparative analysis of laws relating to family violence in Australia and New Zealand, *Domestic Violence Law in Australia*, the Report acknowledged that although the legislation across the States and Territories varied in approach to central issues, there was compatibility across the majority of the legislative provisions. Importantly, the laws are generally clear and robust and cover the same relationships.

“In terms of its effect, the legislation does not appear to be substantially different across jurisdictions in respect of crucial matters such as:

- the types of conduct which may constitute domestic violence, and the grounds on which a protection order may be made;
- the types of orders that may be made in the domestic violence context and the kinds of prohibitions, restraints

¹¹⁵ The Family Court of Western Australia is proposing to pilot an integrated system where the parties are involved in both family law and related child protection issues.

¹¹⁶ The *Family Law Act 1975 (Cth)* s 4(1) defines ‘family violence orders’ as an order (including an interim order) made under a prescribed law of a State or Territory to protect a person from family violence. Family violence orders are given various names under State and Territory Acts; protection orders, restraining orders or apprehended violence orders. For ease of reference, these will be referred to collectively as ‘family violence orders’.

¹¹⁷ See *Crimes Act 1900 (NSW)*, *Crimes (Family Violence) Act 1987 (Vic)*, *Domestic Violence (Family Protection) Act 1989 (Qld)*, *Domestic Violence Act 1994 (SA)*, *Restraining Orders Act 1997 (WA)*, *Family Violence Act 2004 (Tas)*, *Domestic Violence and Protection Orders Act 2001(ACT)*, *Domestic Violence Act 1992 (NT)*.

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and conditions that an order may impose on the person against whom it is made;

- the capacity for temporary orders to be made or obtained quickly by police in emergency situations, without the need for an appearance before a court; and
- the (criminal) effect of contravening a domestic violence protection order.”¹¹⁸

The expedition with which an order can be obtained in the State jurisdiction, the enforcement of the order by State police, and the criminal sanctions associated with the breach of the order provide an individual with an access to justice regime which cannot be replicated by the injunctive relief and enforcement remedies offered by the Family Law Act.

There is often interplay between State Protection orders which provide for the protection of a parent and their children by prohibiting the alleged perpetrator (the other parent) from coming within a defined distance of the parent and child, and federal family court orders that provide for the child to spend time with that parent.

Division 11 of Part VII of the Family Law Act sets out provisions to address some of the inconsistencies in orders made in different jurisdictions. For example, existing Protection orders must be taken into account when making a parenting order.

States and Territories have exclusive jurisdiction over child welfare legislation which, in most cases, is administered in a specialised Children’s Court.¹¹⁹ There is significant variation between the legislative regimes of the States and Territories. However, once it is found that intervention is necessary in order to protect a child from harm, the court may issue a range of orders including custody, guardianship, access, supervision or emergency protection orders. The applicant in all such child protection cases is the relevant child protection authority. There is an issue in those States where the child protection legislation uses terminology which differs from that in the Family Law Act. In those States where the terminology is the same, there is greater potential for those operating across the federal and state divide to understand the orders made in each of the respective courts.¹²⁰

The interplay between State child protection orders and orders by federal family courts is heightened where there are differing arrangements between parents of children in a family or differing orders in respect of siblings within a family unit. This is not uncommon in blended families for a parent to have had children with different partners. Often the arrangements in respect of each of the children may vary. For example, one child may be the subject of a State child protection order (public law) and the arrangements in respect of the other child(ren) are determined under private law (federal family courts). There is also the concern in respect of those children who are the subject of temporary child protection orders in the State courts but the orders are

¹¹⁸ The National Council to Reduce Violence against Women and their Children, *Domestic Violence Laws in Australia*, 2009, p13, [1.15].

¹¹⁹ South Australia and the Northern Territory are the exceptions with a Youth Court and a Family Matters Court having jurisdiction over child welfare legislation respectively.

¹²⁰ See for example *Children and Young Person (Care and Protection) Act 1998* (NSW)

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not pursued by the child welfare authority in the State or Territory courts on the basis that the “relative” is to apply to the federal family courts for parenting orders.

7.3.2 Summary

In summary, the federal family courts determine private disputes between parties in relation to separation and divorce and the consequential disputes that may arise including parenting disputes.¹²¹ The provisions of the Family Law Act require consideration of orders made under a child welfare law¹²² however the division of powers means that neither the Commonwealth nor the States’ jurisdiction provides a family unit with the complete suite of judicial solutions to address all of the legal issues that may impact on a family unit in respect of their children.

7.3.3 Family violence and the jurisdictional divide

Although a court exercising jurisdiction under the Family Law Act may adjourn proceedings when another court or authority has made an order or proposes to make an order, difficulty lies in ensuring that the federal family court is informed there are proceedings in another jurisdiction, or that orders have been made.

The primary obligation to ensure that a court is informed rests on the parties, however often there is failure, inadvertent or deliberate, to make the disclosure to the court. It has been noted that this is more prevalent where parties are unrepresented¹²³. Failure to disclose does not affect the validity of the order¹²⁴ but hampers the ability of the court to make appropriate and informed decisions.

Conflicting decisions include the potential for multiple proceedings and inconsistent or conflicting orders made by different courts in respect of the same children with a consequential waste of judicial time and litigation costs and, often, legal aid funding caused by the duplication of litigation. There remain occasions where the authority vested with the decision making power to litigate in a child welfare case does not exercise that power until the proceedings are well advanced in the federal family court.¹²⁵ One must also acknowledge the emotional cost to parents and trauma to children involved in protracted litigation extending across the federal and state jurisdictions.¹²⁶

¹²¹ See *Family Law Act 1975* (Cth) s 31(1).

¹²² *ibid* s 69ZK.

¹²³ The National Council to Reduce Violence against Women and their Children, *Domestic Violence Laws in Australia* (2009) 225, [6.2.32]; Maurine Pyke, *South Australian Domestic Violence Laws Discussion and Options for Reform* (2007) 137-40.

¹²⁴ *Family Law Act 1975* (Cth) s 60CF(3).

¹²⁵ See Lawrie Moloney, Bruce Smyth, Ruth Weston, Nicholas Richardson, Lixia Qu and Matthew Gray, *Allegations of Family Violence and Child Abuse in Family Law Children’s Proceedings: A Pre-Reform Exploratory Study*, Research Report No 15, Australian Institute of Family Studies, Melbourne, 2007, p.128...

¹²⁶ See eg. Dr Jennifer McIntosh, ‘Child inclusion as a principle and as evidence-based practice: Applications to family law services and related sectors,’ *Australian Institute of Family Studies Issues* (2007)1.

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7.3.4 Interaction and overlap between jurisdictions

Despite the differences between jurisdictions and the distinct divide between private and public law, the orders available under the State and Territory family violence and child protection legislation cover much of the same ground as the Family Law Act. For example, a child protection order from a State or Territory court may grant a mother custody of her child. A parenting order made pursuant to Part VII of the Family Law Act by a federal family court may have the same effect. The courts do use differing terminology as prescribed by their respective legislation but the outcome in terms of legal effect is the same for the parent. Similarly, a State or Territory family violence order may prevent a husband/father/de facto spouse from approaching a wife/mother/ de facto spouse and so may an injunction made under section 114 of the Family Law Act. The enforcement regime varies - the former draws on public law enforcers, the latter falls to the parties. Consequently, despite the courts offering different procedural alternatives from a legislative perspective, there is significant overlap. This gives rise to two primary areas of concern.

7.3.5 Multiple proceedings

The current court structure means that more than one court may be involved in a particular family breakdown. Disputes cannot be neatly divided into private and public areas of law and parties will often have to institute or be engaged in proceedings in various legal forums in order to have all of their issues determined. Research conducted by Kelly and Fehlberg found this was the situation in most cases in the Victorian Children's Court which, at some point, were also conducted in the federal family courts.¹²⁷ The overlapping jurisdictions cause significant angst for the parties involved and considerable difficulties for the courts.

Reforms to the Family Law Act attempted to address the duplication of proceedings. For example section 114AB(2) provides that a person who has taken proceedings under a State or Territory law cannot institute proceedings under section 68B or section 114 in respect of the same matter, with limited exceptions. These provisions are quite limited, however, as they capture only those matters that relate to orders for personal protection. State courts are also conscious of families seeking the benefit of protective orders from State courts but addressing their family issues in the federal family courts. State court orders often exclude contact with children pursuant to a court order under the terms of the protective order. Consequently, it is not uncommon that similar proceedings are on foot, with similar allegations and evidence being presented, but in different forums.

Despite the legislative provisions, there is no guarantee that courts know of the extent of proceedings in other courts. The outcome is further complicated for the family in that the federal family courts do not have an investigative arm and in determining what is in the best interests of the child, make a finding as to risk of harm and not as to whether it has or has not occurred.

¹²⁷ Fiona Kelly and Belinda Fehlberg, 'Australia's fragmented family law system: jurisdictional overlap in the area of child protection' (2002) 26 *International Journal of Law, Policy and the Family* 38, 47-53.

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7.3.6 Inconsistent orders

There is potential for inconsistent orders to be made. The area of greatest concern in relation to family violence is between State and Territory family violence orders and orders made under the Family Law Act in relation to children. For example, federal family courts may issue a parenting order that allows a parent to spend time with a child and there may be a family violence order in place preventing this parent from coming within a stipulated radius of the other parent.

At present, the Family Law Act puts the onus on parties to inform the court of any current family violence orders.¹²⁸

In contrast, the Family Law Act does not place a positive obligation on parties to inform the court about any relevant orders or arrangements in place under child welfare laws, although the federal family courts do require the disclosure of other court cases and orders in Part F of the Initiating Application (Family Law). Failure by a party to disclose this information to the court creates a significant gap in the information available to the courts in making appropriate decisions about what is in the best interests of the child. It is the Council's view that that the Family Law Act should place an obligation on the parties to disclose this information to the court.

If a court does not have information about existing family violence or child protection orders and as a consequence fails to have evidence of violence/abuse allegations or of the existing orders, it may make subsequent orders that fail to protect a person or child from harm and in the more extreme cases may expose a child to risk of harm. Kelly and Fehlberg have argued that notification of orders cannot be left up to the parties¹²⁹. Such information is critical to the proper determination of a case and should be communicated by child welfare agencies and State and Territory courts.¹³⁰ However there is a lack of relevant information exchange between courts of different jurisdictions and between the courts and the child welfare departments.

As discussed earlier, where a parenting order, recovery order or injunction is issued by a federal family court that is inconsistent with a State or Territory family violence order, the family violence order is invalid.¹³¹ In contrast, orders made under State or Territory child welfare legislation for the care or protection of children prevails over federal family court orders.¹³² There is evidence that these provisions are not a complete answer to the problem of inconsistency in orders. The Department of Families, Housing, Community Services and Indigenous Affairs has noted that researchers and practitioners in family law continue to report that conflict between orders creates unsafe and traumatic situations for parents and children.¹³³

¹²⁸ *Family Law Act 1975* (Cth) s 60CF(1).

¹²⁹ Fiona Kelly and Belinda Fehlberg, 'Australia's fragmented family law system: jurisdictional overlap in the area of child protection' (2002) 26 *International Journal of Law, Policy and the Family* 38, 54.

¹³⁰ *ibid.*

¹³¹ *Family Law Act 1975* (Cth) s 68Q(1).

¹³² *ibid* s 69ZK

¹³³ The National Council to Reduce Violence against Women and their Children, *Domestic Violence Laws in Australia*, (2009), 224,[6.2.29].

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7.4 CONCURRENT JURISDICTION – AVENUE FOR REFORM

7.4.1 Federal family courts - protection orders

Protection orders are currently the most practical and accessible response for those experiencing family violence. The federal family courts have the ability to make similar orders under ss 68B and 114, however these are more limited in scope. Consequently, many parties appear before both State/Territory and federal courts to obtain adequate remedies in relation to the same family dispute. There is potential for duplication in proceedings with similar evidence presented and issues argued in various Courts.¹³⁴

Consideration should be given to extending the jurisdiction of the federal family courts to be concurrent with the States and Territories with regard to Protection orders. This proposal would increase the accessibility and timeliness of the response of the federal family courts to family violence and enable parties to deal with all of their issues in one forum¹³⁵.

State and Territory police are responsible for enforcing breaches of family violence orders under the various legislative regimes. To avoid duplication and confusion, once made the order may be “registered” by filing a copy in the relevant State court and may then be enforced as an order of that court. State and Territory police are therefore authorised to enforce any family violence orders that have been made in the federal family courts.

7.5 NATIONAL REGISTER OF FAMILY VIOLENCE ORDERS

Family violence is an important consideration in many aspects of proceedings in the federal family courts. The ability of the Courts to make appropriate orders rests on the provision of adequate information regarding family violence and family violence orders. At present, unless the parties disclose the existence of family violence orders, the courts have little ability to determine whether there are other relevant orders in force.

