WOMEN'S LEGAL SERVICES NSW

Family Violence: Improving Legal Frameworks

Women's Legal Services NSW

Submission to the Australian Law Reform Commission and the New South Wales Law Reform Commission responding to their consultation papers ALRC CP 1 and NSWLRC CP9

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About Women's Legal Services NSW

Women's Legal Services NSW (WLS NSW) is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. Our services include the Women's Legal Resource Centre, the Domestic Violence Advocacy Service and the Indigenous Women's Program and, until 30 June 2010, we are the auspicing body for the Bourke/Brewarrina and Walgett Family Violence Prevention Legal Services. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims compensation, care and protection, human rights and access to justice.

The consultation process

WLS NSW appreciates the opportunity provided to us by the ALRC and NSWLRC to contribute to this consultation throughout the consultation process, including through meetings in late 2009 and early 2010, the NSW Legal Assistance Forum workshops and the ALRC Family Violence Forum for Women's Legal Service Providers.

However, we would like to note our concerns about the length and structure of the Consultation Paper and Consultation Paper Summary, and the short period provided for responding to the papers. A considerable amount of our resources has been dedicated to responding to the consultation paper within the short timeframe. Yet, these three factors have made it difficult for us to engage in detail with the proposals and questions in the Consultation Paper. Consequently, we have not addressed all questions and proposals, and have made limited responses to other questions. While the three-week extension was helpful in finalising the submission, receiving it on the eve of the deadline did not allow us time to plan our internal consultation and response process from the outset with this extended timeframe in mind.

Further, we are concerned that these factors have deterred other organisations from engaging in the consultation process. In particular, we are aware that many organisations and individuals working daily in family violence related areas – including other community legal centres, domestic violence services and Indigenous individuals and organisations – have felt that they do not have sufficient resources to engage with the paper.

Consideration of issues affecting Aboriginal women

We have encountered particular difficulty in engaging with issues affecting Aboriginal women and in consulting with our stakeholders on these issues. This is because of the lengthy and complex nature of the report, as well as the way that these issues have been mainstreamed throughout the whole report, without clearly identifying the location of discussion of these issues in headings or subheadings, contents pages, questions and proposals, or some other form of index. While we appreciate that all aspects of family violence covered in the report also affect Aboriginal women, we are concerned that the particular challenges faced by Aboriginal women have been lost in this large consultation paper.

Feedback on the ALRC Family Violence Online Forum for Women's Legal Service Providers

WLS NSW thanks the ALRC for the opportunity to be involved in this exciting pilot. It was an interesting form of consultation to test. However, based on our experience, we recommend that further consideration should be given as to how this form of consultation is used in the future and, in particular, the resource implications for the organisations and individuals whom are being consulted.

We found this form of consultation to be very resource intensive for the staff involved in the forum. In particular, it took considerable time to read and process contributions already made on the forum as well as contribute further to the discussion. We understand that the ALRC had hoped that the forum would provide a space for relatively informal discussions to take place between individual workers. This presented significant risk management questions for us as an organisation that would need further consideration and development to allow for such participation.

We found that meeting with ALRC and NSWLRC staff to discuss and respond to issues – at WLS NSW or with other organisations – to be a far more preferable approach to consultation. This approach reduced the resource stain on us and allowed for greater contribution and engagement with particular issues.

We would be happy to provide further feedback to the ALRC on the forum to assist with the evaluation of the pilot.

Resourcing women's legal services and other services to engage in law reform and policy development processes

WLS NSW appreciates and supports the Commissions' view that 'the adequate resourcing and further development of women's legal services is critically important, because of the need for specialised, timely and free legal advice and representation' (para 19.108 of the Consultation Paper).

We would add that it is essential that women's legal services, and other non-government organisations, are adequately resourced to provide their experience and expertise to law reform and policy development processes.

General comments about reforms needed to the family law system

WLS NSW believes that changes to the family law system are needed urgently to ensure that the safety of women and children is better protected. We note that our concerns about the family law system are reflected in the Consultation Paper and in the recent reports from the Australian Institute of Family Studies, Professor Chisholm and the Family Law Council. In addition to our comments made below, more detail of our concerns can be found in the Women's Legal Services Australia's submissions to the first two of these inquiries.

