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Dear Ms Wynn

Family Violence – Improving Legal Frameworks

I refer to the Commission's Consultation Paper '*Family Violence – Improving Legal Frameworks*'. The Consultation Paper was referred to expert practitioner representatives on the Law Society's Family Issues, Criminal Law and Dispute Resolution Committees for comment.

Included in this submission are the issues which were highlighted at the Family Violence Forum held on 10 May 2010.

The Family Issues Committee made the following comments:

FAMILY VIOLENCE LEGISLATION AND PARENTING ORDERS

Resolving inconsistencies between protective orders and parenting orders

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

It is possible that the State courts are not using the power in s 68R *Family Law Act 1975* on a regular basis and if so the reluctance on the part of the Court to do so (if any) could be due to the following:

a. State Courts dealing with a wide variety of issues involved in criminal and civil litigation are not specialised in parenting matters which are generally speaking best dealt with by the Family Court and Federal Magistrates Court ("the Federal Family Law Courts") because of their specialised knowledge. The Federal Family Law Courts also have resources, such as the Child Dispute Services division of the Family Court where Family Consultants are able to assist the Court in determining parenting matters. Family Consultants convene over Child Dispute Conferences and also prepare Family Reports (after parties are interviewed) which forms part of the evidence before the court.

b. Allegations made by a former spouse in an Application for Domestic Violence Order against the other party (who is the parent of the subject children) may not include allegations of violence by that party against the children. In such circumstances it would be inappropriate for the State Court to exercise the power in s 68R. It should be noted that in some cases, the cause of harassment (e.g. harassing telephone calls, SMS messages) and outbursts of anger by the defendant against the applicant in Domestic Violence Order applications, is as a result of the applicant not making the children available to the defendant (including cases where there is no good reason to do so).

c. It is not appropriate for the State Court to be used as a back-door method of overturning orders made in the Federal Family Law Courts after a hearing has taken place in those courts. This has the potential of being taken advantage of in matters where one party is dissatisfied with the outcome of the Court's decision and utilise it as a tool to alienate the child/children from the other parent.

d. State Courts may not have the time or resources to determine issues regarding the variation or suspension of parenting orders, particularly in cases where the Federal Family Law Courts have made a determination, following hearing of evidence in the matter which may include a Family Report and where the Federal Family Law Courts may have had the benefit of an Independent Children's Lawyer who was appointed to the case to represent the interests of the children separately.

Reference to s 68R powers in the State Act is unlikely to change the position or to address the problems referred to above in paragraphs a – d above.

A requirement for the State Courts to use the s 68R power would be inappropriate in cases where circumstances are as set out in paragraphs c and d above. It is best for this power to be used at the discretion of the judicial officer based on the circumstances of each case.

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

The State Court is specialised in dealing with domestic violence. The Federal Family Law Courts are specialised in dealing with parenting matters. Rather than creating yet another Court, it would be preferable for transfer provisions to be placed in the State legislation, which enables the State Court to transfer the question of parenting (raised in the Domestic Violence Application) to the Federal Family Law Courts

There is currently provision to transfer applications under the Family Law Act to the Federal Family Law Courts. However, no such provision exists in respect to Domestic Violence Order applications. Any jurisdictional issues could be overcome by the State Court ordering the Domestic Violence Order applicant to forthwith complete an Application in a Case with the State Court, which could then be transferred to the Federal Court. In such cases, if the judicial officer in the State Court is of the view that

due to the circumstances in a particular case that orders should be suspended or varied then suspension or variation of orders could be made, pending the transfer of the matter back to the court which made the parenting orders initially. The prospect of the matter being transferred to the original court is likely to deter any applicants seeking to use the State Court as a back-door method of overturning the parenting orders made in the Federal Family Law Courts.

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

The inclusion on the application form of an option to discharge, vary or suspend a parenting order is not appropriate, as this can be sought by the applicant when the matter is before the Court. It is also likely to encourage such applications in matters where the applicant would not have otherwise sought such an order.

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

Reluctance on the part of practitioners (if any) to seek to advocate the use of s 68R by the State Court is likely to be for the reasons set out in paragraphs a – d referred to above. It important that this provision, which is there for protection of those in need of protection, not be used by others as a convenient method of frustrating the orders made in the Federal Family Law Courts for the children to spend time with the other parent, particularly in circumstances such as those set out in paragraph d above.

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

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

The provision of an exception in a Domestic Violence Order in respect to parenting orders is often not a problem. Such orders are usually made only where the Domestic Violence Order relates to the protection of the other parent and not for the protection of a child. Only the police have the power to seek a Domestic Violence Order for the protection of a child/children. The Police do not make such applications capriciously and will issue such applications in circumstances where child/children need protection. In such circumstances it is unlikely that a Magistrate in the State Court would make that Order subject to a parenting order.

It would therefore be inappropriate to remove the option of an order being made which includes the exception of implementing existing parenting orders.

The form could allow a preference that such exception not be included but again this could prove problematic. There are other methods of protecting the applicant at changeover times, e.g. to ensure that changeover occur at an authorised contact centre in the presence of a supervisor.

State courts- awareness of parenting orders

The Application for a protective order should seek information about the existence of any current parenting orders. In the same way as an Application in the Federal Family Law Courts seeks details of any Domestic Violence Orders seek either a copy of the Order the following details in respect to the Order:-

a The date the order was made;

b The Court in which the Order was made (and whether made by consent or following a hearing);

c A brief description of the provisions of the orders (e.g.: The child/children live/s with the applicant and spends time with the respondent each alternate weekend; for ½ school holidays; and at Christmas and other special occasions).

INTEGRATED RESPONSES AND BEST PRACTICE

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

(a) common policies and objectives;

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

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

(d) training and education programs; and

(e) provision for data collection and evaluation.

The proposal for integrated responses to family violence to be established and further developed is appropriate as are the inclusions of matters set out in the proposal. Some form of regulation may be appropriate in order for integrated responses to work efficiently.

SPECIALISATION

Specialist courts – jurisdiction and features

Specialised courts dealing with the matters raised in this proposal already exist. It would best serve the public for resources to be provided to the existing courts to deal more efficiently with such matters, including appointment of more judicial officers and court support staff to deal with these matters, rather than creating another court which may be under-resourced. It would be inappropriate to create yet another court to deal with such matters when the existing courts have the jurisdiction and the expertise in dealing with these matters.

The following matters should be considered in relation to this issue:

- The State Court has the jurisdiction and is sufficiently specialised in dealing with domestic violence matters and in related criminal matters (e.g. assault). The State Court is also able to deal with any civil claims for damages.

- The Federal Family Law Courts are specialised in dealing with all aspects of family law including parenting matters and child support. There are already two courts operating at Federal level which deal with the same matters (i.e. The Family Court of Australia and The Federal Magistrates Court of Australia).