A national register of protection orders presents a viable option to address these issues.¹³⁶ Orders made by the State and Territory courts, as well as those made by the federal family courts could be made accessible to court staff, child protection agencies, police and mental health agencies on a national register. The data on the register would not constitute evidence for the purposes of court proceedings but would alert relevant staff where appropriate. Extending access to police services and welfare authorities would further enable any response to family violence by these groups to be timely and appropriate.

¹³⁴Family Law Council, *Child Protection and Family Law*, Final Report, 2002.

¹³⁵ The Council awaits with interest developments in the initiatives being pursued through the Standing Committee of Attorneys-General (SCAG) to create a national judiciary across Federal and State Courts¹³⁵. Particular reference is made to the initiative proposed in Victoria with a dual Federal-State appointment.

¹³⁶ See eg, recommendation by Coroner Lock inquest into the Rigg murder-suicide for the establishment of a police data base of family contact supervision orders: *Coroner calls for national domestic violence database* (2005) ABC Online <<http://www.abc.net.au/news/stories/2005/03/18/1326198.htm>..

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The notion of such a register is not unprecedented. In the 1999 Model Domestic Violence Laws Report a national database of domestic violence orders was proposed to streamline and simplify the registration and enforcement of orders between jurisdictions.¹³⁷ The model considered was based upon CrimTrac, an executive agency established by the Commonwealth government to facilitate information sharing. As noted in the Pyke Report in 2007 this database could be adapted to meet the aims of a national register of family violence orders.¹³⁸ The National Plan to Reduce Violence against Women recommended the establishment of a national scheme for the registration of domestic and family violence orders.¹³⁹

In a report by the Allen Consulting Group in 2008, the possibility of expanding the number of agencies able to access information on the 'interstate alert system' was discussed. This system is currently used by child protection agencies in Australia and New Zealand to assist in locating a family or child where child protection concerns exist. The existence of this database, and its potential expansion, could serve as a model for discussion of how a register of family violence orders could operate. It should be noted that the impact of the 2006 amendment which allows a parenting plan to override an order has not yet been considered¹⁴⁰. Such a plan does not require registration and it may impact on the currency of a database.

Models from the United Kingdom may also be of interest. As part of the Every Child Matters program, an online directory called ContactPoint has been deployed from early 2009. On 2 October 2009, the UK Government launched a public consultation on amendments to the ContactPoint regulations (the rules governing ContactPoint). This consultation seeks views on proposed amendments to *The Children Act 2004 Information Database (England) Regulations 2007* (the ContactPoint regulations) which were made under section 12 of the *Children Act 2004* and came into force on 1 August 2007. Consultations are due to close on 29 December 2009.¹⁴¹ It will contain basic information on every child in the country, but most importantly, will disclose which practitioners or agencies have had contact with them. Information will be available to service providers in health, education, welfare and the police. It aims to deliver better support for children at risk and decrease duplication in service delivery. Whilst the scope of this register goes far beyond what is recommended, it nevertheless indicates that access to information is essential to coordinating services for the safety and benefit of children and families.

7.6 INFORMATION SHEETS

Developing an information sheet to be served with all family violence orders may also help to address some of the issues identified above. It could include information on

¹³⁷ Domestic Violence Legislation Working Group, Attorney-General's Department, *Model Domestic Violence Laws Report* (1999).

¹³⁸ Maurine Pyke, *South Australian Domestic Violence Laws Discussion and Options for Reform*, (2007) 139.

¹³⁹ Australian Government, *The National Plan to Reduce Violence against Women - Immediate Government Actions*, April 2009.

¹⁴⁰ *Family Law Act 1975* (Cth), s 64D.

¹⁴¹ Department for Children, Schools and Families, *Every Child Matters: About Contact Point* (2008) <<http://www.dcsf.gov.uk/everychildmatters/strategy/deliveringservices1/contactpoint/about/contactpointabout/>> at 18 December 2008.

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how family violence orders interact with family law proceedings (such as the potential to breach family violence orders by contacting other parties to make parenting arrangements) and information about the need to notify family courts of the existence of such orders. This may help to ensure family violence orders made in State and Territory courts are not inadvertently breached by a party complying with the terms of an Order of a federal family court. Judicial officers in State and Territory Courts are sensitive to this potential for inconsistency between orders and often make provision exempting orders made by federal family courts.

Some State Magistrates Courts already publish fact sheets on the family violence orders available in their jurisdiction.¹⁴² These contain information on what orders are available, how to obtain them, how long they will last and how to cancel them. There is scope to extend these fact sheets to include the information discussed above.

The federal family courts have also published various fact sheets, although none deal with family violence orders or their counterparts available under the Family Law Act.¹⁴³ However, the way in which some fact sheets are utilised could be replicated. For example, the fact sheet entitled 'Parenting Orders – obligations, consequences and who can help' is given to individuals that are subject to parenting orders. It contains information about the legal obligations created by a parenting order and the consequences that may follow if it is breached. A similar information sheet used in an analogous way in all courts issuing family violence orders would go some way to ensuring that parties are aware of the way such orders interact with family law proceedings.

7.7 CONCLUSIONS AND RECOMMENDATIONS

The division of powers in the Constitution in relation to family law has resulted in a complex system of courts that provide various remedies for families experiencing family violence or abuse. As a result many families are involved in proceedings in more than one jurisdiction. This increases the possibility of inconsistent orders being made and of putting family members at risk of further violence and abuse and exacerbating an already strained situation.

The jurisdictional divide has also perpetuated a culture of separation between States and Territories as administrators of public aspects of family law and the federal family courts as adjudicators of public disputes. There is inadequate communication, coordination or information sharing between courts and authorities despite significant overlap.

¹⁴² See, eg, New South Wales Local Courts fact sheets on domestic violence <http://www.lawlink.nsw.gov.au/lawlink/local_courts/ll_localcourts.nsf/pages/lc_family_matters#Domestic%20Violence>; Queensland Magistrates Court fact sheet on domestic violence <<http://www.courts.qld.gov.au/1384.htm>>; Western Australian Magistrates Court fact sheet on violence restraining orders http://www.magistratescourt.wa.gov.au/files/Civil_factsheet_38.pdf.

¹⁴³ See Family Court of Australia website; <<http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/publications/All+Publications/List+of+all+publications/>>..

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In a recent review of the Tasmanian “Safe At Home” initiative a number of stakeholders highlighted these concerns.¹⁴⁴ They noted that jurisdictional cross-overs can potentially compromise the safety of those affected by violence. This is particularly evident in cases where a protection order is in place and where federal family court proceedings are pending or there are orders in place.

To address these concerns consideration should be given to a referral of powers so that federal family courts in determining a parenting application have concurrent jurisdiction with that of State courts to deal with all matters in relation to the children including where relevant family violence, child protection and parenting orders.

Achieving this goal would be the best outcome for people experiencing family violence and may circumvent the disparity between children’s, state and family courts.

Consultation undertaken by Family Pathways supports this view with stakeholders indicating they are in favour of an integrated court.¹⁴⁵ They expressed preference for one court that would deal with criminal proceedings, protection orders, child protection and family law issues.¹⁴⁶ This type of “unified court” goes further than the present recommendation and is consistent with the recommendations of the Council in its report “Family Law and Child Protection”.¹⁴⁷ It is indicative of the growing support for federal family courts to exercise some aspects of State jurisdiction and has the potential to deliver to families the same access to justice that can be delivered by the Family Court of Western Australia.

To implement this recommendation, Constitutional amendment or a referral of powers by the states and territories in relation to child welfare and family violence orders would be required. The process for amending the Constitution is complex and difficult and historically, it is difficult to achieve the required majority of voters nationally and across all States¹⁴⁸. Referral of powers from the States and Territories is far more achievable as has been evident in respect of the recent referral of powers in respect of superannuation, and de facto relationships.

Recommendation 5

7. Jurisdictional framework impacting on family violence and child abuse

7.4 The Attorney-General propose an amendment to the *FLA* to place a positive obligation on the parties to inform the court about any relevant orders or

¹⁴⁴ Department of Justice, Tasmania, *Review of Family Violence Act 2004*, (2008), 20, <http://www.safeathome.tas.gov.au/review_of_family_violence_act_2004/terms_of_reference at 17 December 2008.

¹⁴⁵ Family Pathways, Attorney-General’s Department, *Improved Responses to family violence in the family law system*, 2008.

¹⁴⁶ *ibid.*

¹⁴⁷ Family Law Council, *Family Law and Child Protection*, Final Report, 2002

¹⁴⁸ *Commonwealth of Australia Constitution Act* (Cth) s 128. Historically, the Australian people have only voted ‘Yes’ to 8 out of 42 referendums.

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arrangements in place under child welfare laws. **7.3.6**

7.5 The Attorney General through SCAG develop protocols to encourage a co-operative working relationship between the respective State and Territory child protection agencies and the federal family courts so that those agencies participate in proceedings when invited to do so. However in order to ensure that in those minority of cases where there is no party with the capacity to protect a child from violent or abusive living arrangements, the federal family courts should retain a residual power of last resort to require the State protection agency to become a party to proceedings. **7.3.1**

7.6 The Attorney-General as a member of SCAG address the overlap between jurisdictions and in particular examine:

7.6.1 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. **7.3.4**

7.6.2 The current legislative provisions in respect of the competing priority of orders made by different courts in respect of family violence or child protection which do not provide a complete answer to the problem of inconsistent orders. This issue requires further consideration. **7.3.5**

7.6.3 Family violence injunctive orders made being transportable across jurisdictions, and capable of registration, by filing the orders in the relevant State or Territory court, and having those orders enforced by the relevant State and Territory police services. **7.4**

National register of family violence orders

7.6.4 Through his Department examine the feasibility of establishing a national register of family violence orders and in doing so consider the viability of using existing systems e.g. Crim trac. **7.5**

7.6.5 The database being accessible to authorised persons and agencies including courts exercising family law and protection orders jurisdiction, child protection agencies, police services and mental health agencies. **7.5**

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Recommendation 6

Information Sheets

7.4 The Attorney General's Department develop an information sheet to be served with all family violence or protection orders about the interaction of protection orders and family law orders.

Recommendation 7

Concurrent jurisdiction

7.5 The Attorney-General as a member of SCAG address the referral of powers to federal family courts so that in determining a parenting application federal family courts have concurrent jurisdiction with that of State Courts to deal with all matters in relation to children including where relevant family violence, child protection and parenting orders. 7.7

8 Adducing Evidence in Court

8.1 BACKGROUND

Australian courts are bound by the rules of evidence not to make findings of fact where the relevant burden of proof is not satisfied. Family violence creates particular challenges in terms of adducing evidence of events which often occurred in private, and were not contemporaneously reported. Providing evidence in court can also be very difficult for victims, who may continue to be afraid of their former partner, or suffer other psychological effects of the abuse. At one level, a whole of system approach is required to improve the ways that information is gathered, preserved, shared and reported across the system.¹⁴⁹ In court, it is about ensuring that the information is presented in a form which is admissible as evidence.

8.1.1 Findings of the Australian Institute of Family Studies report on allegations of family violence and child abuse in family law children's proceedings

The 2007 Australian Institute of Family Studies report indicates that in many circumstances, the courts are simply not being provided with enough information upon which to make a determination. The Australian Institute of Family Studies study was the first of its size and scale conducted in Australia, and provides the best empirical evidence for the impact of allegations in such proceedings. The findings of that report have informed some of the policy initiatives that the Council has recommended in this Report. The study uncovered significant issues concerning the information and evidence coming before the courts. Interestingly however, it did not confirm the notion that judicial officers are being influenced by allegations that are not supported by strong evidence.

The research identified significant issues with the information coming before the courts:

[t]hree layers of ambiguity are suggested by these data:

- (a) little evidentiary material to support allegations (especially in the general litigants sample);
- (b) fairly high rates of non-response to allegations of spousal violence, except for cases in the Family Court of Australia requiring a judicial determination; and

¹⁴⁹ Lawrie Moloney, Bruce Smyth, Ruth Weston, Nicholas Richardson, Lixia Qu and Matthew Gray, *'Allegations of family violence and child abuse in family law children's proceedings: a pre-reform exploratory study'*, Research Paper No 15, Australian Institute of Family Studies, 2007.