Part B – Family Violence

4. Family Violence: A Common Interpretative Framework?

Proposal 4–1 *(a) State and territory family violence legislation should contain the same definition of family violence covering physical and non-physical violence, including conduct the subject of Proposals 4–3 to 4–5 and 4–7 to 4–10 below. The definition of family violence in the Family Violence Protection Act 2008 (Vic) should be referred to as a model.*

OR

(b) The definitions of family violence in state and territory family violence legislation should recognise the same types of physical and non-physical violence, including conduct the subject of Proposals 4–3 to 4–5 and 4–7 to 4–10 below. The definition of family violence in the Family Violence Protection Act 2008 (Vic) should be referred to as a model.

WLS NSW supports the inclusion of physical and non-physical aspects of family violence in a definition of family violence. If it is not possible to obtain agreement on a nationwide definition, then a model based on the Family Violence Protection Act 2008 (Vic) is supported. It is essential that protections are not diminished in any state or territory in developing a national definition or model.

Question 4–1 *Should the definition of family violence in state and territory family violence legislation, in addition to setting out the types of conduct that constitute violence, provide that family violence is violent or threatening behaviour or any other form of behaviour that coerces, controls or dominates a family member or causes that family member to be fearful?*

WLS NSW supports this approach.

Proposal 4–2 *The Crimes (Domestic and Personal Violence) Act 2007 (NSW) should be amended to include a definition of 'domestic violence', in addition to the current definition of 'domestic violence offence'.*

WLS NSW supports this proposal.

Proposal 4–3 *State and territory family violence legislation should expressly recognise sexual assault in the definition of family violence to the extent that it does not already do so.*

WLS NSW supports this proposal.

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.*

WLS NSW supports this proposal.

Proposal 4–5 *State and territory family violence legislation should include specific examples of emotional or psychological abuse or intimidation or harassment that illustrate acts of violence against certain vulnerable groups including: Indigenous persons; those from a culturally and linguistically diverse background; the aged; those with a disability; and those from the gay, lesbian, bisexual and transgender community. Instructive models of such examples are in the Family Violence Protection Act 2008 (Vic) and the Intervention Orders (Prevention of Abuse) Act 2009 (SA). In each case, state and territory family violence legislation should make it clear that such examples are illustrative and not exhaustive of the prohibited conduct.*

WLS NSW supports this proposal and a consistent approach throughout jurisdictions. We are aware of many instances where police are reluctant to apply for a protection order in NSW unless there has been a physical altercation. This is despite women complaining of non-physical violence such as isolation, harassment, intimidation and economic abuse. Having specific examples of economic, emotional or psychological abuse would give police confidence that protection orders are appropriate in circumstances where there is not a physical altercation.

However WLS NSW notes the need for careful consideration of the complexities of persons deemed to be part of a vulnerable group. In particular, the specific needs of each group should be clarified to ensure that these diverse groups are not treated as homogenous.

Case study: Elder abuse in Aboriginal communities

Jan is an elderly Aboriginal woman and is in receipt of a Centrelink pension. She lives by herself but her eldest son, John, comes to visit her regularly. John is a large man and often runs out of money a week or so before he gets his pension. John starts harassing his mother on her pension days. He says, 'I'm not going to visit you anymore if you don't give me some money'.

Other times he is quite aggressive and literally stands over his mother demanding her pension money. Jan feels really bad that she cannot support her son, however does not support the way he behaves or what he spends his money on.

Jan complained to the police that she is often left without money because she is unable to stand up to his aggressive behaviour. The police told her that there is nothing that can be done, and she needs to stand up to her son.

On a later day, Jan spoke to a different police officer, who told her that if there is economic or financial abuse then the police can apply for an order that says her son is not to harass or intimidate her and that will inform him that his behaviour in demanding money from her is not acceptable. Jan is surprised that previous police officers had not told her about this when she had complained to them before.

Question 4–2 *Some state and territory family violence legislation lists examples of types of conduct that can constitute a category of family violence. In practice, are judicial officers and lawyers treating such examples as exhaustive rather than illustrative?*

We are unable to comment specifically as the relevant NSW legislation does not have a definition of domestic violence. The legislation does however have an objects clause that refers to patterns of abuse and acknowledges domestic violence as extending beyond physical violence. This is very useful in persuading courts about the nature of domestic

violence; however, they are not expansive enough to use as a list of types of conduct that can constitute domestic violence.