- The availability of funding for any new specialised court is an issue. If such funding is likely come from the existing State Federal Courts and Federal Courts budgets, it would remove limited resources from these courts. If so, this would not serve the interests of the public.

- All of the matters which are listed as desirable or appropriate for the specialised court to have in place in proposal 20-4 already exist in the current system.

- The creation of yet another court which deals in matters existing courts are equipped to deal with at present, may result in encouraging forum shopping by litigants by providing a further alternate venue. It does not change the nature of the problem or address the problem more efficiently; it simply moves the problem from one venue to another.

- The co-location of the "one stop shop" may seem appropriate, however these types of arrangements do not always serve the public well or address the needs of the problems they are dealing with. For example, the Federal Howard Government's reforms in family law created the Family Relationship Centres (FRCs). The creation of FRCs has not changed the nature of the problems people and their children experience. The Family Court counselling service (as it was previously known – now called Child Dispute Services) provided a similar service (free of charge) both before and after the parties commenced court proceedings. That is, parties seeking "counselling" were not required to be litigants in the court system in order to get an appointment for counselling to discuss the arrangements for the children and attempt to reach an agreement at the court counselling service. It was voluntary and most people utilised this service when needed.

Had the funds to create these FRCs been shared with the existing Family Court system at the time, we would now have a far more efficient service for the litigants, who previously had (but no longer have) the benefit of:

- Having seen their solicitor and obtained legal advice before going to "counselling" (i.e. it was more often than not, the solicitor who advised clients about the service and set up appointments) as there are no legal services provided (nor can there be) at a Government mediation service centre.

- The knowledge and experience of the "Counsellors" within the court in reaching agreement (where possible) as to what arrangement was in the best interest of the children. The Family Dispute Resolution Practitioners who work in these centres whilst trained in respect to these matters, do not necessarily had a great deal of experience and understanding of the types of problems the clients face.

- Cases involving domestic violence were noted and parties were not required to attend a joint session (or any if deemed inappropriate).

- Memoranda (in respect to non-confidential aspects of the counselling session) were provided on the court file where proceedings had been commenced. The Judicial Officer dealing with the matter was therefore able to have a better understanding of what was happening between the parties from an independent third party. There is no such information available to the Court with the current FRC model.

- Appointments for voluntary free counselling, before Court proceedings were commenced could often be obtained within two to four weeks. There is a lengthy delay in at present of about ten weeks before one is able to obtain an appointment for free mediation in many of the FRCs.

- The availability of the parties' solicitors to prepare consent orders (in legally binding form) after agreement was reached and lodged them with the court so that orders are promptly made by consent. Now, more often than not, parties enter into "Parenting Agreements" which are poorly drafted. Often agreements are inappropriate and provide for 50/50 living arrangements for very young children, which in many circumstances people feel pressured into signing at mediation by the mediator because they believe (having sought and received no legal advice about the matter) that this is what the law requires them to agree to.

Whilst of course, it is still open to parties to seek and obtain legal advice they often do not do so and go into the situation ignorant of their rights, their children's rights and what the law states in relation to what is appropriate in respect to parenting arrangements. The creation of the FRC, whilst no doubt well intentioned, has not responded to the problems people face. The problems have simply moved (initially at least) from the court to the FRC. Often in more serious cases where a court determination is required, this has created yet another hurdle to overcome by the people who are experiencing the problem, before they can get to court. The first place they go is to the "one stop shop" of the FRC, rather than to their solicitor for legal advice, before seeking mediation. In many cases, this has served to remove people's ability to make informed decisions regarding parenting disputes.

For the reasons set out above, it seems inappropriate for a specialised court to be created with a "one stop shop" premises with integrated services. This proposal could result in problems with persons seeking assistance not being informed about their legal rights.

THE INTERSECTION OF FAMILY LAW AND CHILD PROTECTION

Question 14–6: What other practical changes to the application forms for initiating proceedings in federal family courts and the Family Court of Western Australia

would make it clear to parties that they are required to disclose current or prior child protection proceedings and current child protection orders?

The forms could be simplified so that applicants are prompted to provide details of family violence. For example, perhaps a 'tick – a box' system could be used. Often AVOs and the involvement of child protection agencies are not disclosed, particularly by self represented litigants.

This type of system would assist and inform assessment of risk processes, particularly for self-represented litigants.

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

One of the greatest 'missing pieces' in determining matters before the Courts, and even in diverting them from a final hearing, is information. There is no easy flow of information between the courts and state agencies. This kind of issue has been raised in a number of recent reports as a direct hindrance to courts making orders appropriate to risks faced by children and to protecting children from harm.

Ideally the courts and Community Services would enter into a Memorandum of Understanding about the automatic provision of relevant information about every family who comes before the Family Courts. This might be assisted by the presence of a liaison offer from Community Services at Family Court registries.

This would arguably require an amendment to section 29(4A) of the *Children and Young Persons (Care and Protection) Act 1998* should be made to allow the disclosure of the identity of a person who made a report that a child was at risk of significant harm to courts exercising jurisdiction under the *Family Law Act 1975*.

This could be done by specifically:

- Amending s 29(1)(d) to include the words 'and in courts exercising jurisdiction under the Family Law Act' after the words 'Children's Court.
- Amending ss 29(4A), 29(4B) and 29(4C) to include the words 'and in courts exercising jurisdiction under the Family Law Act' after the words 'law enforcement agency'

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

The state child protection agencies have a far greater role and capacity than the Family Courts and there are many families who go between both jurisdictions. More co-operation between state child protection agencies and Federal Family Courts is needed.

Child protection agencies should intervene in the Family Courts more often as they have a useful and relevant role to play.

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

Yes.

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

Given the likely integration of the two courts, this may not need to be addressed. It is unnecessary for a separate process in the Federal Magistrates Court to be established. The protocols between the two courts would suggest that any matters involving serious allegations, of the nature that are in Magellan should be transferred to the Family Court for admission into the Magellan project.

That said, the over-arching principles of Magellan are:

- Co-operation between all agencies & stake-holders who are or who might have been involved with the family, and
- Speed. That is, the devotion of resources to move the matter through to trial more quickly.

Magellan is, at its heart, a case-management system. That is, it represents the model of how best to manage cases which fall within the ambit being discussed.

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

It is not uncommon for parents to move between States with children. However if the family was subject of a child protection assessment or risk of harm reports this information is not automatically transferred to another state. The movement of families from State to State, whether to avoid the intervention of welfare authorities or not, is a regular occurrence. One model adopted in jurisdictions overseas is the maintenance of a national register of children. Such a register contains information of children who are considered to be in need of protection but where their best interests suggest that they should remain in the family home with a high level of support. The register is available to service providers in health, education, welfare and the police. It allows these agencies to ensure they are aware that these children must be closely monitored when there is contact with their services.

A register must be national to ensure families who move between States do not become lost in the system.