- (c) generally low levels of detail in the allegations and low levels of detail when responses are made.¹⁵⁰

8.2 LEGISLATION

A number of the 2006 Shared Parenting amendments were in part directed to ensure that the evidentiary vacuum was addressed so that federal family courts could address parenting applications where there were allegations of family violence in a more robust and timely way. Some of the more significant amendments, excluding the Principles and Presumptions in Part VII, were the introduction of section 60K, section 60I, section 69ZW and section 117AB. Section 60K addresses the issues of allegations of family violence in cases where parenting orders are sought; section 60I concerns attendance at family dispute resolution before filing and grounds for exemption; section 69ZW evidence relating to child abuse or family violence from State or Territory welfare agencies; and section 117AB relates to mandatory cost provisions where a party knowingly makes a false allegation or statement (and by implication, false denial).¹⁵¹

8.2.1 Section 60K

The section is designed to ensure that information about family violence is brought before the family law courts as early as possible in proceedings and that the courts make appropriate interim orders.¹⁵² Section 60K applies to all applications where a parenting order is sought.¹⁵³ The provision supports the requirement for the filing of a Notice of Abuse or Risk of Abuse to allegations of family violence in parenting cases.

It is ultimately the responsibility of the party seeking to establish a particular fact to provide the court with the evidence required to satisfy the burden of proof. The Family Court amended its Rules to provide for a party to file a "Notice of Child Abuse or Family Violence"¹⁵⁴. The Family Law Act puts the onus on parties to inform the court of any current family violence orders and the Family Court Rules require the filing of a copy of the protection order.¹⁵⁵

Consideration of section 60K is triggered by the filing of a document (stipulated in the Rules) which makes an allegation of child abuse or family violence relevant to Part VII proceedings.¹⁵⁶ In completing the Form 4 Notice of Child Abuse or Family Violence,

¹⁵⁰ *ibid* 97

¹⁵¹Renata Alexander, *Behind closed Doors Family Violence Cases Under the Family Law Act Outlined and Analysed*, Australian Family Lawyer, vol 20 no 4, Spring 2009 2009.

¹⁵²Revised Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2006 (Cth).

¹⁵³ An order in relation to a child under Part VII, *Family Law Act 1975* (Cth).

¹⁵⁴Division 2.3.1 Family Law Rules 2004 Rule 2.04D provides that the Form 4 Notice of Child Abuse or Family Violence (Form 4) is the prescribed document for the purposes of s 60K.

¹⁵⁵ *Family Law Act 1975* (Cth) s 60CF(1).

Family Law Rules 2004, Rule 2.5

¹⁵⁶ Family Law Act, s 60K(1).

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the party is required to provide evidence of how the alleged child abuse or family violence will impact on the parenting orders being sought.¹⁵⁷

Sub-section 60K(2) of the Family Law Act provides that where a Form 4 is filed the court must:

- (a) consider what interim or procedural orders (if any) should be made:
 - (i) to enable appropriate evidence about the allegation to be obtained as expeditiously as possible; and
 - (ii) to protect the child or any of the parties to the proceedings; and
- (b) make such orders of that kind as the court considers appropriate; and
- (c) deal with the issues raised by the allegation as expeditiously as possible.

The court must take the action required by paragraphs (a) and (b) as soon as reasonably practicable, or where appropriate in the circumstances of the case, within eight weeks¹⁵⁸. The court must also consider making an order under section 69ZW to obtain information from State and Territory agencies in relation to the allegations,¹⁵⁹ and an order under section 68B to ensure the safety of children and litigants.¹⁶⁰

The Family Court has a procedure in place to ensure that in matters where a Form 4 is filed it is referred to a Registrar to consider what orders or steps are necessary to ensure the safety of the child or any party to the proceedings. In the Federal Magistrates Court, urgent matters are referred to the Registrar.

The Family Law Rules elaborate on the provisions in the Act. Rule 2.04B(1) provides that a Form 4 *must* be filed if an allegation of abuse or family violence is made by a party, the independent children's lawyer, or an intervener in the case. Rule 2.04B(2) provides that the person filing the Form 4 must at the same time file an affidavit or affidavits setting out the evidence on which the allegations in the Form 4 are based. The Rules add to the requirements in the Act by making the Form 4 procedure mandatory where there are allegations of family violence in parenting proceedings, and in mandating the filing of affidavits supporting the Form 4 at an early stage.

The federal family courts rely on this information and evidence to trigger the court response both at an administrative level through in-court client service staff putting in place safety plans, and at a judicial level in rebutting legislative presumptions in determining what is in the best interest of the child.

The Form 4 procedure is a means by which the federal family courts can ensure that sufficient information comes before them at an early stage.

The requirement for the filing of a Form 4 also ensures that litigants and legal practitioners turn their mind to the particulars of violence, and to the evidence available to substantiate allegations. Once the Form has been filed, the court will be

¹⁵⁷ S 60K(1)(c) Family Law Act

¹⁵⁸ s 60K(2A).

¹⁵⁹ s 60K(3).

¹⁶⁰ s 60K(4).

alerted to the existence of the allegations of family violence and it may make appropriate interim or procedural orders to allow further evidence to be obtained.

The process implemented in 2006 to identify allegations of family violence has not been as effective as hoped in ensuring parties and legal practitioners consider any issues of family violence at an early stage. The level of compliance has been relatively low.

8.2.2 Use of forms to notify alleged abuse and family violence

Council has given careful consideration to the most effective way for allegations of abuse and family violence to be brought to the attention of the federal family courts.

Council believes it is imperative the courts are made aware, as early as possible in the proceedings, of allegations of abuse and family violence regarded by a litigant as relevant to the determination of what is in a child's best interests.

In addition, Council had regard to the findings of the AIFS report into allegations of child abuse and family violence, that when allegations of family violence are made which are not supported by evidence, they are likely to have little impact on the outcome of the proceedings.

Child abuse

Abuse in relation to a child is defined in section 4 of the Family Law Act to mean:

- (a) *an assault, including a sexual assault, of the child which is an offence under a law, written or unwritten, in force in the State or Territory in which the act constituting the assault occurs; or*
- (b) *a person involving the child in a sexual activity with that person or another person in which the child is used, directly or indirectly, as a sexual object by the first-mentioned person or the other person, and where there is unequal power in the relationship between the child and the first-mentioned person.*

Section 10E(2) of the Family Law Act provides that communications about child abuse to a family dispute resolution practitioner are not privileged communications.

Under section 67Z of the Family Law Act, if a party to family law proceedings alleges a child to whom the proceedings relate has been abused or is at risk of being abused, that party must file and serve (on the person against whom the allegation is made), a notice in the prescribed form. If such a notice is filed in a court, section 67Z(3) provides that the Registry Manager must, as soon as practicable, notify a prescribed child welfare authority. The Family Court Rules and the Federal Magistrates Court Rules provide that the prescribed form is a Form 4 – *Notice of Child Abuse or Family Violence*.

In the experience of the federal family courts, parties to parenting proceedings alleging sexual abuse or risk of sexual abuse of a child rarely fail to comply with section 67Z.

Family violence

There is no requirement in the Act for a party alleging family violence to notify the court about the violence alleged, whether or not children are exposed to that violence. However, there is a requirement under Rule 2.04B of the Family Law Rules (adopted by the Federal Magistrate Court) for a party alleging abuse or family violence to file a Form 4.

Allegation of abuse or family violence, is defined in Rule 2.04 to mean:

- (a) *that a child has been abused or that there is a risk of a child being abused; or*
- (b) *that there has been family violence involving a child or a member of the child's family or that there is a risk of family violence involving a child or a member of the child's family.*

It is the experience of both federal family courts that Rule 2.04B is not followed by the profession or litigants in person, unless a party alleges sexual abuse or serious physical abuse of a child.

It is noteworthy that under section 60K, the federal family courts are required to take prompt action in relation to family violence allegations **but only if** the party alleging family violence has filed a Form 4.

Courts generally become aware of allegations of family violence because a party, or a child involved in the proceedings, voluntarily discloses the existence of family violence, usually in one of the following ways:

- (a) a party claims an exemption from the requirement to file a section 60I certificate because of family violence; or
- (b) a party makes an *ex parte* application or makes an application for short service of an application because of concerns about family violence; or
- (c) A family consultant reports the allegations to the court after a s.11F conference or in a family report; or
- (d) a party deposes to family violence in an affidavit.

A disclosure of a child's exposure to family violence, made by a party to a family dispute resolution practitioner is inadmissible under section 10E(1) of the Act.

It is therefore possible that a party to proceedings involving a child does not disclose that he or she and/or the subject children are being, or have been exposed to serious family violence.

Given the known serious impact of family violence on parties and children, the Council believes this situation is unsatisfactory.

The Council recommends that the Attorney-General give consideration to the following:

1. Section 67Z of the Act be amended to require a party to parenting proceedings to file a Notice of Family Violence in all cases in which a party claims family violence is a factor to which the court should have regard in determining a parenting case.
2. Section 10E(2) of the Act be amended to exclude the operation of section 10E(1) when an adult or child discloses that a child has been exposed to family violence.

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3. Section 60K(2) be amended to require the courts to consider referring a party (or parties) alleging family violence for a risk assessment.
4. If the risk assessments are to be undertaken by Court-based family consultants, the federal family courts be appropriately resourced to do so.

The Council also recommends that the federal family courts give consideration to the following:

1. The Form 4, in its present form, or amended to make it much simpler OR
2. A new Notification of Child Sexual Abuse form be created, the filing of which will trigger notification of the matter to the relevant child welfare authority. (As occurs now with the filing of a Form 4).
3. Another Form be created for Notifications of Family Violence. The filing of this Form would not trigger notification of the matter to the relevant child welfare authority.
4. That both Forms be short and simple to complete.
5. The Notification of Family Violence Form require a party to file and serve an affidavit setting out the particulars of the violence alleged including: the person(s) alleged to have committed the violence; the person(s) against whom the violence was perpetrated; the dates on which the events alleged occurred; briefly what occurred; the frequency of the alleged acts of violence; the nature and severity of the violence alleged; whether children were present or in the vicinity when the violence occurred.
6. The Form 1 (Initiating Application) and Form 2 (Response) be amended to require a party to respond to 2-3 questions about family violence, when a party claims that family violence is a factor to which the court should have regard when determining that application.
7. The Form 1 (Initiating Application) and Form 2 (Response) be amended to require a party to tick a box and complete an Annexure A about family violence allegations, when a party claims that family violence is a factor to which the court should have regard when determining that application.

8.2.3 Section 117AB – the false allegation

If parties knowingly make false allegations of family violence, section 117AB provides a sanction in the form of an adverse costs order. Where the Court 'is satisfied that a party to the proceedings knowingly made a false allegation or statement in the proceedings', the Court 'must order that party to pay some or all of the costs of another party... to the proceedings'. This provision has been widely discussed in literature and case law, and has been used in some cases to found adverse costs orders.¹⁶¹

Given the serious possible consequences of a finding that a person had knowingly sought to mislead the court, the standard in section 117AB has been held to be a stringent one. Section 140(2) of the *Evidence Act* (the *Briginshaw* standard) will apply to elevate the standard of proof above the balance of probabilities.¹⁶² Moreover, the term

¹⁶¹ *Sharma and Sharma* (No 2) [2007] FamCA 425 at paras 8–14 (Ryan J); *Hirsschfield and Hirschfield* [2007] FamCA 631 at paragraph 35 (Monteith J); *Claringbold and James* (Costs) [2008] FamCA 57 at paragraphs 34–35 (Bennett J); *Hogan and Halvorsen* [2007] Federal Magistrates Court, Afam 1131.

¹⁶² *Charles and Charles* [2007] FamCA 276 at paragraph 24 (Cronin J).

'knowingly' has been interpreted as meaning that it is not enough that the untrue statement was made recklessly or without belief¹⁶³. It seems that the litigant must make a positive decision to mislead the court¹⁶⁴. It is worth noting that this provision, while almost always discussed in the context of allegations of family violence, in fact extends to any false allegation or denial made in any proceeding under the Family Law Act.

In addition, the amendments introduced a number of provisions which may be engaged to the detriment of a party making false allegations of family violence. Perhaps of greatest importance is section 60CC (3)(c) of the Family Law Act, which provides that in determining what is in the child's best interests, the court must take into consideration:

...the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent;

As many commentators have noted, it is likely that an adverse finding under this paragraph might flow from a finding that a parent had knowingly made false allegations of family violence. In the Council's view, there is no evidence to support that section 117AB is achieving its purpose.

8.3 OBLIGATIONS TO MAKE DISCLOSURE OF VIOLENCE

8.3.1 Evidence in courts

Anecdotal evidence suggests that the use of the Form 4 procedure has not been widely adhered to in relation to family violence, although it is generally provided if there are allegations of child abuse, in particular where there has been an involvement of the relevant State or Territory child welfare agency. Further, those Form 4s which are filed outlining allegations of family violence are often not supported by the affidavits required by Rule 2.04B(2).