Proposal 4–6 *The definition of family violence in state and territory family violence legislation should not require a person to prove emotional or psychological harm in respect of conduct which, by its nature, could be pursued criminally—such as sexual assault. In particular, the Intervention Orders (Prevention of Abuse) Act 2009 (SA) should be amended to ensure that sexual assault of itself is capable of meeting the definition of 'abuse' without having to prove emotional abuse.*

The definition of family violence should not involve a requirement to prove emotional or psychological harm as a result of any conduct.

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.*

WLS NSW agrees with this proposal however we are concerned that including a very specific list of behaviours in the definition may result in the list being regarded as exhaustive rather than inclusionary.

Proposal 4–10 *State and territory family violence legislation should include in the definition of family violence exposure of children to family violence as a category of violence in its own right.*

WLS NSW supports this proposal to acknowledge the effect of domestic violence on children.

Proposal 4–11 *Where state or territory family violence legislation sets out specific criminal offences that form conduct constituting family violence, there should be a policy reason for the categorisation of each such offence as a family violence offence. To this end, the governments of NSW and the ACT should review the offences categorised as 'domestic violence offences' in their respective family violence legislation with a view to (a) ensuring that such categorisations are justified and appropriate; and (b) ascertaining whether or not additional offences ought to be included.*

WLS NSW supports this proposal.

Proposal 4–12 *Incidental to the proposed review of 'domestic violence offences' referred to in Proposal 4–11 above, s 44 of the Crimes Act 1900 (NSW)—which deals with the failure to provide any wife, apprentice, servant or insane person with necessary food, clothing or lodgings—should be amended to ensure that its underlying philosophy and language are appropriate in a modern context.*

WLS NSW supports this proposal.

Question 4–3 *Are there any other examples where the criminal law of a state or territory would allow for prosecution of conduct constituting family violence in circumstances where a state or territory's family violence legislation would not recognise the same conduct as warranting a protection order?*

WLS NSW is not aware of any criminal offence that would not warrant a protection order. The protection order legislation provides for a protection order to be issued when certain criminal charges are laid.

Question 4–4 *In practice, what effect do the different definitions of family violence in the Family Law Act 1975 (Cth) and in state and territory family violence legislation have in matters before federal family courts:*

(a) where a victim who has suffered family violence

(i) has obtained a state or territory protection order; or

A number of our clients have reported to us that federal magistrates or judges in family law courts have not recognised their protection orders, particularly in cases where no charges and convictions were laid. This is also seen in matters where the defendant of a protection order had consented to the protection order, without admissions.

(ii) has not obtained a state or territory protection order; and

When there are no protection orders, it can be even more difficult for victims of family violence to demonstrate what they have experienced.

Many women report to us that the family law courts take little notice of descriptions of family violence in their affidavits or in their applications for protection orders. Women regularly inform us that their experience in the family law courts is that if the police did not lay criminal charges, apply for and succeed in obtaining a protection order, then generally their recounts of family violence is pointless in family law proceedings.

Question 4–5 *Does the broad discretion given to courts exercising jurisdiction under the Family Law Act 1975 (Cth) and the approach taken in the Family Court of Australia's Family Violence Strategy overcome, in practice, the potential constraints posed by the definition of 'family violence' in the Family Law Act?*

In our experience, the broad discretion does not overcome the constraints of the definition. Further, the legislation is a means of educating the community about the law and these benefits of including a definition should not be overlooked.

Proposal 4–17 *The definition of family violence in the Family Law Act 1975 (Cth) should be expanded to include specific reference to certain physical and non-physical violence—including conduct the subject of Proposals 4–3 to 4–5 and 4–7 to 4–10 above—with the definition contained in the Family Violence Protection Act 2008 (Vic) being used as a model.*

WLS NSW supports this proposal.

Proposal 4–18 *The definition of 'family violence' in the Family Law Act 1975 (Cth) should be amended by removing the semi-objective test of reasonableness.*

WLS NSW supports a review of the definition of 'family violence' that includes consideration of the removal of the objective test of reasonableness. The test was introduced as part of the 2006 reforms in the absence of any identified need to amend the definition in this way. We believe that the objective test was included in the definition to respond to apparent concerns about the making of 'false allegations' of family violence and was, at the time, a highly inappropriate policy response to this issue which has no empirical basis.