Government departments should be mandated to provide information to child protection agencies and to Family Courts. In October 2008 it was announced that a new national protocol will be developed for Centrelink to release information to child protection agencies to help locate children at serious risk of abuse and neglect when their whereabouts are unknown. This unfortunately did not extend to protocols for sharing with the Family Court. This omission has an unfortunate consequence because it again creates a system where certain children fall through the gaps of the child protection and family law systems.

There is also a need for improved co-operation between Commonwealth, State and Territory Governments to streamline the process for federal and interstate police checks in all matters about children. Whilst Community Services can obtain this information from Police Departments from other states, no such process is available to Family Courts dealing with child protection issues. A Local Court has access to the antecedents of defendants who come before them. Such information should be available to all courts considering allocating parental responsibility for a child. A court determining parental responsibility for a child should be able to obtain a report on all police involvement with any person who proposes to exercise parental responsibility for a child.

There is a need for processes for information transfer/sharing between different courts dealing with the same families. Protocols or memorandums of understanding need to be developed, or legislative change needs to occur to enable the transfer and/or sharing of information about children (as suggested above).

It is not uncommon for a Children's Court to deal with a child who has been subject to Orders made under the Family Law Act. An example:

- A matter was heard in the Children's Court. Two years prior, orders about the child were made in the Federal Magistrates Court (FMC). The same issues were before the court on both occasions. In the FMC proceedings, a Family Consultant prepared a comprehensive report. A range of subpoenas were issued. An Independent Children's Lawyer (ICL) acted for the child.
- When the matter came before the Children's Court in NSW an Independent Legal Representative was appointed for the child. Because it was a different jurisdiction, it was not the same ICL from the FMC proceedings. Guidelines for ICL's require continuity of representation for a child however those guidelines are not recognized in the state welfare jurisdiction. The FMC was asked to provide their file to the Children's Court. The file arrived with a note requiring no photocopying – this was a problem in terms of making the information available to the Children's Court expert. In addition the Family Report could not be released to the expert without an order by the FMC due to the publication restrictions. The Family Consultant who prepared the report for the FMC was obviously not attached to the Children's Court Clinic who prepared a new report. This is unfortunate as not only was the child subject to further interviews with a person unknown (a process identified as "systems abuse" in the ICL guidelines) but much of the information about the child and her family had to be gathered again. The net effect of separate jurisdictions in a matter such is this is duplication, cost, delay and possibly worse outcomes for the child.

A restructuring of the current jurisdictional arrangements for dealing with children's issues such as an extended cross vested scheme for family law and care and protection matters would improve these outcomes. As a minimum, the Family Court should be enabled to act as the appellate jurisdiction for care and protection matters. This potentially could be achieved by recognising that the Family Court exercises parens patriae, or by having Family Court judicial officers sworn in as Judges of the Supreme Court, then a specialist national court of appeal for children's matters would evolve.

A second example:

- A matter in the Family Court (Magellan) involving three children and allegations of abuse. An expert's report is ordered and awaited.
- At the same time the NSW police bring an application for an AVO to protect the three children.
- The Local Court proceedings are listed for hearing, and adjourned, twice because the Family Court expert's report has not been released.
- When the Family Court report is made available it is not released widely enough to be provided to the Local Court or to prosecutors.
- Separately, in the Family Court there is a great deal of material available having been produced on subpoena.
- The Local Court Magistrate is of the view however that their Court cannot (and hence will not) request the Family Court make the subpoena material

available. Accordingly someone in those proceedings has to re-subpoena the documents. This will be useless if the documents produced were original.

- A separate application is required to the Family Court to have the report released. One party objected with further cost and delay.
- By the time the AVO hearing is conducted, at least a year will have passed. When the hearing occurs there may not be sufficient material before it.

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

Yes possibly – see comments above.

The Criminal Law Committee (CLC) made the following comments.

FAMILY VIOLENCE: A COMMON INTERPRETATIVE FRAMEWORK

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

The CLC would prefer to leave economic abuse out of domestic violence legislation. It would be difficult to prove, especially where the parties simply have different spending habits and attitudes towards saving and lifestyle. Economic abuse could be covered by intimidation if it can be proved to be used in an unacceptably controlling way. Otherwise the legislation is taking on the task of scrutinising and possibly criminalising the frugality of one party to a relationship.

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

This proposal is opposed.

Section 7 of the *Family Violence Protection Act* 2008 (Vic) has the following definition for emotional or psychological abuse:

> *"For the purposes of this Act, emotional or psychological abuse means behaviour by a person towards another person that torments, intimidates, harasses or is offensive to the other person.*

The inclusion of essentially bad manners by including the term "offensive" removes Domestic Violence Orders from a position of protecting victims of domestic or personal violence to a remedy for the aggrieved.

Section 7 proceeds to provide the following examples:

- *repeated derogatory taunts, including racial taunts;*
  This is not domestic violence, it is bad manners
- *threatening to disclose a person's sexual orientation to the person's friends or*

family against the person's wishes;
Again, this is not domestic violence; it may possibly amount to defamatory conduct if the disclosure is untrue.

- *threatening to withhold a person's medication;*
  This example would be covered by harassment or intimidation under other sections of each state's legislation
- *preventing a person from making or keeping connections with the person's family, friends or culture, including cultural or spiritual ceremonies or practices, or preventing the person from expressing the person's cultural identity;*
  In theory, if you prevented a person from wearing a nose ring and the nose ring had cultural significance within a particular culture, this would mean the person could apply for an apprehended violence order. This is not what the legislation was designed for. The issues in this dot point are remedied civilly, not through the family violence laws.
- *threatening to commit suicide or self-harm with the intention of tormenting or intimidating a family member, or threatening the death or injury of another person.*
  The threat to commit suicide does not expose an individual to violence. This is not what the legislation was designed for.

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

This proposal is opposed.

There are already criminal sanctions available for offences such as cruelty to animals (s 530 *Crimes Act 1900*). There should not be a separate offence because it occurs in the context of a domestic relationship.

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

This proposal is opposed if the definition of family violence is broadened as proposed. Homicide is an extremely serious charge. The extension of defences available for such an offence should be carefully considered rather than driven by an ideological concern for the victims of domestic violence.

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

NSW legislation covers carers (s 5 *Crimes (Domestic and Personal Violence) Act 2007.* If carers, paid or unpaid are not included, either in domestic violence of personal violence legislation, some of the most marginalised people in society are left without protection. These include:

- Elderly people living in nursing homes;

- People with an intellectual disability living in group homes where paid carers are, effectively, the family;
- People living in mental health facilities;
- Foster children.

Proposals 4-21 and 4-25: State and territory family violence legislation should contain guiding principles, which should include express reference to a human rights framework. The preamble to the Family Violence Protection Act 2008 (Vic) provides an instructive model, although it would be preferable if the principles also referred expressly to relevant international conventions such as the Declaration on the Elimination of Violence against Women, and the United Nations Convention on the Rights of the Child.