8.3.2 AIFS study findings in regards to affidavit material

The 2007 Australian Institute of Family Studies Report found that while the courts expect litigants to provide most of the legal "evidence" in the form of written affidavits that are to be found on the court file, the file remains limited as a source of information about what has transpired in a relationship.¹⁶⁵

¹⁶³ *ibid* at paragraphs 25–27 (Cronin J).

¹⁶⁴ The test in *Charles and Charles* was applied in *Eleninowska and Patronis* (No.2) (Unreported, Federal Magistrates Court of Australia - Family Law Decisions, Sexton FM, 2 November 2007). In that case, Sexton FM held that the 'cavalier' and 'irresponsible' conduct of the husband did not amount to knowingly misleading the court (at paragraph 10).

¹⁶⁵ Lawrie Moloney, Bruce Smyth, Ruth Weston, Nicholas Richardson, Lixia Qu and Matthew Gray, 'Allegations of family violence and child abuse in family law children's proceedings: a pre-reform exploratory study', Research Paper No 15, Australian Institute of Family Studies, 2007

Adducing Evidence in Court

The way in which allegations were documented in affidavit material may, in part, be a reflection of both the nature of the disclosure by a litigant and the framing of this information on the advice of a lawyer representing that party. For instance, one lawyer might adopt a “less is more” strategy, and suggest that the client report two or three critical events, but combine a longer-term pattern of behaviour as a single allegation. Another lawyer may suggest a “more is more” approach, and advise that every instance of perceived abuse be documented as a separate allegation. This means that the number of allegations documented on an affidavit is not necessarily a measure of the frequency and duration of specific types of abuse.

Recommendation 8

8. Adducing Evidence in Court

8.1 The current use of Section 60I certificates is limited. An options paper should be prepared to consider the advantages and disadvantages of Family Relationship Centres and Family Dispute Resolution Practitioners having some responsibility to provide to the federal family courts any information about family violence or any other related issue disclosed during an intervention. **8.2.1**

Recommendation 9

Legislation

8.2 The Attorney-General propose amendments to the *FLA* as follows:

8.2.1 Section 10E (2) be amended to exclude the operation of s.10E (1) when an adult or child discloses that a child has been exposed to family violence. **8.2.2**

8.2.2 Section 60K (2) be amended to require the courts to consider as one of the options available, referring a party (or parties) alleging family violence for a risk assessment. If the risk assessments are to be undertaken by Court-based family consultants, the federal family courts be appropriately resourced to do so. **8.2.2**

Recommendation 10

Use of forms to notify alleged abuse and family violence

8.3 The Attorney General propose Section 67Z be amended to require a party to

parenting proceedings to file a Notice of Family Violence in all cases in which a party claims family violence is a factor to which the court should have regard in determining a parenting case.

8.4 Council recommends that the federal family courts give consideration to the following:

8.4.1 The *Notice of Child Abuse or Family Violence* (Form 4) being revised to make it more user friendly or alternatively that there be two individual forms to allow the notification of either *Notification of Child Abuse*, and/or *Notification of Family Violence*. The notification of child abuse will trigger information about the matter being sent to the relevant child welfare authority.

8.4.2 The *Notification of Family Violence* form require a party to file and serve an affidavit setting out the particulars of the violence alleged including: the person(s) alleged to have committed the violence; the person(s) against whom the violence was perpetrated; the dates on which the events alleged occurred; briefly what occurred; the frequency of the alleged acts of violence; the nature and severity of the violence alleged; whether children were present or in the vicinity when the violence occurred.

8.4.3 When a party claims that family violence is a factor to which the court should have regard when determining that application, the Initiating Application and the Response should include 2 – 3 additional questions addressing family violence – similar to those questions used in the Family Court’s Parenting Questionnaire. These forms should also require a party to tick a box and complete an Annexure about family violence allegations. **8.2.2**

8.5 The FMC give consideration to including in their Rules a provision that requires that where there are allegations of child abuse, physical or sexual, or family violence that an explanation is provided to the court as to how the order attempts to deal with the allegation. **8.2.2**

Recommendation 11

Costs provisions

8.6 The Attorney-General give consideration to clarifying either through legislative amendment or public education the intention of Section 117AB. This section provides for cost orders to be made where a party knowingly makes a false allegation or statement. There is no evidence that this section has achieved its purpose in relation to false allegations of family violence. **8.2.3.**

9 Communication between States, Territories and Federal authorities

9.1 INFORMATION SHARING

These issues extend beyond the state and federal courts and child welfare agencies. This is because dysfunctional families experiencing violence and/or issues of child abuse often have issues of alcohol and substance abuse, and/or mental health issues¹⁶⁶ which cause them to come into contact with State and Territory police and mental health agencies. The police and child protection agencies are mandated to investigate allegations of abuse or violence and often participate in or instigate court proceedings in the State jurisdiction. The tension lies in those cases where some investigation has been undertaken but the decision as to the instigation of proceedings has been deferred pending the instigation of proceedings in the federal family courts – often by a relative (such as a grandparent) with the encouragement of an agency.

Accessing information held by child protection agencies has proved a significant challenge for federal family courts¹⁶⁷ and has been the impetus for some law reform.¹⁶⁸

The federal family courts have over a period of years worked with various state child protection agencies to develop protocols for the sharing of information. The level of co-operation is inconsistent and many children are disadvantaged by the restrictions on the sharing of relevant information between these agencies and the courts either through the perceived legislative impediment or internal departmental policy practices. At a recent meeting of the Standing Committee of Attorneys-General, Ministers noted that there may be opportunities for improved cooperation between the family courts and State and Territory child welfare authorities and agreed to explore options for improvement with their Ministerial colleagues. The Commonwealth Attorney-General has written to State and Territory child protection ministers seeking assistance to improve collaboration.¹⁶⁹

The family violence and child protection systems consist of the various State and Territory courts, as well as the police and child welfare departments that provide investigative, support and advocacy services.

¹⁶⁶ Thea Brown, Rosemary Sheehan, Margarita Frederico and Lesley Hewitt, *Resolving Family Violence to Children: The Evaluation of Project Magellan, a Pilot Project for Managing Family Court Residence and Contact Disputes when Allegations of Child Abuse Have Been Made, Family Violence and Family Court Research Program*, Monash University, Melbourne, 2001

¹⁶⁷ *Northern Territory of Australia and GPO & Ors* (1999) 196 CLR 553; Quarterly Report of the Family Law Council Meeting Newcastle 7th – 8th May 2009. A key issue that arose was the need for improved cooperation between child protection agencies and the courts in order to come up with options for children in need of protection in family law matters.

¹⁶⁸ *Family Law Act 1975 (Cth)* s 69ZQ.

¹⁶⁹ SCAG Communiqué 6/7 August 2009

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State and Territory police generally provide the first response to family violence incidents and are often the first point of contact for individuals making allegations or reports of violence. They are responsible for investigating allegations and the subsequent prosecution of individuals where appropriate. They may also participate in civil proceedings before a court.

Child welfare departments¹⁷⁰ are mandated to promote the safety and wellbeing of children. This includes assessing and investigating allegations of child abuse, providing intervention services and out-of-home care. They may also make applications for care or protection orders in a Children's Court if necessary.

The police and welfare departments retain important information on the contact they have had with families experiencing violence and abuse. Such information is relevant to many aspects of proceedings before the federal family courts. Unfortunately, research over the past 10 years has revealed there is little coordination, communication or information sharing between these authorities and the courts.

Research undertaken by Kelly and Fehlberg in relation to child protection found that "communication was almost invariably absent" in Victoria between the Department of Human Services and the Family Law Court.¹⁷¹ This added an extra level of complexity and confusion to disputes and wasted the time and resources of all involved.¹⁷²

Consultation undertaken by Family Pathways has supported these findings. A common theme emerging throughout consultation was that there is an unsatisfactory disconnect between the family law system and the state and territory family violence and child protection systems.¹⁷³

Lack of coordination precipitates the possibility of multiple proceedings, contradictory orders and the potential for orders to be made that inadvertently put parents and children at risk.

9.2 THE IMPORTANCE OF SHARING INFORMATION IN FEDERAL FAMILY COURT PROCEEDINGS

The 2007 Australian Institute of Family Studies Report found it was only in cases where evidence of a highly probative nature was presented to the federal family courts that an apparent link between the allegations of violence or abuse and the final orders could be discerned.¹⁷⁴ Most allegations however, were not supported by relevant and

¹⁷⁰ The Department of Child Services (NSW), the Department of Human Services (Vic), the Department of Child Safety (Qld), Department of Human Services (SA), Department for Child Protection (WA), Department of Health and Human Services (Tas), Department of Disability, Housing and Community Services (ACT), Department of Health and Community Services (NT).

¹⁷¹ Fiona Kelly and Belinda Fehlberg, 'Australia's fragmented family law system: jurisdictional overlap in the area of child protection' (2002) 26 *International Journal of Law, Policy and the Family* 38, 53.

¹⁷² *Ibid.*

¹⁷³ Family Pathways, Attorney-General's Department, *Improved Responses to family violence in the family law system*, December 2008.

¹⁷⁴ Lawrie Moloney, Bruce Smyth, Ruth Weston, Nicholas Richardson, Lixia Qu and Matthew Gray., Australian Institute of Family Studies, *Allegations of family violence and child abuse in family law children's proceedings: a pre-reform exploratory study*, research report no 15, 2007, ix.

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cogent evidence.¹⁷⁵ It is important to note that this research predates the 2006 Shared Parenting amendments.

This finding supports earlier research conducted by Kaspiew that found allegations of violence needed strong evidential support before it becomes feasible to link concerns about a history of violence with arguments for no contact or supervised contact.¹⁷⁶ Decision-making in the federal family courts may often be taking place in the context of factual uncertainty.¹⁷⁷

This is concerning as allegations of family violence or child abuse will often arise for the first time in the federal family law jurisdiction. Due to the division of powers in the Constitution, the Commonwealth does not have the role, nor the expertise or resources to investigate allegations of family violence or child abuse which fall within the criminal and child welfare jurisdiction of the States and Territories.¹⁷⁸ Consequently, if an allegation of child abuse is first made in the context of a dispute in a federal family court the Family Law Act mandates that the State authorities must be notified¹⁷⁹. This provides the State child protection agencies with an opportunity to assess the protective issues arising in the cases so that a decision can be made on whether the child protection agency should intervene in the federal family court proceedings or institute proceedings in the relevant State or Territory court. However, it has been noted that when State and Territory authorities become aware that a matter is proceeding in the federal family court, the case is not investigated, or if it is, only to a preliminary stage.¹⁸⁰ Consequently, the parties (and by implication the Family Court) are largely left to employ their own resources to produce evidence upon which critical decisions will be made.

Some evidence may be available to the courts from State and Territory authorities or police through section 69ZW of the Family Law Act. It enables the courts to make orders compelling a State or Territory authority to produce documents where violence is alleged in child-related proceedings. However, this is restricted to particular circumstances.¹⁸¹ Once in the federal court system there is little avenue for independent investigation of any abuse or violence allegations.

¹⁷⁵ *ibid*, vii.

¹⁷⁶ Rae Kaspiew, *Violence in contested children's cases: an empirical exploration* (2005) 19 *Australian Journal of Family Law* 112. It should be noted that this research predates the change in terminology reflected in the 2006 SPR amendments.

Lawrie Moloney, Bruce Smyth, Ruth Weston, Nicholas Richardson, Lixia Qu and Matthew Gray., Australian Institute of Family Studies, *Allegations of family violence and child abuse in family law children's proceedings: a pre-reform exploratory study*, research report no 15, 2007,, p ix.

¹⁷⁸ *ibid*, 69.

¹⁷⁹ *Family Law Act 1975* (Cth) s 67Z.

¹⁸⁰ Fiona Kelly and Belinda Fehlberg, *Australia's fragmented family law system: jurisdictional overlap in the area of child protection*, (2002) 16 *International Journal of Law, Policy and the Family* 38, 42; Family Law Council, *The best interests of the child? The interaction of public and private law in Australia*, Discussion paper no.2, October 2000.

¹⁸¹ See discussion at para 7.2 above.

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As allegations of family violence and child abuse are increasingly becoming the “core business”¹⁸² of the federal family courts, increased communication, cooperation and information sharing between the federal family courts and agencies dealing with family violence and child protection issues is necessary to minimise situations where the federal family courts are making critical decisions without adequate information. During a quarterly meeting in Newcastle, Council heard that information and reporting from child protection authorities on any relevant assessment or information on families known to the child protection authority would greatly assist the courts in deciding family law matters involving the protection of children. However, a tension exists for child protection authorities where confidentiality requirements prohibit the provision of comprehensive information to the courts.¹⁸³ By way of example, a court may be asked to make an *ex parte* recovery order in favour of a parent known by a State Welfare Authority to be abusive. If the court has no access to that information, and a recovery order is made, that child could be put at serious risk.