We also consider that the provisions relating to 'false allegations' of family violence and the 'friendly parent' provisions need to be removed. Together, these provisions have had a very serious impact on the proper consideration of family violence in the family law system.

Proposal 4–20 *State and territory family violence legislation should include as protected persons those who fall within Indigenous concepts of family, as well as those who are members of some other culturally recognised family group. In particular, the Family Violence Act 2004 (Tas) and the Restraining Orders Act 1997 (WA) should be amended to capture such persons.*

WLS NSW supports this proposal.

Aboriginal kinship relations, as well as those who are members of some other culturally recognised family groups, should be recognised consistently in all Australian jurisdictions.

We note that even though the Aboriginal kinship system is included in section 5(h) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), it is not included in section 6 which deals with meaning of relative.

WLS NSW recommends specific inclusion of the Aboriginal kinship system in section 6 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

Further, WLS NSW emphasises that more work needs to be done to train police and other professionals about kinship relations and their significance to Aboriginal people. We are aware of instances where the importance of kinship relations are not being recognised by police and other professionals in their responses to family violence.

Proposal 4–22 *State and territory family violence legislation should contain a provision that explains the nature, features and dynamics of family violence including: its gendered nature; detrimental impact on children; and the fact that it can involve exploitation of power imbalances; and occur in all sectors of society. The preamble to the Family Violence Protection Act 2008 (Vic) and s 9(3) of the Crimes (Domestic and Personal Violence) Act 2007 (NSW) provide instructive models in this regard.*

WLS NSW supports this proposal.

We agree that the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) provides an instructive model and would support a similar approach in other jurisdictions.

In addition, family violence legislation should refer to the particular impact of family violence on: Indigenous persons; those from a culturally and linguistically diverse background; those from the gay, lesbian, bisexual and transgender community; older persons; and people with disabilities.

If such reference is made, appropriate measures must be in place to ensure that these diverse groups are not treated homogenously and that the unique situation of every case is taken into account, as well as these broader contextual considerations.

Proposal 4–23 *The Family Law Act 1975 (Cth) should be amended to include a provision that explains the nature, features and dynamics of family violence.*

WLS NSW supports this proposal.

Proposal 4–25 *State and territory family violence legislation should articulate a common set of core purposes which address the following aims:*

(a) to ensure or maximise the safety and protection of persons who fear or experience family violence;

(b) to ensure that persons who use family violence accept responsibility—or are made accountable—for their conduct; and

(c) to reduce or prevent family violence and the exposure of children to family violence.

WLS NSW supports this proposal.

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?*

In NSW the protection order legislation requires a court to consider the effect of any contemplated protection orders on other persons. In particular, this is used when considering exclusion orders. However, it is also important that protection order legislation does not become too complex to be applied in practice. In our experience, in busy courtrooms magistrates may not follow all aspects of the legislation. For example, NSW legislation says children should be included on orders unless there is good reason not to do so. However, in practice, magistrates are concerned with the interaction with family law issues, and are not applying the provision unless there is clear evidence of violence to a child.

Proposal 4–27 *State and territory family violence legislation should adopt the same grounds for obtaining a protection order.*

WLS NSW supports this proposal. However, it is essential that protections are not diminished in any state or territory in developing a national definition or model. For example, reasonable grounds to fear future violence should be sufficient.

Proposal 4–28 *The grounds for obtaining a protection order under state and territory family violence legislation should not require proof of likelihood of repetition of family violence, unless such proof is an alternative to a ground that focuses on the impact of the violence on the person seeking protection.*

WLS NSW supports a proposal that family violence legislation should not require proof of likelihood of repetition of family violence.

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.

WLS NSW supports proposal (b).

5. Family Violence Legislation and the Criminal Law—An Introduction

Question 5–1 *How are matters dealt with in practice that involve:*

(a) an overlap between state or territory family violence legislation and federal criminal law; and

(b) a joint prosecution of state or territory and federal offences arising in a family violence context?

In particular, do state and territory prosecutors seek the consent of the Commonwealth Director of Public Prosecutions to prosecute federal offences arising in a family violence context, and inform it of the outcomes of any such prosecutions?

In our experience, NSW police will and do charge defendants with offences under federal criminal law such as 'use of carriage service to make a threat' in the context of family violence.

We do not have knowledge of the communications between the Commonwealth and NSW offices of the directors of public prosecutions.