State and Territory family violence legislation should articulate a common set of core purposes which address the following aims:

- to ensure or maximise the safety and protection of persons who fear or experience family violence;
- to ensure that persons who use family violence accept responsibility—or are made accountable—for their conduct, and
- to reduce or prevent family violence and the exposure of children to family violence.

If State and Territory domestic violence legislation is to contain guiding principles and purposes, it should also state that those principles include the right to a fair trial and the purposes of protection and accountability must operate in the context of the fundamental right to a fair trial.

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

Family violence legislation should not specify a purpose of "ensuring minimal disruption to the lives of those affected by family violence". This statement can be nothing more than a meaningless aspirational statement.

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

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

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

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

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

The test outlined in the NSW legislation incorporates a subjective belief by the applicant and that belief to have some objective basis. A combination of the subjective and objective tests is preferred.

FAMILY VIOLENCE LEGISLATION AND THE CRIMINAL LAW

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

The 2008 evaluation of the Domestic Violence Court Intervention Model in NSW conducted by Bureau of Crime Statistics and Research involving interviews with domestic violence victims suggested that this was the case.

Proposal 5-4: State and territory family violence legislation, to the extent that it does not already do so, should

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

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

The making of an Apprehended Personal Violence Order or an Apprehended Domestic Violence Order by the police is opposed. Judicial officers should determine whether an order should be made according to law. In NSW the police have the power to seek a provisional order. They do so by obtaining a telephone approval from an authorised justice. Police powers should not be extended to enable them to make interim orders without reference to a judicial officer or authorised justice.

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

In NSW such proceedings can be instituted by the complainant or a police officer on behalf of the person in need of protection (PINOP). The vast majority of such matters are instituted and run by the police.

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

The police already have the power to arrest a person who has committed a domestic violence related offence. This includes the power to refuse bail. Interfering with the liberty of another person should only be exercised in those circumstances where the police are exercising statutory powers of arrest and bail determination. This power should not be extended to circumstances which may not involve the commission of a criminal offence.

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

The presumption in favour of bail has been gradually eroded in NSW for specific offences, including breaching an apprehended violence order where that breach involves an act of violence or the accused has a history of domestic violence (s 9A *Bail Act 1978*). Legislative change such as this usually follows an horrific case and is often more a politically charged reaction to public opinion than a carefully considered response to whether a change in the law is necessary.

The CLC is opposed to the erosion of the presumptions in favour of bail and supports the retention of judicial discretion in matters such as this.

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

This proposal should be covered by the imposition of an interim order in combination with bail if a charge is involved.

PROTECTION ORDERS AND THE CRIMINAL LAW

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

This is overcome to a large extent in NSW because it is court practice that the apprehended violence order hearing follows the criminal charge. Some Magistrates attempt to hear them together – there is no power to do this. The reason criminal hearings are conducted first is because if a person is found guilty, an apprehended violence order is automatically made. This alleviates the need for a subsequent hearing on the apprehended violence order case.

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

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

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

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

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

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

This proposal is opposed. The imposition of an apprehended violence order may occur after a judicial officer considers the evidence and decides whether the complainant has satisfied the court that an order should be made on the balance of probabilities. An order may be made because the respondent agrees to the making of an order without

admission as to the allegations made against him. A criminal law trial for a related domestic violence offence is one where the evidence must be established beyond reasonable doubt. The making of an apprehended violence order either according to a different standard of proof or where it was made by consent is not relevant to the facts in issue in a trial and could be prejudicial to the accused.

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

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

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

The provisions are working in NSW where the making of an apprehended violence order by the Court invariably follows a conviction for a domestic violence related offence. There is a discretion not to impose an order but this would happen rarely and only in exceptional cases – for example a charge is proven but the court decides to dismiss the charge unconditionally and without recording a conviction, it is a first offence and the victim advises the court that s/he does not require the protection of an order.

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

In NSW the court will not necessarily follow the wishes of the victim. A related issue is the extent to which the police should be allowed to impose their will and seek an order against the wishes of the victim. Obviously where an offence has been committed they have no choice. Police will in all but the most minor of matters proceed to charge the alleged offender. The court will usually impose an order following conviction or plea in all but the most exceptional of circumstances. This change in policing and in legislation is designed to reflect the seriousness with which the Government views domestic violence in all its forms.

However, there is a danger in police losing all discretion in the charging process and in the courts losing judicial discretion in imposing domestic violence orders. For instance, sometimes a person seeks some intervention to resolve a situation involving domestic violence which is not a feature of their relationship. The incident may have arisen in exceptional circumstances. If by calling the police victims lose all control over the outcome of the process, there may be a disincentive to involve police at all. In summary, balance and discretion should be maintained. Public attitudes can still be shifted without applying the sledgehammer to every domestic violence situation.

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

See answer to Question 6-5 above.

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

An order which contains a prohibition on locating or attempting to locate a victim of domestic violence would be difficult to enforce. The current prohibition on contacting a victim should be sufficient.

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

The lack of options for alleged perpetrators often leads to breaches of orders. Some people will be able to rely on family/friends or make their own arrangements, but others will not. The availability of suitable accommodation should be a Government priority if it is serious about reducing family violence.

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

The presumption favours the alleged victim and that is fair. However, there should be sufficient discretion as the presumption may not always be the safest option for the alleged victim, or the fairest one for the alleged perpetrator.

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

There is no power to impose such conditions on the making of an order. The making of an order does not mean that an offence has been committed, and the State needs to be cautious about the extent it seeks to compel people to do things not associated with the commission of a criminal offence. There is however power to impose such conditions as part of a bond imposed on conviction for a domestic violence related offence. The Government needs to look at the availability and suitability of programs before introducing legislation that will direct people to undergo such programs.

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

See the answer to Proposal 6-10 above.

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

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

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

Courts do this in any event if they are dealing with a domestic violence related offence. There would appear to be no need for this proposal.

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

This proposal is opposed. The police in NSW rarely charge in such circumstances, but this option should be available in exceptional circumstances.

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

This proposal is opposed. The threat of criminal prosecution can work towards ensuring the integrity of the judicial process, and be an incentive for a witness to tell the truth. The making of an apprehended violence order has implications and may lead to criminal sanctions including imprisonment if breached.

It is acknowledged that the prospect of a genuine victim of domestic violence being prosecuted and facing criminal sanction for minimising the role of the perpetrator is to be avoided. This is a matter for the courts to determine in the circumstances of each case. It is more dangerous for the Government to legislate away this incentive to tell the truth. It undermines the judicial process to do so.

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

As a matter of fairness this should be available to be put in mitigation. If such consent is obtained through intimidation it will carry little weight. If however, it is genuinely given, it obviously mitigates the seriousness of the offence. The danger again is that enacting such a provision the legislators would be taking away from the courts the ability to determine each case on its merits.