9.3 OTHER AVENUES FOR REFORM – COORDINATION, COMMUNICATION AND INFORMATION SHARING

The Commonwealth Family Violence Strategy, released in 2006 by the former government, noted that the Commonwealth Government has a role in ensuring a consistent and thorough approach to dealing with family law disputes involving family violence.¹⁸⁴ In particular, there is an important coordination role for the Commonwealth to strengthen inter-agency relationships between the relevant State and Territory agencies, including the courts.¹⁸⁵

Coordinated approaches are needed to bring information from each of the relevant courts and agencies in the family law system together to ensure that private family law disputes involving violence or abuse are resolved in the most appropriate manner. This has led to the introduction of a number of programs and strategies across Australia. Some of those programs are outlined below. Elements of these programs may be adapted to help facilitate coordination and communication between the federal family courts and State and Territory family violence and child protection systems.

9.3.1 Magellan

In 1998, the Family Court of Australia introduced Project Magellan in response to concerns about the management of allegations of child abuse raised in parenting disputes. In particular, there was concern about the lack of coordination between various professions such as the State police, child protection agencies and Legal Aid, all of whom had important, yet differing roles. An interdisciplinary case management

¹⁸² Lawrie Moloney, Bruce Smyth, Ruth Weston, Nicholas Richardson, Lixia Qu and Matthew Gray., Australian Institute of Family Studies, *Allegations of family violence and child abuse in family law children's proceedings: a pre-reform exploratory study*, research report no 15, 2007, vii, 47, 110, 113.

¹⁸³ Quarterly Report of the Family Law Council Meeting Newcastle 7th – 8th May 2009.

¹⁸⁴ Attorney-General's Department, *The family law violence strategy*, February 2006, 2.

¹⁸⁵ *ibid.*

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pathway was introduced as the primary avenue to bring together information from each of these agencies.¹⁸⁶

Once a case was identified as “Magellan”, an Independent Children’s Lawyer was appointed and e-mail notification sent to Legal Aid, the State child protection authority and the police. The Court then considered making interim orders and requested a report (known as the Magellan Report) from the child protection authority. A typical report contained a summary about the actions taken by the child protection authority, their views about the veracity of the allegations and any concerns held about future risks to the child. The Magellan Report was essential to the success of the project.¹⁸⁷

Complementing the case management system were protocols and communication mechanisms that outlined the processes to be followed in obtaining information, the roles and contact points of the agencies and what type of information could be communicated.¹⁸⁸ These successfully facilitated increased cooperation and information sharing.¹⁸⁹

When evaluated, both the Court and participants felt the project delivered better outcomes for families and children.¹⁹⁰ Participants felt the process kept members of the family calmer because they knew their concerns were being dealt with seriously. They also felt matters proceeded faster and greater clarity of issues was achieved by bringing information together from all agencies.¹⁹¹ The Courts and other stakeholders acknowledged that the protocols with each State and Territory Department have resulted in improved relationships and an increased understanding of the role of each agency.¹⁹² Magellan has been rolled out across the Family Court’s registries since 2003 with the exception of postcode limitations currently applying to cases in NSW through the NSW protocol, for example excluding cases in the area of the Newcastle registry. It is clear from the Council’s consultations, that the relationship between the federal family courts and the child protection agencies in NSW and the NT is a challenging one.

9.3.2 Columbus Project

The Family Court of Western Australia has entered into Memoranda of Understanding (MOU) to enable the free exchange of information between relevant stakeholders. In June 2008 an MOU was established between the Court, the Department of Child Protection (DCP) and Legal Aid WA. Under the MOU the DCP will notify the court by email when it has referred a client to file an application regarding children known to the DCP. Upon receipt of the email with details of the client, the court will forward the

¹⁸⁶ Magellan was endorsed by the Hon James Wood in The Report of the Special Commission of Inquiry into Child Protection Services in New South Wales Nov 2008

¹⁸⁷ D.J Higgins, *Cooperation and coordination: an evaluation of the Family Court of Australia’s Magellan case-management model*, 2007, p 178.

¹⁸⁸ *ibid*, 48, 77.

¹⁸⁹ *ibid*, 78-79.

¹⁹⁰ *ibid*, 122.

¹⁹¹ *ibid*, 149.

¹⁹² *ibid*, 147.

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email from DCP to Legal Aid's Duty Lawyer and create a client in its electronic file management system. If an application is then filed the court will know the DCP has an interest and will have some details.

In urgent *ex parte* applications, the Court can enquire with the DCP if they have an open file relating to the relevant parties. This is done through a family consultant.

In February 2009 the Family Court of Western Australia, the Magistrates Court, the Department of the Attorney-General, the Department of Corrective Services and Legal Aid entered into a MOU for matters involving family violence whereby information can be obtained when the parties to the MOU share clients.

9.3.3 Safe At Home, Tasmania

Safe at Home is Tasmania's response to family violence and involves a range of services and government agencies working together. Effective information sharing between these authorities and agencies is critical to the scheme.¹⁹³ It is facilitated by weekly integrated case coordination meetings and an integrated case management system which is used by police, the Court, Legal Aid, the Department of Justice and the Department of Human Services. Evaluation on these aspects of the scheme was to be undertaken in 2009.¹⁹⁴ An evaluation of the scheme was released in 2009 that indicates the Safe at Home program is achieving all of its goals to some degree, and that it has a number of strengths. These strengths include increased public awareness and legal recognition of family violence and an improved police response. There were also a number of recommendations aimed at raising the level of safety for adult victims and improving the understanding of the processes involved among both victims and offenders.¹⁹⁵

9.3.4 Collaboration delivering positive outcomes

The success of the above programs indicates there is great potential to increase communication and coordination between courts, government agencies and services to more adequately and appropriately address issues of family violence and child abuse in the federal family courts.

Essential to the success of all programs was strong interagency collaboration and coordination and high quality information sharing. This was underpinned by the terms embodied in the respective memorandum of understanding and protocols which set out in clear and unambiguous terms, processes for information sharing and knowledge and acceptance of the different roles and priorities of each agency.

¹⁹³ Karen Wilcox, *Island innovation, mainland inspiration: comments on the Tasmanian Family Violence Act*, (2007) 32(4) *Alternative Law Journal* 213, 213.

¹⁹⁴ Department of Justice, Tasmania, *Review of Family Violence Act 2004*, 13 November 2008, viewed 17 December 2008, <http://www.safeathome.tas.gov.au/review_of_family_violence_act_2004/terms_of_reference.

¹⁹⁵ Department of Justice (Tas), *Review of the Integrated Response to Family Violence: Final Report*, June 2009

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There is scope to develop similar mechanisms to increase coordination, communication and information sharing between the federal family courts, the State and Territory courts and agencies, in particular, developing consistent memoranda of understanding and protocols for information sharing in matters involving allegations of family violence and/or child abuse and supplementing these with training to ensure all involved understand the roles and obligations of the respective authorities.

9.3.5 Existing Memorandum of Understanding and protocol for the exchange of information

At present the Family Court of Australia and the Federal Magistrates Court are party to a number of existing memoranda of understanding and protocols with State child protection agencies, which need review. The primary purpose of the memoranda is to facilitate cooperation between the courts and the respective agencies and clarify procedures between the two bodies. This objective is achieved by a consistent and streamlined approach to the sharing of information; clear mutually understood procedures for both agencies; and arrangements for facilitating cooperation between their respective staff.

A protocol was also negotiated between the Tasmanian Magistrates Court and the Tasmanian registry of the Family Court of Australia after concerns were raised that inconsistent orders were increasing the risk of violence in families.¹⁹⁶ The protocol stipulates that if a concern arises that a Family Contact Order poses a risk to the safety of the victim of family violence, the Police Prosecutor alerts the Magistrate of this concern who can then suspend any such order.¹⁹⁷ The Magistrate's file, with the grounds of suspension, is then transferred to the Family Court for a review of the Contact Order¹⁹⁸.

Western Australia is finalising a memorandum of understanding with state authorities including the Department for Child Protection (DCP) and Legal Aid. It establishes a process for sharing information between the parties on family violence, child protection and drugs matters¹⁹⁹. DCP information will be recorded on a file under the parties' names for use if an application is filed.²⁰⁰

Other memoranda and protocols exist between the Family Court of Australia and/or the Federal Magistrates Court and the Victorian Department of Human Services; the Department of Child Safety Queensland; the South Australian Department of Human Services (Family and Youth Services) and the Northern Territory Department of Health and Community Services. The Memorandum with the Department of Child Safety in New South Wales is confined to a postcode arrangement and the postcodes are extended from time to time. Each aims to facilitate co-operation and sharing of

¹⁹⁶ Department of Justice, Tasmania, *Review of the Family Violence Act 2004*, March 2008, 20.

¹⁹⁷ *ibid.*

¹⁹⁸ *ibid.*

¹⁹⁹ A Child Protection Departmental officer is now co-located in the Perth Registry

²⁰⁰ The pilot facilitates the DCP bringing care applications to the Family Court of Western Australia when the parties are ready involved in family law proceedings. The further progress of the pilot is dependent upon funding and appropriate resources.

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information and to clarify procedures in order to provide better protection for children. A number of the existing protocols have been in place for some years and are under review although progress has been quite slow.

The Council considers that there is a role for the Attorney-General's Department to facilitate discussions across the relevant agencies so that there is greater consistency of practice across all States. There remains ongoing tension between some child safety agencies and the Courts in respect of the provision of information, or in responding to orders made by federal family courts in respect of section 69ZW.²⁰¹

The Council is supportive of the work being undertaken by SCAG in inviting collaboration between the federal family courts and the respective State child protection agencies for the sharing of information, and for the intervention of welfare authorities in child related proceedings.²⁰²

As noted by the Allen Consulting Group in their 2008 report, there is currently no formal, nationally consistent protocol or agreement for information sharing between relevant Commonwealth agencies and State and Territory child protection agencies.²⁰³ Implementing consistent agreements with the States and Territories would enable more efficient, less complicated processes for information sharing and coordination to develop.

Additionally, current memoranda of understanding and protocols focus primarily on child protection, rather than family violence more generally. There is potential to expand and improve agreements to also include information relevant to family violence provided that the federal family courts and legal aid are adequately resourced to undertake the additional workload generated by these families.

9.4 PRIVACY LAWS

Any agreement which provides for information sharing by Commonwealth Courts must comply with the *Privacy Act 1988* (Cth) and State and Territory privacy laws. The Allen Consulting Group Report found the Privacy Act presented one of the major barriers to information sharing for child protection purposes.²⁰⁴ Specifically, the legislative thresholds for when information could be disclosed were 'too high', restricting information sharing to a small number of extreme, and crisis situations²⁰⁵.

However, the Allen Consulting Group Report noted that amendments to these provisions may not be needed to make some initial improvements to information sharing. Implementing clear and consistent protocols that outline the processes, the information that may be requested and time frames in which information should be

²⁰¹ *Fitzpatrick and Fitzpatrick* (2004) FamCA 938

²⁰² Section 91B of the Family Law Act allows federal family courts to request the intervention of the relevant child welfare authorities in child related proceedings.

²⁰³ Allen Consulting Group, *Information sharing to assist families and children in the child protection system*, report to Department of Families, Housing, Community Services and Indigenous Affairs, September 2008, 30.

²⁰⁴ *ibid.*

²⁰⁵ *ibid.*, 28.

Communication between States, Territories and Federal authorities

provided would create greater certainty and facilitate information sharing in the meantime.²⁰⁶

Ultimately, however, the exchange of information provided for in memoranda of understanding or protocols would have to operate within legislative constraints, so any further expansion and improvement of information sharing between agencies would need to be supported by legislative change.

At present, the Government is considering reform of Australia's privacy laws more generally in response to the Australian Law Reform Commission's review of the Privacy Act.²⁰⁷ The review recommends, amongst other things, greater consistency of privacy laws across Australia and amendments to the definitions and thresholds for disclosure.

The Government has released the first stage of its response to the ALRC report addressing 197 of the Australian Law Reform Commission's 295 recommendations for improving privacy protection.²⁰⁸ It is possible that some barriers to information sharing will be addressed by any subsequent reforms and they should be monitored closely. Nevertheless, legislative reform may still need to be explored.

Tasmania provides one model for how this may be done. As part of the Safe At Home initiative the *Family Violence Act 2004* (Tas) was enacted. Information sharing between agencies is vital to the initiative (see discussion above). Privacy issues were consequently dealt with in the legislation through section 37. It protects service providers from committing an offence against the *Personal Information Protection Act 2004* (Tas) where they are acting in good faith for the safety, psychological wellbeing and interests of people affected by family violence.²⁰⁹

Short of sweeping reforms stemming from the Australian Law Reform Commission inquiry, similar legislative reform in other jurisdictions will be necessary to encourage efficient and adequate information sharing.