Proposal 5–1 *The definition of family violence in state and territory family violence legislation should be broad enough to capture conduct the subject of potentially relevant federal offences in the family violence context—such as sexual servitude.*

WLS NSW supports this proposal.

Proposal 5–2 *The Commonwealth Director of Public Prosecutions—either by itself or in conjunction with other relevant bodies—should establish and maintain a centralised database of statistics that records the number of times any federal offence has been prosecuted in a family violence context including when such an offence is prosecuted:*

(a) in addition to proceedings for the obtaining of a protection order under state or territory family violence legislation;

(b) jointly with a state or territory offence in a family violence context; and

(c) in the absence of any other criminal or civil proceeding.

WLS NSW supports this proposal.

Proposal 5–3 *In order to facilitate the establishment and maintenance of the centralised database referred to in Proposal 5–2, state and territory prosecutors—including police and directors of public prosecution—should provide the Commonwealth Director of Public Prosecutions with information about:*

(a) federal offences in a family violence context which they prosecute, including the outcomes of any such prosecutions;

(b) the prosecution of any federal offence in a family violence context conducted jointly with a prosecution of any state or territory family-violence related offence; and

(c) whether the prosecution of the federal offence is in addition to any protection order proceedings under state or territory family violence legislation.

WLS NSW supports this proposal.

Question 5–3 *Is there a need for lawyers involved in family violence matters to receive education and training about the potential role of federal offences in protection order proceedings under state and territory family violence legislation? How is this best achieved?*

Our view is that additional training is always useful. This training should also extend to police and prosecutors to ensure that potential offences are dealt with via criminal charges in addition to applying for protection orders where appropriate.

Question 5–4 *As a matter of practice, are police or other participants in the legal system treating the obtaining of protection orders under family violence legislation and a criminal justice response to family violence as alternatives rather than potentially co-existing avenues of redress? If so, what are the practices or trends in this regard and how can this best be addressed?*

In our experience there are many occasions where police use protection orders as an alternative to charging offenders with an appropriate criminal offence. We see cases where, on the face of the Apprehended Domestic Violence Order, the facts are sufficient for charges to have been laid. For many of our clients it is common for police not to charge offenders when charges would have been indicated as appropriate by police policy and the legislation. The following case study is not an unusual experience, demonstrating a poor criminal justice response to family violence:

Case study

Mary contacted WLS NSW to seek advice about a past domestic violence relationship which had been a particularly brutal one. The level of violence was extraordinarily high including sexual assaults and physical violence on different occasions resulting in a broken ankle, broken arm, broken ribs, broken jaw and broken fingers. Mary told us that she had contacted the police on many occasions with varying responses. As a result of a Freedom of Information application, we received copies of the COPS Events over the period of the relationship. The COPS Events included over 370 separate entries of incidences of domestic violence and only 3 occasions when criminal charges were laid. The police records indicated that officers regularly assessed the situation as not violent / serious. The record included notes to the effect of: 'victim appears to have contacted the police in order to get a compensation claim'. The client did not even find out about compensation for many years.

WLS NSW considers that training programs to support police attitudinal change may be of some assistance. It is imperative that serious family violence is recognised as a crime. In

some cases where the victim and perpetrator are in a relationship, the police do not charge with criminal offences until there have been a number of incidents. This approach is not appropriate and may place victims of family violence at further risk of harm.

Strategies for addressing the failure of police to charge with a criminal offence when it is indicated by the facts include:

- developing a clear and cohesive framework to assist police in their understanding of their obligations to respond appropriately to family violence, criminal offences within the family violence context and to act to protect victims of family violence;
- providing ongoing police training about their obligations to respond appropriately to family violence;
- developing systems to monitor and scrutinise police response, including a system to track actions taken by police to ensure that they are appropriate.

Proposal 5–4 *State and territory family violence legislation which empowers police to issue protection orders should provide that:*

(a) police are only able to impose protection orders to intervene in emergency or crisis situations in circumstances where it is not reasonably practicable or possible for the matter to be dealt with at that time by a court; and

(b) police-issued protection orders are to act as an application to the court for a protection order as well as a summons for the person against whom it is issued to appear before the court within a short specified time period. In particular, s 14(6) of the Family Violence Act 2004 (Tas)—which allows police-issued protection orders to last for 12 months—should be repealed

WLS NSW does not support police issued protection orders, even for a limited period.