RECOGNISING FAMILY VIOLENCE IN CRIMINAL LAW

This Chapter appears to make an assumption that a history of domestic violence is not sufficiently taken into account in the sentencing process. Situations of domestic violence which attract a criminal sanction are varied and dynamic, so the courts should not have judicial discretion fettered. Sentencing principles exist which require courts to take into account the objective seriousness of an offence, the person's criminal history and the offender's subjective circumstances. Aggravating and mitigating circumstances are taken into account in the sentencing process. This may include some of the matters referred to in the questions in this chapter. However, as a matter of fairness, the accused person is sentenced for the offence committed not uncharged conduct. These sentencing principles should be maintained in order to maintain fairness for the accused.

IMPROVING EVIDENCE AND INFORMATION SHARING

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

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

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

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

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

The proposal that the applicant be able to oppose the making of an order by consent and without admission is unusual. An order made by consent without admissions is one means of getting a quick and acceptable result for the parties and the courts. To be able to set such matters down for hearing will test the resources of the courts, increase delays for litigants and hence potentially increase tensions in family situations. The object of reducing family violence would not be served by this proposal.

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

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

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

No. The idea is that people can apply for a protection order as cheaply and inexpensively as possible. If the application needs to be sworn, self-represented applicants who have an application put together by a registrar, or police applicants where the application is rushed, may be significantly disadvantaged. There are some jurisdictions, such as NSW, where a court of its own motion can order that statements be served. This has the benefit of allowing victim evidence to be set out in a logical coherent manner but has the detrimental aspect to it that the witness is "cold" when they are cross-examined by the defence.

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

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

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

In most jurisdictions there is a prohibition on an unrepresented accused cross examining the alleged victim in sexual assault trials. If this was to be extended to all charges relating to family violence, respective Governments would nee to put in place a strategy to fund interlocutors. Legal Aid Commissions are not funded to provide such a service. They are funded to represent people who are eligible for legal aid, and even then it is a stretch. They are not funded to also represent people who either do not seek, or are not eligible for their services.

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

(a) protection order proceedings under state and territory family violence legislation; and/or
(b) family law proceedings in federal family courts?

Yes. One such example occurred in NSW when agencies attempted to agree on information-sharing protocols at the two DVICM sites (Campbelltown and Wagga Wagga).

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

This is opposed. Information sharing should not occur without the parties having the opportunity to object in the same way as would occur in a contested subpoena hearing.

SEXUAL OFFENCES

Question 16-1: Do significant gaps or inconsistencies arise among Australian jurisdictions in relation to sexual offences against adults in terms of the:
(a) definition of sexual intercourse or penetration;
(b) recognition of aggravating factors;
(c) penalties applicable if an offence is found proven;
(d) offences relating to attempts; or
(e) definitions of indecency offences?

There are no doubt inconsistencies and the temptation to adjust maximum penalties and sentencing practices in an upward direction should be resisted. It may be that NSW with the availability of standard non-parole periods for sexual assault offences means that it can boast the heaviest penalties. In combination with continuing detention for sex offenders, such a regime is crushing in its severity.

A review such as this should be seeking to achieve fairness and consistency in sexual assault definitions and penalties.

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

Social research data should be considered in this context. If the research shows that young people have sex under the age of 16 years, and do so with someone who is usually only a bit older than them, then this creates the situation where the law is out of step with current practices amongst young people and runs the risk of criminalising consensual sexual conduct who face little or no risk of harm as a result of their conduct.

In relation to the question should it be a defence, the answer is no – it simply should not be an offence where the age gap is 2 years or less (e.g. 16 and 14 years).

The CLC notes that juveniles are significantly disadvantaged in relation to the law's treatment of sex offences in NSW, for two main reasons. Firstly, because all sexual contact with a child under 16, even consensual contact, is an offence, even where both parties are under 16. Secondly, an offence involving two juveniles is automatically 'aggravated' because it is designated as a 'child sex offence' which places the offence in a more serious category, attracting higher penalties. In addition, child sex offences attract the provisions of the Child Protection Register set up under *the Child Protection*

(Offenders Registration) Act 2000, even where the offender and the victim are both children.

Lack of consent is a different issue. The discussion above is in the context that the sexual activity in which the young people are engaged is consensual.

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

It should be available to be raised at any age.

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

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

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

(c) unlawful detention;

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

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

The CLC opposed the introduction of a statutory definition of 'consent' when the *Crimes Amendment (Consent - Sexual Assault Offences) Bill 2007* was introduced in November 2007. The 2007 legislation introduced a list of circumstances which vitiate consent or potentially vitiate consent as outlined above.

The NSW legislation provides that a person "knows" that there is no consent to sexual intercourse if "the person has no reasonable grounds for believing" there is consent. The law prior to the amendments required actual knowledge of absence of consent or at least recklessness, which meant that if the accused honestly believed that consent was present, there was no necessary "guilty mind" and the accused person cannot be convicted. The amending legislation makes such an accused guilty of sexual assault if the person failed to meet an "objective" standard of having reasonable grounds for that belief.

- Under the law prior to the 2007 amendments, where a jury concluded that an accused had no reasonable basis for believing that the complainant had consented it would usually then infer that the accused realised that there was no consent. For that reason, this change to the law was unnecessary. It will only affect cases there the jury accepts that the accused did honestly believe there was consent.
- Sexual assault is a serious crime with severe maximum penalties, and it should be reserved for behaviour that is so seriously wrong as to be deserving of such criminal punishment.
- Although there are negligence offences with substantial penalties within the criminal law, these are the exception, rather than the rule. The vast majority of criminal offences require a "guilty mind".

- The rare negligence based offences always have much lower maximum penalties than intentional or recklessness offences. The maximum penalty for negligently causing grievous bodily harm (2 years) is very much lower that the maximum penalty for reckless infliction of grievous bodily harm (10 years).
- An accused who is so negligent or intoxicated as to fail to appreciate that there are good reasons to conclude that consent is absent should not be regarded by the criminal law as equivalent to an accused who knows there is no consent.
- An accused who lacks the capacity of a hypothetical reasonable person (for example, an accused with a cognitive disability) and who mistakenly believes that consent is present should not be held to the standard of people who have full capacity.
- The amending legislation has created a situation where, after a jury trial resulting in a conviction, the sentencing judge will not know the basis upon which the jury found the accused guilty and could proceed to sentence on a much more serious basis than in fact determined by the jury.

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

See the answer to 16-3 above

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

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

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

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

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

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

(e) any evidence of that belief; and

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

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

The proposed direction re consent to the effect that the complainant did not do or say anything to indicate free agreement to a sexual act is enough to show that the agreement took place without their agreement seems to be an extraordinary direction to give in a sexual assault trial. The CLC queries how this could possibly be enough to indicate lack of consent. Such behaviour may be interpreted that way in some, but certainly not in all circumstances.