Recommendation 12

9. Communication between States, Territories and Federal Authorities

Information sharing

9.7 The Attorney General give consideration to amending s 69ZW to remove any

²⁰⁶ *ibid*, 32.

²⁰⁷ Australian Law Reform Commission, *For your information: Australian privacy law and practice*, Report No 108, (2008).

²⁰⁸ Australian Government First Stage Response to the Australian Law Reform Commission Report 108 *For Your Information: Australian Privacy Law and Practice*, October 2009 In this first stage report the Government commits to a harmonised set of Privacy Principles, a redraft of the Privacy Act to make the law clearer, a comprehensive credit reporting network, improved health sector information flows, the extension of privacy protection for information sent overseas and strengthening of the Privacy Commissioners powers.

²⁰⁹ See *Family Violence Act 2004* (Tas) ss 3, 37.

Communication between States, Territories and Federal authorities

ambiguity as to its requirement for the production of documents or reports so that information held by the respective agency which is relevant to the issue for determination is made available to the federal family courts. **9.1**

9.8 The Attorney General through his Department facilitate an appropriate response by child protection authorities and law enforcement agencies to orders made pursuant to s 69ZW for the production of reports or the provision of information. **9.2**

9.9 The Attorney General through his Department, facilitate the development of protocols for the collaborative exchange and sharing of information between the federal family courts, the State and Territory child protection agencies, Legal Aid, Police services and Mental Health in respect of those families that are mutual clients. **9.3.4**

9.10 The protocols should:

9.10.1 Outline the circumstances which support the intervention of welfare authorities in child related proceedings in response to orders made pursuant to s 91B so that there is clear understanding as to when such orders will be made, and under what circumstances the protection agency will intervene, including where appropriate a police response.

9.10.2 Be premised on the understanding that federal family courts have access to the information obtained by the State agencies as a result of investigations undertaken by or caused to be undertaken by the State agencies.

9.10.3 Set out in clear unambiguous terms, the process for information sharing and an acknowledgement and acceptance of the different roles and priorities for each agency. **9.3.5**

9.11 Current memoranda of understanding and protocols focus primarily on child protection rather than family violence more generally. The focus of the protocols should be expanded to include the sharing of information in respect of family violence. The federal family courts and legal aid agencies be resourced to undertake the additional workload generated by these families. **9.3.5**

9.12 Prior to embarking on this facilitation the Attorney-General's Department should ensure that the current level of information sharing exhausts the current limits of the legislation imposed by the Privacy Act and legislative provisions around confidentiality. This issue should be revisited as part of any legislative reform introduced in response to the ALRC report on Privacy. **9.4**

10 Framework for legislative reform

It is not the Council's intention to agitate for changes to Part VII of the Act given the Attorney-General will be informed as to the effectiveness of the 2006 Shared Parenting amendments by the research commissioned by the previous Attorney-General, Phillip Ruddock MP being undertaken by the Australian Institute of Family Studies. Stage 1 is due for completion in late 2009. However, the Council has had the benefit of consultations with a myriad of organisations that have worked with the amendments over the last three years and has endeavoured to incorporate that information, albeit in some area anecdotal, in this advice.²¹⁰

10.1 COMMON MISPERCEPTIONS: THE "FRIENDLY PARENT" AND 50/50 TIME

Section 60CC(4)(b) requirements are often referred to as the "friendly parent" criteria and it encompasses those provisions which require the federal family court to take into consideration as an exercise of parental responsibility, the attitude or conduct exhibited by one parent towards the other in the facilitation of the relationship between the parent and child. The tension arises where there are issues of family violence and where the allegations are not able to be corroborated by reliable evidence. Concern was expressed that a vulnerable parent may elect not to make disclosure of family violence for fear of being considered an "unfriendly parent" or being exposed to a costs order if they are unable to substantiate the allegation.

A similar misperception exists around the concept of equal shared parental responsibility and the reluctance of some vulnerable parents electing not to disclose violence or take issue with the children spending time with a violent parent because of a mistaken belief that they will be labelled as hostile or "unfriendly" and lose time with their children. There is also a perception that equal shared parental responsibility equates to equal time or "50/50" and that the burden rests on the parent seeking different orders to carry the burden of convincing the court that something other than 50/50 time is appropriate. This understanding of what the legislation means appears to have been informed by some broad public perceptions. Those matters that the federal family courts take into consideration in making the determinations of whether equal time is appropriate do not appear to have filtered through to community views. Concepts of "custody" and "access" and "contact" still carry influence with the court users with "shared care" being translated as being "what custody used to be". The differing terminology used in some State systems could also contribute to this inaccurate understanding.

Once the Australian Institute of Family Studies report on the reforms has been evaluated, consideration should be given to reassessing the premise in s 60CC(2) that

²¹⁰ Organisations include family dispute resolution practitioners, family court judiciary, counsellors and staff, Legal Aid Commissions, private legal practitioners, child protection agencies, academics and representative bodies such as grandparents and indigenous groups.

the two primary considerations – having a meaningful relationship with both parents, and the need to protect from harm, are of equal importance. It is the Council’s view that the public’s misperceptions as to how these equally important considerations can impact on time spent with a parent has contributed significantly to decisions taken by parents which may not be in the best interests of the child. A consideration may be that child safety is prioritised over other factors.

10.2 EQUAL SHARED PARENTAL RESPONSIBILITY - PRACTICALITY

Section 65DAC provides that an order for equal shared parental responsibility requires the persons sharing such responsibility to make decisions about major long term issues for a child, jointly. Each of these persons must consult and make a genuine effort to come to a joint decision about such an issue²¹¹.

If the Court makes an order for equal shared parental responsibility, whether or not the presumption in favour of equal shared parental responsibility applies, s 65DAA requires the Court to consider whether an order for equal time or for significant and substantial time with each parent, would be in the child’s best interests. In such cases, the Court must consider whether the child spending equal time with each parent or the child spending substantial and significant time with each parent, is “reasonably practicable”. Section 65DAA (5) sets out the factors a Court must have regard to when determining ‘reasonable practicality’.

The Court is not required to consider whether or not an order for equal shared parental responsibility is “reasonably practicable”. Council is informed that there are many instances of such orders being made, particularly by consent, when there is a high level of acrimony and low levels of trust between parties. Many of these parties are not willing or able to communicate.

Council believes consideration should be given to amending Division 6 of Part VII of the Act to require the Court to consider whether making an order for equal shared parental responsibility is “reasonably practicable”. This would require the Courts to have regard to at least:

- (a) the parties’ capacity and/ or willingness to communicate co-operatively;
- (b) the extent of any family violence;
- (c) the impact such an order would have on a child.

10.3 CONSENT PARENTING ORDERS AND ALLEGATIONS OF ABUSE

The Family Law Rules provide in Rule 10.15A that where there are allegations of child abuse, physical or sexual, that an explanation is provided to the court as to how the order attempts to deal with the allegation.

There is no reciprocal provision in the Federal Magistrates Court Rules and the Council recommends that consideration be given to inclusion of the provisions.

²¹¹ *Family Law Act 1975 (Cth)* s 65DAC(3)

10.4 CONSISTENCY OF LEGAL TERMINOLOGY AND CONCEPTS

The terminology used in the Family Law Act to describe those bundles of parental obligations and responsibilities has changed a number of times and with the change in terminology, there has been an attempt to move away from the use of possessory terms such as custody and guardianship. The legislation in some States however still refers to these concepts. This difference in terminology hinders the portability of orders made in the federal family courts into the State sphere and causes confusion to court users endeavouring to relate current terminology to concepts of “custody and access”.²¹²

10.5 WHAT DEFINES FAMILY VIOLENCE

This issue is discussed in Chapter 3. The Council recommends the adoption of the definition used in the Victorian personal protection legislation.²¹³ The definition in section 4 of the Family Law Act would therefore need to be amended.

10.6 LEGISLATIVE IMPEDIMENT IN STATE ACTS: THE OPERATION OF SECTIONS 69ZW AND 91B FAMILY LAW ACT

The legal argument as to the enforceability of the provision in a Commonwealth act for the production of documents by a State Protection Agency to the federal family courts remain alive and well in spite of the 2006 amendments. Section 69ZW was intended to remedy the impost created as an outcome of the decision in *Northern Territory of Australia and GPAO & Ors*.²¹⁴ There is a single judge decision that supports the premise that the provision has met its objective in requiring State welfare agencies to produce documents.²¹⁵ There is as yet no authoritative decision of the Full Court. Until that issue is determined either by the Full Court (and ultimately by the High Court) or clarified by further legislative amendment federal family courts will continue to be faced with making decisions in difficult parenting cases without access to the documents held by State welfare agencies relevant to the issues of what is in the child’s best interest.

Council recommends that section 69ZW be amended so that the perceived ambiguity is removed and ensure that federal family courts have available all the relevant information.

The federal family courts are not empowered by the Family Law Act to require a child protection agency to become involved in parenting applications. The federal family courts do have power pursuant to section 91B to request the intervention of the relevant officer responsible for child welfare in the State. There have been many occasions when judges of the Family Court have made comments in judgments critical

²¹² See discussion at 10.1.

²¹³ *Family Violence Protection Act (Vic) 2008, section 5.*

²¹⁴ (1999) 196 CLR 553

²¹⁵ *Fitzpatrick and Fitzpatrick* (2004) FamCA 938

of the failure by the respective officer to intervene²¹⁶, and indeed in a recent case, the officer was ordered to become a party to the proceedings²¹⁷. The reluctance of the relevant officer either to intervene or to have the proceedings dealt with in a State court places the children in a precarious position²¹⁸.

10.7 REVIEW OF CURRENT OBLIGATIONS IN RESPECT OF FAMILY VIOLENCE

10.7.1 Section 60I certificates

A section 60I certificate is a document which materialises because a confidential family dispute resolution intervention has been unsuccessful and the parties must proceed to obtain a judicial determination of their dispute. Save for the exceptions provided for in the Family Law Act, evidence of what occurred at the family dispute resolution intervention is not admissible.

The tension lies in the perceived restriction on the family dispute resolution practitioner providing to the Court some guidance as to what intervention would best suit the needs of the family. The function of the Certificate as simply the vehicle which authorises parties to move to litigation does not reflect the financial investment by Government in creating family relationship centres, or the skill of the family dispute resolution practitioner in working with the family to provide guidance to the Court as to the program or services best suited to the needs of the participants. In discussions with Family Relationship Centres, legal aid and others, the Council was not able to ascertain a consensus across all of the relevant agencies as to whether Family Relationship Centres could have some responsibility for communicating relevant information to the court without it compromising the inadmissibility of the intervention, or the anonymity of a violence allegation thereby placing a victim at risk.

There are of course many unintended consequences that will flow from changing the status of a family dispute resolution practitioner (FDRP) from a practitioner delivering a privileged intervention to that of a "family consultant" style expert witnesses and report writers for the court system. For example:

- Funding to FDRPs will need to increase to add report writing skills and tasks;
- FDRP officers will be subpoenaed to testify about their due process, factual conclusions and diagnosis;
- Violent persons will develop strategies to avoid attending FDRPs;
- Many 'violated' persons will develop strategies not to disclose the violence to FDRP officers as they would rather just 'get the money and kids sorted out, rather than make a fuss'.

²¹⁶ *Markham and Markham* (2004) FamCA 914

²¹⁷ *Ray and Anor and Males and ors* (2009) FamCa 219.

²¹⁸ *Denny and Purdy* (2009) FamCA 547..

Before mandatory report writing or box ticking roles are added to the current mediation and advice giving roles of FDR's, the Council recommends that an options paper be written with advantages and disadvantages of each option, for comment by interested groups.

10.7.2 Review obligations in respect of confidential interventions

The Council has identified a number of strategies that can be considered in assist those working in the family law to highlight family violence as an issue and to consider options available to families. These strategies include:

- Provision as one of the exemptions under section 10E(2) admission by an adult, or disclosure by a child, that a child is at risk in a household where family violence is occurring;²¹⁹
- A legislative requirement for parties to advise federal family courts of existing or pending child welfare orders or arrangements, or of existing family violence or protection orders in place;
- Section 67 of the Family Law Act be amended to require a party to parenting proceedings to file a Notice of Family Violence in all cases in which a party claims family violence is a factor to which the court should have regard in determining a parenting case;
- Amend section 60K (2) to require a court to consider as one of the options referral for a risk assessment.

10.8 JUDICIAL OFFICERS TO TAKE JUDICIAL NOTICE OF COMMON KNOWLEDGE BASE

This issue has been considered in Chapter 6.1.

The Council considers that the judiciary should be empowered to take judicial notice of the common knowledge base and that consideration be given to amend s69ZX(3) accordingly.