Judicial oversight of the issuing of protection orders is an important step in ensuring that police are using their powers appropriately. In our experience, after incidents or alleged incidents where police fail to determine who is the actual victim, police will often make applications for protection orders against female victims of family violence. Establishing a system where police are able to issue a protection order, even time limited, without oversight risks potentially criminalising (and further abusing) victims of violence. Further, issuing a protection order is a judicial function as it has potential criminal consequences for the defendant.

In NSW police can apply for provisional orders 24 hours a day when necessary. In our opinion this is working, with an average 45-minute turn around time. This is a system that could be introduced in other states if it does not already exist.

We are aware that police in NSW have concerns that offenders leave the scene prior to a provisional order being obtained and other issues related to the practicality of service. WLS NSW believes that these issues can be dealt with in other ways, such as taking the offender into custody for the purpose of service or the use of information technology to speed up the process of getting a provisional order.

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

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

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

WLS NSW supports this proposal. Section 49 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) provides an example of an appropriate clause in legislation. WLS NSW is of the view that it is important to have the duty of the police set out in legislation rather than just in policy.

Question 5–7 *In what circumstances, if any, should police be required to apply for protection orders on behalf of victims? Should such a requirement be imposed by state and territory family violence legislation or by police codes of practice?*

WLS NSW supports the approach that the duty of police to apply for protection orders should be imposed by legislation. It should also be included in police codes of practice consistent with the legislation. Further, it is essential that a comprehensive and proactive system of supervision for police be developed to ensure that there is oversight of the legislative duty.

Question 5–8 *Should all state and territory governments ensure that there are Indigenous-specific support services in courts to enable Indigenous people to apply for protection orders without police involvement?*

WLS NSW supports the increase of Aboriginal-specific support services in courts. This may address the reluctance of some Aboriginal people to approach police for protection orders.

Specifically, WLS NSW supports the increase of Aboriginal Court Liaison Officers within local courts and the expansion of that service. There should also be increased support services for Aboriginal people within police stations as well as further support of Aboriginal people already working within police stations and courts.

The NSW Police has acknowledged that there are barriers that prevent Aboriginal people from reporting to police, including the 'historical relationship between police and Aboriginal people' and '[d]istrust of police', together with 'poor police/community relationships' stemming from a fear of authorities, a 'fear of community reprisals', and fear of children being removed.1 WLS NSW considers there is significant work required to improve the relationships between Aboriginal people and the police.

However, careful consideration needs to be given to how an Aboriginal specific support service within a court may impact on the already poor relations between Aboriginal people and the police. Aboriginal-specific support services assisting without police involvement should not occur by default, but should be channelled to co-exist with police involvement. Victims should be able to access appropriate support irrespective of which system they choose.

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[1] NSW Police Force, Code of Practice, NSW Police Force response to Domestic and Family Violence, November 2009, at page 39.

It is important that Aboriginal-specific support services do not become a splitting mechanism – providing Aboriginal people with a second tier response to family violence. Without a coordinated response, a fracturing of the already tenuous relationships with police may occur, reducing the efficacy of police practices and responses.

Police prosecutors should have capacity to represent a personal applicant for a protection order, with the applicant's consent to ensure that the person needing protection is able to easily access representation in the absence of other options. Formal processes for this should be developed, rather than relying on ad hoc arrangements, which is the current situation in NSW.

Further, Aboriginal family violence prevention legal services should be expanded to urban areas to ensure that Aboriginal people can access culturally appropriate services, and Aboriginal women's legal services should be established and funded adequately across Australia.

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 the Director of Public Prosecutions will take over the prosecution of a protection order from the police on appeal to the District Court.

Proposal 5–6 *State and territory legislation which confers on police powers to detain persons who have used family violence should empower police to remove such persons from the scene of the family violence or direct them to leave the scene and remain at another specified place for the purpose of the police arranging for a protection order.*

WLS NSW supports this proposal. The NSW legislation already allows for this and in our experience it works well.

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?*

Yes.

Question 5–12 *Is there a need for legislative amendments to provide guidance in identifying the primary aggressor in family violence cases?*

WLS NSW agrees that there needs to be legislative amendments to provide guidance in identifying the primary aggressor in the context of family violence. Any amendments will need to be clear about the factors that police need to consider in deciding who is the primary aggressor, including the history of violence by one party to the other and self-defence. Comprehensive training and ongoing supervision is also necessary to ensure consistency in police practice.