The proposed direction that consent is not to be regarded as having been freely given just because the complainant agreed to engage in another sexual act with the same person, or agreed to a sexual act with another person on a previous occasion, is fraught with difficulty if the fairness of a trial in these kinds of matters is to be maintained. These are matters for the jury, rather than for directions which limit and perhaps confuse the jury. For example, it may be relevant for the jury to consider whether the accused made an honest and reasonable mistake about consent because of the nature of their previous relationship. It would be relevant for the jury to consider how consent had been shown in the past rather than being told that this was irrelevant to the issue of consent in relation to the charge before the court.

In relation to that part of the proposal which sets out the matters to be addressed by the judge where belief as to consent has been raised as a defence, there would have to have been evidence of the matters raised in the proposal for it to succeed. The presiding judge would then direct the jury as to what the evidence is along the lines of (e), (f), (g) and (h). In other words there is nothing new in this proposal. This is what the judges already do.

Proposal 16-6: State and territory sexual offences legislation should include a statement that the objectives of the legislation are to:
(a) uphold the fundamental right of every person to make decisions about his or her sexual behaviour and to choose not to engage in sexual activity;
(b) protect children and persons with a cognitive impairment from sexual exploitation.

Statements of principle such as these should always be seen in the context that a fundamental right of every person brought before the court to answer a criminal charge is that they will receive a fair trial. Perhaps this also needs to be stated so that the legislators do not get too carried away with the perceived wrong they are trying to right.

Proposal 16-7: State and territory sexual offences, criminal procedure or evidence legislation, should provide for guiding principles, to which courts should have regard when interpreting provisions relating to sexual offences. At a minimum, these guiding principles should refer to the following:
(a) there is a high incidence of sexual violence within society;
(b) sexual offences are significantly under-reported;
(c) a significant number of sexual offences are committed against women, children and other vulnerable persons, including persons with a cognitive impairment;
(d) sexual offenders are commonly known to their victims; and
(e) sexual offences often occur in circumstances where there are unlikely to be *any physical signs of an offence having occurred.*

This proposal is opposed. Judges already take these matters into account on sentence in NSW. The danger with enunciating these principles in legislation is that they may be given added weight thus leading to a double-counting effect in relation to matters that are already regarded as aggravating factors on sentence.

REPORTING, PROSECUTION AND PRE-TRIAL PROCESSES

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

The alternative position put in this proposal is the one that currently exists in NSW. Although it is rare for complainants to be called to give evidence in sexual assault committals, defendants who are required to answer charges decades after they are alleged to have occurred, have significant disadvantages in preparing their defence. For this reason, cross examination of a complainant at committal, even if restricted to issues relating to date and time of offences, can assist in preparation. Clarification of lengthy charge periods or details surrounding old offences assists with trial preparation for both the Crown and the defence.

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

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

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

This proposal is opposed. Where there is more than one complainant, the prejudice to the accused of a joint trial is high, and the probability that the jury would disregard the evidence of the other complainant in their assessment is questionable. The fairness of a trial for the accused is thus called into question by the proposal of a presumption in favour of joint trials.

TRIAL PROCESSES

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

This proposal reflects the current position in most States and Territories.

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

The case law in this area is evolving towards exclusion of evidence of multiple complainants where there is a "reasonable possibility of concoction". If there is a reasonable possibility of concoction, the risk of prejudice outweighing its probative value is high. This proposal is therefore opposed.

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

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

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

This is the law in NSW.

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

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

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

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

This is the law in NSW.

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

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

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

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

OR

(b) the judge:

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

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

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

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

The second proposal is the law in NSW.

Proposal 18–14: Commonwealth, state and territory legislation should:
(a) prohibit an unrepresented defendant from personally cross-examining any complainant or other witness in sexual assault proceedings; and
(b) provide that any person conducting such cross-examination is a legal practitioner representing the interests of the defendant.

NSW has a prohibition on an unrepresented accused cross examining a complainant in sexual assault proceedings. There is no requirement that the interlocutor is a legal practitioner, and their role is simply to ask the questions put by the accused, not represent his/her interests.

The Law Society has determined that it is not appropriate for a legal practitioner to undertake the role of questioner as provided for in section 294A of the *Criminal Procedure Act 1986*.

Section 294A(2) of the *Criminal Procedure Act 1986* stipulates that a complainant in a sexual assault trial cannot be examined in chief, cross examined or re-examined by the accused, but can be examined by a person appointed by the court. However, the person appointed by the court is limited to asking the complainant only the questions that the accused person requests (s 294A(3)), and is therefore acting merely as a mouthpiece for the accused.

The provisions of section 294A create practical and ethical limitations for a practitioner who is engaged for a limited purpose. The limited terms of engagement impact on a practitioner's ability to act in the client's interests, and to prepare and conduct a full interrogation of the witness. Acting in such a capacity conflicts with a practitioner's legal, professional and ethical obligations to the client and the court. It is for these reasons that the Law Society is of the view that it is not appropriate for a practitioner to undertake the questioning of a complainant in a sexual assault trial pursuant to section 294A.

The Dispute Resolution Committee made the following comments:

IMPROVING EVIDENCE AND INFORMATION SHARING

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

This is not supported. If Family Dispute Resolution (FDR) is not appropriate or has not been successful that should signal to the Court that there is a need to establish why. The Court has Family Consultants who report on consultation with family members. Parties for whom FDR is not appropriate should be referred to Family Consultants. To require Family Dispute Resolution Providers (FDRPs) to also report, further compromises the confidentiality of the FDR process, as well as the neutrality and impartiality of the FDRP.

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

Yes, it should be used only for the purpose of screening and risk assessment.

Question 10–13 Are the confidentiality provisions in ss 10D and 10H of the Family Law Act 1975 Act (Cth) inappropriately restricting family counsellors and family dispute resolution practitioners from releasing information relating to the risks of family violence to:
(a) courts exercising family law jurisdiction; and
(b) state and territory courts exercising jurisdiction under family violence legislation?

The Dispute Resolution Committee and the Family Issues Committee have differing views on the questions which are set out below.

The Dispute Resolution Committee's view

The Dispute Resolution Committee strongly believes that the provisions under ss 10D, E, H and J operate appropriately. FDRPs and counsellors are mandatory reporters of any disclosure of risks to children. Sections 10D and 10H clearly provide that FDRPs and counsellors may disclose information relating to the risk of family violence.

Sections 10D(4) and 10H(4) provide for disclosure of communications that the practitioner reasonably believes are necessary for the purpose of (inter alia) protecting a child from the risk of harm whether physical or psychological, preventing or lessening a serious and imminent threat to the life or health of a person and reporting the commission or likely commission of an offence, involving violence or threat of violence to a person.

Most importantly ss10D(4)(f) and 10H(4)(f) provide for the independent legal representation of a child.

If a solicitor representing a parent is concerned about the child they should seek the appointment of an Independent Children's Lawyers (ICL) under 68L.

The court also now has the benefit of Family Consultants to report what occurs during their sessions with the family.