10.9 SECTION 117AB – THE FALSE ALLEGATION

This issue is discussed in Chapter 8.3.3. In the Council's view, there is no evidence to support that section 117AB is achieving its purpose.

10.10 CONCURRENT JURISDICTION

This issue is discussed in Chapter 7. The jurisdictional divide has had the unintended consequence of requiring families to seek redress for their problems in State and federal family courts. The concern is that families and children are unnecessarily being put at risk.

²¹⁹ See Chapter 8.2.2.

Consideration should be given to a referral of powers to the federal family courts so that when those courts are required to make determinations under federal laws, the judicial officers may exercise State powers. Registration of orders made in the federal family courts, need to be registered in State courts and where necessary enforced by State police officers.

Recommendation 13

10. Further legislative amendments to address issues of family violence

10.2 The Attorney-General give consideration to clarifying either through legislative amendment or public education the intention of the following provisions:

- 10.2.1** Section 60CC(4)(b) often referred to as the “friendly parent” provisions may impede the disclosure of family violence in cases where a vulnerable parent’s allegations of family violence are not able to be corroborated by reliable evidence. **10.1**
- 10.2.2** Section 61DA - there remains a perception in the community that equal shared parental responsibility equates to equal time (50/50) and that the onus rests on the parent seeking different orders to convince the court that equal time is not appropriate. **10.1**
- 10.2.3** Section 65DAA(5) sets out the factors a court must have regard to in determining whether a child spending equal time, or substantial and significant time with a parent is “reasonably practical”. The consideration of reasonable practicability should extend to orders for equal shared parental responsibility and in doing so the Court should have regard to the following factors including:
- The parties capacity and / or willingness to communicate co-operatively;
 - The extent of any family violence;
 - The impact such an order would have on a child. **10.2**

Appendix A - Domestic Violence Definitions

| DOMESTIC VIOLENCE DEFINITIONS | | | |
|-------------------------------|--|---|--|
| JDN | STATUTE | DEFINITION OF FAMILY VIOLENCE | COMMENT |
| NZ | <i>Domestic Violence Act 1995 (NZ)</i> | <p>Section 3</p> <p>Meaning of domestic violence</p> <p>(1) In this Act, domestic violence, in relation to any person, means violence against that person by any other person with whom that person is, or has been, in a domestic relationship.</p> <p>(2) In this section, violence means—</p> <p>(a) Physical abuse:</p> <p>(b) Sexual abuse:</p> <p>(c) Psychological abuse, including, but not limited to,—</p> <p>(i) Intimidation:</p> <p>(ii) Harassment:</p> <p>(iii) Damage to property:</p> <p>(iv) Threats of physical abuse, sexual abuse, or psychological abuse:</p> <p>(v) In relation to a child, abuse of the kind set out</p> | <p>Definition includes physical, sexual and psychological abuse.</p> <p>Psychological abuse includes being threatened, harassed, or intimidated.</p> <p>Examples of psychological abuse include stalking, damaging property to intimidate a partner, or preventing social contact with others.</p> <p>Psychological abuse includes allowing a child to see or hear domestic violence.</p> <p>A domestic relationship exists if a person:</p> <p>Is a spouse or partner of the other person</p> |

| DOMESTIC VIOLENCE DEFINITIONS | | | |
|-------------------------------|---------|--|--|
| JDN | STATUTE | DEFINITION OF FAMILY VIOLENCE | COMMENT |
| | | <p>in subsection (3) of this section.</p> <p>(3) Without limiting subsection (2)(c) of this section, a person psychologically abuses a child if that person—</p> <p>(a) Causes or allows the child to see or hear the physical, sexual, or psychological abuse of a person with whom the child has a domestic relationship; or</p> <p>(b) Puts the child, or allows the child to be put, at real risk of seeing or hearing that abuse occurring;—</p> <p>but the person who suffers that abuse is not regarded, for the purposes of this subsection, as having caused or allowed the child to see or hear the abuse, or, as the case may be, as having put the child, or allowed the child to be put, at risk of seeing or hearing the abuse.</p> <p>(4) Without limiting subsection (2) of this section,—</p> <p>(a) A single act may amount to abuse for the purposes of that subsection:</p> <p>(b) A number of acts that form part of a pattern of behaviour may amount to abuse for that purpose, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.</p> <p>(5) Behaviour may be psychological abuse for the purposes of subsection (2)(c) of this section which does not involve actual or threatened physical or sexual abuse.</p> | <p>Is a family member of the other person</p> <p>Ordinarily shares a household with the other person (not just because they occupy the same house, or are landlord/tenant, or in an employment relationship); or</p> <p>Has a close personal relationship with the other person (not just an employment relationship). In deciding whether there is a close personal relationship, account is taken of the nature, intensity and duration of the relationship, but it need not be a sexual relationship.</p> |

| DOMESTIC VIOLENCE DEFINITIONS | | | |
|-------------------------------|--|--|---|
| JDN | STATUTE | DEFINITION OF FAMILY VIOLENCE | COMMENT |
| CTH | <i>Family Law Act 1975</i> | <p>s.4 Interpretation</p> <p>family violence means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety.</p> | <p>Definition of family violence inserted by the <i>Family Law Amendment (Shared Parental Responsibility) Act 2006</i> Schedule 1 Part 1 [3].</p> <p>Objective test – a person must reasonably fear for their personal wellbeing or safety in particular circumstances if a reasonable person in those circumstances would fear for their personal wellbeing or safety.</p> |
| STATE | STATUTE | DEFINITION OF FAMILY VIOLENCE | COMMENT |
| VIC | <i>Family Violence Protection Act 2008</i> | <p>s5. Meaning of family violence</p> <p>1) For the purposes of this Act, family violence is-</p> <p>(a) behaviour by a person towards a family member of that person if that behaviour-</p> <p>(i) is physically or sexually abusive; or</p> <p>(ii) is emotionally or psychologically abusive; or</p> <p>(iii) is economically abusive; or</p> <p>(iv) is threatening; or</p> | <p>Passed by the Victorian Parliament on 12 September 2008. Replaces the <i>Crimes (Family Violence) Act</i>.</p> <p>Empowers the police to issue family violence safety notices which may include the same conditions as a family violence intervention order and last until the application for a family violence intervention order is brought before the court.</p> <p>Broadens the definition of family member to include carers.</p> <p>Broadens the definition of family violence to include economic and emotional abuse.</p> |

| DOMESTIC VIOLENCE DEFINITIONS | | | |
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| JDN | STATUTE | DEFINITION OF FAMILY VIOLENCE | COMMENT |
| | | <p>(v) is coercive; or (vi) in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person; or</p> <p>(b) behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, behaviour referred to in paragraph (a).</p> <p>Examples: The following behaviour may constitute a child hearing, witnessing or otherwise being exposed to the effects of behaviour referred to in paragraph (a)-overhearing threats of physical abuse by one family member towards another family member; seeing or hearing an assault of a family member by another family member; comforting or providing assistance to a family member who has been physically abused by another family member; cleaning up a site after a family member has intentionally damaged another family member's property; being present when police officers attend an incident involving physical abuse of a family member by another family member.</p> <p>(2) Without limiting subsection (1), family violence includes the following behaviour-</p> <p>(a) assaulting or causing personal injury to a family member or threatening to do so;</p> <p>(b) sexually assaulting a family member or engaging in another</p> | <p>Restricts the ability of self-represented respondents to personally cross-examine the alleged victim in court.</p> <p>Violent partners barred from questioning victims in court.</p> <p>Police will be able to issue safety notices outside court hours, giving them the power to remove violent family members.</p> <p>Allows women and children to remain in the family home following a violent incident while the perpetrator is removed.</p> <p>The <i>Crimes (Family Violence) (Holding Powers) Act 2006</i> allows police to detain a person suspected of family violence for up to six hours.</p> <p><i>The Crimes Amendment (Rape) Act 2007</i> amends provisions applying to sexual offences in Victoria making it easier for witnesses to give evidence in sexual offence trials.</p> |

| DOMESTIC VIOLENCE DEFINITIONS | | | |
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| JDN | STATUTE | DEFINITION OF FAMILY VIOLENCE | COMMENT |
| | | <p>form of sexually coercive behaviour or threatening to engage in such behaviour;</p> <p>(c) intentionally damaging a family member's property, or threatening to do so;</p> <p>(d) unlawfully depriving a family member of the family member's liberty, or threatening to do so;</p> <p>(e) causing or threatening to cause the death of, or injury to, an animal, whether or not the animal belongs to the family member to whom the behaviour is directed so as to control, dominate or coerce the family member.</p> <p>(3) To remove doubt, it is declared that behaviour may constitute family violence even if the behaviour would not constitute a criminal offence.</p> <p>s6. of the Act defines economic abuse.</p> <p>s7. of the Act defines emotional or psychological abuse.</p> | |
| QLD | <i>Domestic and Family Violence Protection Act 1989</i> | <p>Section 11 - What is domestic violence</p> <p>(1) Domestic violence is any of the following acts that a person commits against another person if a domestic relationship exists between the 2 persons—</p> | <p>Provide for the safety and protection of a person who is in a domestic relationship where violence is committed against them by the other party to the relationship.</p> <p>Achieved by the court making a domestic violence order to protect the person against further violence.</p> <p>Substantial amendments made in 2003 extending the types of</p> |

| DOMESTIC VIOLENCE DEFINITIONS | | | |
|-------------------------------|---------|--|---|
| JDN | STATUTE | DEFINITION OF FAMILY VIOLENCE | COMMENT |
| | | <p>(a) wilful injury;</p> <p>(b) wilful damage to the other person's property;</p> <p><i>Example of paragraph (b)—wilfully injuring a defacto's pet</i></p> <p>(c) intimidation or harassment of the other person;</p> <p><i>Examples of paragraph (c)—</i></p> <p>1 following an estranged spouse when the spouse is out in public, either by car or on foot</p> <p>2 positioning oneself outside a relative's residence or place of work</p> <p>3 repeatedly telephoning an ex-boyfriend at home or work without consent (whether during the day or night)</p> <p>4 regularly threatening an aged parent with the withdrawal of informal care if the parent does not sign over the parent's fortnightly pension cheque</p> <p>(d) indecent behaviour to the other person without consent;</p> <p>(e) a threat to commit an act mentioned in paragraphs (a) to (d).</p> <p>(2) The person committing the domestic violence need not personally commit the act or threaten to commit it.</p> | <p>relationships in which a party to any one of those relationships could make application to a Magistrates' Court.</p> <p>Domestic violence is committed under the Act if it takes place between two people in the following domestic relationships:</p> <ul style="list-style-type: none"> - a spousal relationship; - an intimate personal relationship; - a family relationship; and - an informal care relationship. (see section 11A) |

| DOMESTIC VIOLENCE DEFINITIONS | | | |
|-------------------------------|---|--|--|
| JDN | STATUTE | DEFINITION OF FAMILY VIOLENCE | COMMENT |
| WA | <i>Acts Amendment (Family and Domestic Violence) Act 2004</i> | <p>S6. Meaning of “act of family and domestic violence” and “act of personal violence” (1) In this Act — act of family and domestic violence means one of the following acts that a person commits against another person with whom he or she is in a family and domestic relationship —</p> <p>(a) assaulting or causing personal injury to the person;</p> <p>(b) kidnapping or depriving the person of his or her liberty;</p> <p>(c)damaging the person’s property, including the injury or death of an animal that is the person’s property;</p> <p>(d) behaving in an ongoing manner that is intimidating, offensive or emotionally abusive towards the person;</p> <p>(e) causing the person or a third person to be pursued — (i) with intent to intimidate the person; or (ii) in a manner that could reasonably be expected to intimidate, and that does in fact intimidate, the person;</p> <p>(f) threatening to commit any act described in paragraphs (a) to (c) against the person.</p> <p>(2) In this Act — “act of personal violence” means one of the following acts that a person commits against another person with whom he or she is not in a family and domestic relationship —</p> <p>(a) assaulting or causing personal injury to the person;</p> <p>(b) kidnapping or depriving the person of his or her liberty;</p> <p>(c) causing the person or a third person to be pursued — (i) with intent to intimidate the person; or (ii) in a manner that could reasonably be expected to intimidate, and that does in fact intimidate, the person;</p> <p>(d) threatening to commit any act described in paragraph (a) or (b) against the person;</p> | <p>Makes important changes to Western Australia’s family violence legislative framework [which mainly consists of the <i>Restraining Order Act 1997</i>, <i>The Criminal Code</i> and the <i>Bail Act 1982</i>].</p> <p>Better protection for direct and indirect victims of domestic violence.</p> <p>Seven major changes to Western Australia’s domestic violence law including:</p> <ul style="list-style-type: none"> - increasing penalties where domestic violence is committed in circumstances of aggravation; - significantly limiting the defences to breaching an order; - making it possible to vary or cancel an interim order as opposed to only a final order; - allowing for a violence restraining order to be granted automatically in some cases; - providing better protection to the interests of children in the court environment; - giving police stronger investigation powers and enabling them to issue on-the-spot temporary restraining orders to immediately remove violence offenders from the home; and - reclassifying the various types of restraining orders to include domestic violence rather than just violence.(see Freemantle Attorney-General Mr J.A. McGinty, ‘Acts Amendment (Domestic Violence) Bill 2004’ (Second reading speech, 2 June 2004)) |