It is a fundamental principle of mediation that information disclosed during the process is not admissible in subsequent court proceedings. FDR is an informal process in which the parties are encouraged to participate with openness and honesty. It is emphasised to the participants that what they discuss will not be used in any future court proceedings. If FDRPs are to commence giving evidence of disclosures made during FDR it is likely to have at least two undesirable consequences. Namely that, parties will be guarded about what they say during FDR and FDRPs will avoid the situation of being required to give evidence and consequently being subjected to cross examination.

If the FDRP is conducting a competent risk assessment before agreeing to conduct FDR they should identify victims of family violence. In such circumstances, FDRPs should issue a Certificate under Section 60I(b) of the *Family Law Act 1975*, advise the victim/s to report the violence to the police and recommend that the victim/s see a solicitor.

There is no need for change to the legislation if counsellors and FDRPs are properly trained to ensure that they competently recognise when they should report the disclosure of risk to person or property, especially children and act on that disclosure. FDRPs must be trained to conduct their work in accordance with the current legislation. Solicitors must also be trained to ensure that they protect children and families from family violence through the appropriate use of obtaining information regarding risk of domestic violence e.g. seeking the appointment of an ICL who is focused on the best interest of the child, not engaged to "win" the case for one of the parents.

The Family Issues Committee's view

The Family Issues Committee strongly believes that the provisions under ss 10D, E, H and J do operate inappropriately and potentially to the detriment of children.

The reasons for confidentiality are understood. But those reasons must be balanced by the need to have a complete understanding of a family dynamic when family violence is involved.

There are three recently released reports which touch upon Family Violence:

- The Australian Institute of Family Studies – *'Evaluation of the 2006 Family Law Reforms'*.
- The 2009 report by Professor Richard Chisholm – *'Family Courts Violence Review'*.
- Family Law Council 2009 Report – *'Improving Responses to Family Violence in the Family Law System'*.

The Family Law Council 2009 Report *'Improving Responses to Family Violence in the Family Law System'* (pp33-34) states that 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 violence.

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 outcomes. However, the research indicated that when evidence of the existence of family violence was appropriately presented to the federal family courts, the judiciary made orders aimed at protecting the victims of that violence when framing parenting orders.

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

Subpoenas and the material produced in response to them, are often the only sources of reliable or expositive information.

All three recently released reports speak of, or allude to examples of cases where only because of subpoenaed information from health professionals and child protection agencies was the Court able to make Orders which were appropriate and responsive to the risks.

In this discussion it is worth noting that s 10J goes only to admissibility of material, not compellability. That said, members of the Family Issues Committee report that many

FDRPs and organisations which practice FDR refuse to answer subpoenas in the good faith belief that they are not obliged to. Of course the obligation is to produce the documents to the court where the decision about what is or is not admissible can be made.

The exception is in relation to admissions or disclosures which indicate a risk of abuse. The difficulty is that the admission or disclosure may not of itself be indicative of the risk. That judgment might only be possible when the admission or disclosure is put in the context of other evidence produced to the Court. Accordingly there is an inherent risk to children in the failure of family counsellors and FDRPs to release information in the mistaken belief they are not required to do so.

It is noted that ss 10E(2) and 10J(2) contain qualifications to admissibility if, in the opinion of the Court, there is sufficient evidence of the admission or disclosure from other sources. Of course to make this decision the Court must have access to the material, not just from the 'other sources' but from the family counsellor or FDRP.

By way of analogy, if in a standard property case there is a need to investigate whether someone is telling the truth about their bank accounts, it is possible to issue a subpoena to the financial institutions. They will charge a fee and produce the documents.

If however one is involved in a case where a child's welfare is at risk, there are a number of Federal and State barriers to obtaining information - in the current situation ss 10D, E, H and 10J.

Without access to information one should not be surprised nor complain if Orders made by a Court aren't as responsive to family violence as the community expects. The provisions in sections 10 D, E H and J are well intentioned but have the consequence in some cases of shielding family violence. They therefore may contribute to exposing children to risk.

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

The Dispute Resolution Committee and the Family Issues Committee have differing views on this proposal which are set out below.

The Dispute Resolution Committee's view

The Dispute Resolution Committee is of the view that the ss 10D(4)(b) and 10H(4)(b) adequately provide for FDRPs to make such disclosures. See also commentary on 10-13 above.

The Family Issues Committee's view

The Family Issues Committee strongly believes the answer is "yes". See commentary in answer to question 10-13.

Proposal 10–9: Sections 10D(4)(c) and 10H(4)(c) of the Family Law Act 1975 (Cth) should permit family counsellors and family dispute resolution practitioners to disclose communications where they reasonably believe that disclosure is

necessary to report conduct that they reasonably believe constitutes grounds for a protection order under state and territory family violence legislation.
The Dispute Resolution Committee and the Family Issues Committee have differing views on this proposal which are set out below.

The Dispute Resolution Committee's view

The Dispute Resolution Committee is strongly of the view that the answer is "No". To do so will further erode the role of the FDRP as an impartial, neutral, non-judgmental facilitator. FDRPs should strongly recommend that the parties seek legal advice and such advice should extend to any risk of family violence. See also commentary on 10-13 above.

The Family Issues Committee's view

The Family Issues Committee strongly believes "yes". See commentary in answer to question 10-13.

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

The Dispute Resolution Committee and the Family Issues Committee have differing views on this question which are set out below.

The Dispute Resolution Committee's view

The Dispute Resolution Committee is strongly of the view that the answer is "no".
See also commentary on 10-13 above.

The Family Issues Committee's view

The Family Issues Committee strongly believes that the answer is "yes". See commentary in answer to question 10-13.

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

The Dispute Resolution Committee and the Family Issues Committee have differing views on this proposal which are set out below.

The Dispute Resolution Committee's view

The Dispute Resolution Committee is strongly of the view that the answer is "no". FDR is an informal process in which the parties are encouraged to participate with openness and honesty. It is emphasised that what they discuss will not be used in any future court proceedings. If FDRPs are to commence giving evidence of disclosures made during FDR it is likely to have at least two undesirable consequences. Parties will be guarded and about what they say during FDR and FDRPs will avoid the situation of being

required to give evidence and being subjected to cross examination. See also commentary on 10-13 above.

The Family Issues Committee's view

The Family Issues Committee strongly believe that the answer is "yes". The social science evidence is strong that there is as much damage to children caused by exposure to family violence as experiencing it themselves. In some cases the research suggests that the damage can be worse. It is constraining the ability of courts to put in place appropriate parenting arrangements if the relevant evidence is not available. See also commentary in answer to question 10-13.

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

The Dispute Resolution Committee and the Family Issues Committee have differing views on this question which are set out below.

The Dispute Resolution Committee's view

The Dispute Resolution Committee is strongly of the view that the answer is "no". See also commentary on 10-13 and 10-14 above.