| DOMESTIC VIOLENCE DEFINITIONS | | | |
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| JDN | STATUTE | DEFINITION OF FAMILY VIOLENCE | COMMENT |
| | | <p>(e) if the person who commits the act has an imagined personal relationship with the person against whom the act is committed, an act that would constitute an act of family and domestic violence if those persons were in a family and domestic relationship.</p> <p>(3) For the purposes of this Act, a person who procures another person to commit an act of abuse, or part of such an act, is to be taken to have also committed the act himself or herself.</p> <p>(4) In this section — “assaulting” includes — (a) an assault within the meaning of <i>The Criminal Code</i>; and (b) behaving in a manner described in paragraph (a), (b) or (c) of section 319(3) of <i>The Criminal Code</i> ;</p> <p>“intimidate” has the same meaning as in section 338D of <i>The Criminal Code</i> ; “kidnapping or depriving the person of his or her liberty” includes behaving in a manner described in section 332 of <i>The Criminal Code</i> ; “pursue” has the same meaning as in section 338D of <i>The Criminal Code</i> .</p> | |
| NSW | <i>The Crimes Amendment (Apprehended Violence) Act 2006</i> | <p>562A Definitions</p> <p>domestic relationship—see section 562B.</p> <p>domestic violence offence means a personal violence offence committed by a person against another person with whom the person who commits the offence has or has had a domestic relationship.</p> <p>personal violence offence means: an offence under, or mentioned in, section 19A, 24, 26, 27, 28, 29, 30, 31, 33, 33A, 35, 35A, 37, 38, 39, 41, 44, 46, 47, 48, 49, 58, 59, 61, 61B, 61C, 61D, 61E, 61I, 61J, 61JA, 61K, 61L, 61M, 61N, 61O, 65A, 66A,</p> | <p>Assented to on 27 October 2006.</p> <p>562E Objects of Division 2 [Apprehended DV orders]</p> <p>(1) The objects of this Division are:</p> <p>(a) to ensure the safety and protection of all persons, including children, who experience or witness domestic violence, and</p> <p>(b) to reduce and prevent violence between persons who are in a domestic relationship with each other, and</p> |

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| | | 66B, 66C, 66D, 66EA, 80A, 80D, 86, 87, 93G, 93GA, 195, 196, 198, 199, 200 or 562ZG, or an offence of attempting to commit an offence referred to in paragraph (a). | <p>(c) to enact provisions that are consistent with certain principles underlying the Declaration on the Elimination of Violence against Women, and</p> <p>d) to enact provisions that are consistent with the United Nations Convention on the Rights of the Child.</p> <p>(2) This Division aims to achieve its objects by:</p> <p>(a) empowering courts to make apprehended domestic violence orders to protect people from domestic violence, intimidation, stalking and harassment, and</p> <p>(b) ensuring that access to courts is as speedy, inexpensive, safe and simple as is consistent with justice.</p> <p>(3) In enacting this Division, Parliament recognises:</p> <p>(a) that domestic violence, in all its forms, is unacceptable behaviour, and</p> <p>(b) that domestic violence is predominantly perpetrated by men against women and children, and</p> <p>(c) that domestic violence occurs in all sectors of the community, and</p> <p>(d) that domestic violence extends beyond physical violence and may involve the exploitation of power imbalances and patterns of abuse over many years, and</p> <p>(e) that domestic violence occurs in traditional and non-traditional settings, and</p> <p>(f) the particularly vulnerable position of children who are exposed to</p> |

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| | | | domestic violence as victims or witnesses, and the impact that such exposure can have on their current and future physical, psychological and emotional well-being, and (g) that domestic violence is best addressed through an integrated framework of prevention and support and, in certain cases, may be the subject of appropriate intervention by the court. |
| SA | <u>Domestic Violence Act 1994</u> | <p>s4 spells out the grounds for making a domestic violence restraining order and states that a defendant commits domestic violence if:</p> <p>(2)For the purposes of this Act, a defendant commits domestic violence—</p> <p>(a) if the defendant causes personal injury to a member of the defendant's family; or</p> <p>(b) if the defendant causes damage to property of a member of the defendant's family; or</p> <p>if on two or more separate occasions—</p> <p>(i) the defendant follows a family member; or</p> <p>(ii)the defendant loiters outside the place of residence of a family member or some other place frequented by a family member; or</p> <p>(iii) the defendant enters or interferes with property occupied by, or in the possession of, a family member; or(iv) the defendant—</p> <p>(A) gives or sends offensive material to a family member or leaves offensive material where it will be found by, given to, or</p> | <p>The South Australian Parliament passed a number of Acts in 2008, namely:</p> <p><i>Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act 2008</i> Reforms many offences, including persistent sexual abuse, unlawful sexual intercourse, incest, and offences with animals. Rape defined more comprehensively, including a continuation of sexual intercourse when consent is withdrawn. Introduces a new offence of compelled sexual activity and defines reckless indifference to consent to sexual acts, as well as consent to sexual activity.</p> <p><i>Statutes Amendment (Evidence) Act 2008</i> Reforms laws about the special arrangements for witnesses giving evidence, particularly from vulnerable witnesses including children and victims of serious offences. Reforms the way witnesses may be questioned, the manner in which judges warn or direct juries about the evidence of children, and restricts access to sensitive material that is to be used as evidence. Enable a victim to read impact statements by pre-recording them or for a representative to read them.</p> <p><i>Victims of Crimes Act 2001</i> Provides for a Commissioner for Victim's Rights.</p> |

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| | | <p>brought to the attention of a family member; or (B) publishes or transmits offensive material by means of the internet or some other form of electronic communication in such a way that the offensive material will be found by, or brought to the attention of, a family member; or the defendant communicates with a family member, or to others about a family member, by way of mail, telephone (including associated technology), facsimile transmission or the internet or some other form of electronic communication; or</p> <p>(v) the defendant keeps a family member under surveillance; or (vi) the defendant engages in other conduct, so as to reasonably arouse in a family member apprehension or fear of personal injury or damage to property or any significant apprehension or fear.</p> | <p>Able to require a public agency or official to consult about steps the agency or official might take to further the interests of victims. After consultation, the Commissioner may recommend that the agency or official issue a written apology to the victim. The Commissioner is required to have regard to the wishes of the victim.</p> |
| TAS | Family Violence Act 2004 | <p>s. 7 Family violence In this Act –</p> <p>"family violence" means –</p> <p>(a) any of the following types of conduct committed by a person, directly or indirectly, against that person's spouse or partner:</p> <p>(i) assault, including sexual assault; (ii) threats, coercion, intimidation or verbal abuse; (iii) abduction; (iv) stalking within the meaning of section 192 of the Criminal Code; (v) attempting or threatening to commit conduct referred to in</p> | <p>Includes most of the recommendations from <i>Safe at Home: A Criminal Justice Framework for Responding to Family Violence in Tasmania</i> (2003).</p> <p>Includes non-physical abuse, such as verbal abuse, intimidation, coercion, stalking, threats, abduction, emotional abuse and economic abuse.</p> <p>Inclusion of economic abuse in a definition of family violence was an Australian first.</p> <p>Includes the withholding of financial support, maintenance and money for household expenses.</p> |

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| | | <p>subparagraph (i), (ii), (iii) or (iv); or</p> <p>(b) any of the following:</p> <p>(i) economic abuse;</p> <p>(ii) emotional abuse or intimidation;</p> <p>(iii) contravening an external family violence order, an interim FVO, an FVO or a PFVO.</p> <p>s8. of the Act defines economic abuse</p> <p>Includes emotional abuse or intimidation</p> | <p>The only Australia domestic violence legislation to include sexual assault in its definition of domestic/family violence.</p> <p>Creates a presumption against bail for alleged perpetrators, requiring the decision-maker to consider the likely effect of release on the safety, wellbeing and interests of the victim or affected child.</p> <p>Safety of victims is a primary concern, should be able to remain in the family home.</p> <p>Increased penalties for breaches of orders.</p> <p>A breach that exposes a child to violence considered an aggravating factor in sentencing.</p> <p>Police mandated to notify the Child Protection services of any children present during an incident of family violence and considered at risk.</p> |
| ACT | <i>Domestic Violence and Protection Orders Act 2008</i> | <p>s. 13 What is domestic violence?</p> <p>(1) For this Act, a person's conduct is domestic violence if it—</p> <p>(a) causes physical or personal injury to a relevant person; or</p> <p>(b) causes damage to the property of a relevant person; or</p> <p>(c) is directed at a relevant person and is a domestic violence offence; or</p> <p>(d) is a threat, made to a relevant person, to do anything in relation to the relevant person or another relevant person that, if done, would fall under paragraph (a), (b) or (c); or</p> <p>(e) is harassing or offensive to a relevant person; or</p> <p>(f) is directed at a pet of a relevant person and is an animal violence offence; or</p> <p>(g) is a threat, made to a relevant person, to do anything to a pet</p> | <p>Section 6 of the Act outlines the objects of the Act which include:</p> <p>(a) to prevent violence between family members and others who are in a domestic relationship, recognising that domestic violence is a particular form of interpersonal violence that needs a greater level of protective response;</p> <p>and</p> |

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| | | <p>of the person or another relevant person that, if done, would be an animal violence offence.</p> <p>(2) In this Act: domestic violence offence means an offence against—</p> <p>(a) section 90 (which is about contravening protection orders); or (b) a provision mentioned in an item in schedule 1 (Domestic violence offences against other legislation) of an Act mentioned in the item.</p> <p>(3) In this section:</p> <p>animal violence offence means an offence against any of the following provisions of the Animal Welfare Act 1992:</p> <p>(a) section 7 (Cruelty); (b) section 7A (Aggravated cruelty); (c) section 8 (Pain); (d) section 12 (Administering poison); (e) section 12A (Laying poison); (f) section 13 (Electrical devices).</p> <p>offence, other than in relation to the <i>Public Order (Protection of Persons and Property) Act 1971</i> Cth, section 11 (Additional offences on premises in a Territory), includes conduct, engaged in outside the ACT, that would be an offence if it were engaged in within the ACT.</p> <p>personal injury includes nervous shock.</p> <p>S14 defines personal violence.</p> | <p>(b) to facilitate the safety and protection of people who fear or experience violence by--</p> <p>(i) providing a legally enforceable mechanism to prevent violent conduct;</p> <p>and</p> <p>(ii) allowing for the resolution of conflict without the need to resort to adjudication.</p> |
| NT | <i>Domestic and Family Violence Act 2007</i> | <p>s5 - <i>Domestic violence</i> is any of the following conduct committed by a person against someone with whom the</p> | <p>Replaced the Domestic Violence Act (NT). Commenced on 1 July 2008. Provides for the protection of people in a domestic relationship against violence.</p> |

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| | (NT) | <p>person is in a domestic relationship:</p> <p>(a) conduct causing harm; <i>Example of harm for paragraph (a)</i> <i>Sexual or other assault.</i></p> <p>(b) damaging property, including the injury or death of an animal;</p> <p>(c) intimidation;</p> <p>(d) stalking;</p> <p>(e) economic abuse;</p> <p>(f) attempting or threatening to commit conduct mentioned in paragraphs (a) to (e).</p> <p><i>Note - Under Part 2.2, a DVO may be sought, and made, against a person if the person counsels or procures someone to commit the domestic violence, see section 17</i></p> <p>s.6 of the Act defines intimidation s.7 of the Act defines stalking s.8 of the Act defines economic abuse</p> | <p>Simplifies the processes associated with domestic violence orders to protect women and children.</p> <p>Defines domestic violence to include economic abuse and intimidation as being explicit grounds for orders, as is violence that impacts on the welfare of a child.</p> <p>Provides for the option for children to apply for a Domestic Violence Order (DVO) on their behalf.</p> <p>Increasing the maximum penalty for breaching a Domestic Violence Order from 6 months to 2 years.</p> <p>Presumption in favour of a DVO applicant, who has children in their care, remaining in the family home.</p> <p>Economic abuse and intimidation being explicit grounds for orders, as is violence that impacts on the welfare of a child.</p> <p>The Northern Territory Government introduced the Victims of Crime Assistance Act 2006 to establish schemes to help victims of violent acts with counselling and financial assistance.</p> |