The Family Issues Committee's view

The Family Issues Committee strongly believes that the answer is "yes". See commentary in answer to question 10-13 & 10-14.

The exception could be added as sub-section (2)(c) as "...an admission by an adult, or disclosure by a child, which indicates a child has been exposed to family violence....".

Consideration should be given to deleting the exception which follows whereby the Court effectively 'compares' it to other evidence. The status of evidence is often not ruled on until after submissions. Further, evidence may be 'admissible' but be given little or no weight. Hence the admission or disclosure from a family counsellor or FDRPs may become crucial.

Finally, this exception appears to have created much confusion in practice whereby FDRPs, counsellors and relevant organisations have interpreted this as 'permission' to not comply with a subpoena.

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

The Dispute Resolution Committee and the Family Issues Committee have differing views on this question which are set out below.

The Dispute Resolution Committee's view

The Dispute Resolution Committee is strongly of the view that the answer is "yes". See also commentary on 10-13 and 10-14 above.

The Family Issues Committee's view

The Family Issues Committee strongly believes that the answer is "no". See commentary in answer to question 10-13, 10-14 & 10-15.

ALTERNATIVE PROCESSES

Question 11–1: Should any amendments be made to the provisions relating to family dispute resolution in the Family Law Act 1975 (Cth)—and, in particular, to s60I of that Act—to ensure that victims of family violence are not inappropriately attempting or participating in family dispute resolution? What other reforms may be necessary to ensure the legislation operates effectively?

The Dispute Resolution Committee and the Family Issues Committee have differing views on this question which are set out below.

The Dispute Resolution Committee's view

The Dispute Resolution Committee is strongly of the view that the answer is "no".
If the FDRP is conducting a competent risk assessment before agreeing to conduct FDR they should identify victims of family violence. FDRPs should issue a Certificate under Section 60I(b) of the Family Law Act 1975, advise the victim/s to report the violence to the police and to see a lawyer. See also commentary on 10-13 and 10-14 above.

The Family Issues Committee's view

The Family Issues Committee strongly believes that the answer is "yes". Referring to the IAFS Report 2009, it found:

- Approximately 20% of shared care arrangements involved high conflict.
- Up to 20% of separating parents had safety concerns linked to parenting arrangements, and shared care time in cases where there are safety concerns correlates with poorer outcomes for children (p25).
- A significant minority of children in shared care-time arrangements who have a family history entailing violence and a parent concerned about the child's safety, and who are exposed to dysfunctional behaviours and inter-personal relationships (p11).
- Many FDR clients had concerns about violence, abuse, safety, mental health or substance misuse. Some of these parents appeared to attempt FDR where the level of these concerns were such that they were unlikely to be able to represent their own needs or their children's needs adequately (p25).

This issue is not so much about the legislation. The Family Issues Committee wishes to be clear that in many respects the work done in FDR is very fine, appropriate and producing excellent outcomes. The difficulty comes in some of the following:

- Training. Many FDRPs and organisations are well trained at conducting risk assessments. Based on the AIFS report and other research, it should not however be assumed this is a universal situation.
- Funding/Inducements: There is a concern that some FDRPs and organisations inappropriately attempt to deal with high conflict matters.

- There are concerns that misunderstandings in the community and the various professions regarding the meaning and extent of the new laws may have resulted in a higher proportion of victims of family violence engaging in mandatory 'mediation' at various organisations or with FDRPs. It is understood that tools used by Community Based Organisations and Family Relationship Centres aim to 'filter' matters where there is family violence. That being said, there remains a risk of family violence, and its effects, being ignored or not properly taken into account.

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

Yes. Although, a considerable amount of legal education on this topic is currently available. The Family Pathways Networks are well placed to facilitate such training. They encourage interdisciplinary family service providers to network and learn from each other. The counselling professions are highly skilled in screening and risk assessment of domestic violence. Unfortunately, many separating partners do not see a solicitor. See also commentary on 10-13 and 10-14 above.

Consideration should also be given to encouraging and funding cross-sector training. Solicitors have much to learn from the social sciences. Family Counsellors and FDRPs have much to learn about the legal dynamic.

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

Yes.

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

Yes. The Legal Aid Commission of NSW (LAC) has a very successful and safe model of FDR. Most of the parties attend FDR with a solicitor. The solicitors are alert to any disclosure of risk to the safety of persons or property and they advise their clients accordingly. The solicitor acting for the perpetrator is also alerted to the situation and can play a very positive role by advising their client of the consequences of their behaviour. The solicitor being present also allows the FDRP to remain neutral and impartial.

This is happening on a number of levels e.g.:

- Greater Sydney Families in Transition (GSFIT) which evolved from 'Pathways' and is a cross-sector body which has already organised a number of very successful seminars and 'learning' opportunities. It is nonetheless embryonic and should be supported to allow it to gain traction and become part of the landscape. Hopefully, with the right support, it may evolve to the level of the organisation in the United States called the Association of Family and Conciliation Courts – AFCC. The AFCC describes itself as "an interdisciplinary and international association of professionals dedicated to the resolution of family conflict." Its membership base includes counsellors, academics, mediators, lawyers, psychologists, judicial officers, researchers and financial planners. AFCC is now in its 47th year.

- The evolution of Collaborative practice which allows for cross-disciplinary involvement in helping families reach resolution.

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

The Dispute Resolution Committee and the Family Issues Committee have differing views on this question which are set out below.

The Dispute Resolution Committee's view

The Dispute Resolution Committee is strongly of the view that the answer is "no". See also commentary on 10-13 above.

The Family Issues Committee's view

The Family Issues Committee believes there is confusion about the definition, although it is a point of discussion whether it is simply isolated to the family dispute resolution processes.

- There is the real issue of the concept of 'reasonableness' in s 4. Objectifying the definition fundamentally misunderstands the broad nature of family violence and its wide ranging effects.
- Members report anecdotally that the application and/or interpretation of the definition is spasmodic.

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

It is inconsistent. However, improving the appropriate use of protection orders requires ongoing education of the police, solicitors, the judiciary and the community, not further legislation.

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

Yes.

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

Yes. To be serious about not using FDR in situations involving domestic violence a great deal more resources need to be provided to provide appropriate services and support to families in which domestic violence occurs. Their also needs to be a change in the way the success of services providing FDR is measured.

The LAC model is very effective, especially if the LAC acts on the recommendations of the FDRP to fund follow up FDR. If interim agreements are negotiated, conditional upon specified behaviour to be reviewed in six (6) or twelve (12) months, it appears to assist to educate both of the parties to develop a more functional relationship.

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

Yes. By adopting an ADR mechanism similar to the LAC FDR in which an ICL is a participant.

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

Yes. The mechanisms should be consistent.

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

Yes.

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

No.

I trust that you have found these comments useful. Should you require anything further, please contact Maryanne Plastiras, Responsible Legal Officer for the Family Issues Committee on 9926 0212.

Yours sincerely

Mary Macken
President