WLS NSW has seen an increase in the number of instances where police apply for protection orders for a male person against a woman, despite a history of violence

perpetrated by the male. This may be because at the time the victim was considered 'hysterical' and is deemed 'the aggressor'. This stems from a lack of understanding of the dynamics of family violence.

Our view is that a significant number of errors made by police in identifying the primary aggressor could be prevented by the following:

- The development of a clear procedure for police to address the identification of victims of family violence in ambiguous circumstances which involves police looking to the history of family violence (reported and as far as possible unreported) and an assessment of self defence as a factor.
- A willingness of police to withdraw applications for protective orders / charges if it becomes evident that they are dealing with a victim as an alleged defendant.
- A willingness of the police to investigate actively the family violence, and then to charge or apply for protective orders against the violent party.
- Ongoing training for police and quality supervision on these issues.
- The adequate resourcing of specialist police within local area commands to ensure that police practice is monitored.

Case study

Jo attended the police station after being assaulted by her ex-boyfriend. She was bruised and swollen and needed medical attention. Jo was taken into an interview room. A short time later Jo's ex-boyfriend attended the police station and asked that an Apprehended Violence Order application be made for his protection as Jo had 'intimidated' him. The police applied for this order. When Jo emerged from the interview room she was informed that she would need to attend court later that day. Jo was astonished to hear that an order was being made for her ex-boyfriend's protection when she was the one who was assaulted.

Jo does not understand how the police could be assisting him when she went to the police station to ask for help and she was injured.

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?*

In our experience, most offenders in these circumstances are granted bail. While this is appropriate in most circumstances, there are cases where bail is granted and the victim is highly fearful of further violence and may be at risk.

Question 5–14 *How often are victims of family violence involved in protection order proceedings under family violence legislation not informed about a decision to release the offender on bail and the conditions of release?*

In our experience, it is common that victims of family violence involved in protection proceedings do not understand or have not be informed about the bail conditions. Most victims know that the offender has been released on bail but often do not understand the conditions of that bail.

Proposal 5–7 *State and territory legislation, to the extent that it does not already do so, should impose an obligation on the police and prosecution to inform the victim of a family violence offence of: (a) decisions to grant or refuse bail to the offender; and (b) where bail is granted, the conditions of release. The Bail Act 1992 (ACT) provides an instructive model in this regard. Police codes of practice or operating procedures and prosecutorial guidelines or policies as well as appropriate education and training programs should also address the obligation to inform victims of family violence of bail decisions.*

WLS NSW supports this proposal.

Question 5–15 *How often are inconsistent bail requirements and protection order conditions imposed on a person accused of committing a family violence offence?*

In our experience, the bail conditions and provisional protection orders are usually consistent.

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).*

WLS NSW supports this proposal.

6. Protection Orders and the Criminal Law

Proposal 6–1 *State and territory family violence legislation should be amended, where necessary, to make it clear that the making, variation or revocation of a protection order or the refusal to make, vary or revoke such an order does not affect the civil or criminal liability of a person bound by the order in respect of the family violence the subject of the order.*

WLS NSW supports this proposal.

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?*

In NSW, a criminal proceeding and protection order about substantially the same incident is dealt with together by the court.

If an interim protection order was made without the consent of the defendant, then it is possible that a victim would have given evidence in support of the interim order and could be cross-examined about that evidence in the criminal proceeding. However, in practice, victims rarely give evidence in support of an interim protection order if criminal charges are also being dealt with. Section 40 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) requires the court to make an interim order if the charge relates to an offence that the court regards as serious.

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.

In NSW, the protection order application is dealt with after the criminal trial is finalised. The matters run together when they deal with the same conduct. This works well in that victims and other witnesses give evidence in the one matter, then submissions are made with regard to whether a protection order is appropriate (including when the criminal matter is dismissed or the defendant found not guilty).

Question 6–3 *In practice, to what extent are courts exercising their powers to make protection orders in criminal proceedings on their own initiative where a discretion to do so is conferred on them?*

In NSW, courts must make an interim protection order when defendants have been charged with an offence that is regarded by the court as a serious offence. In practice interim orders are usually made when the matter also involves criminal charges. In our experience, courts in NSW are exercising their power to make protection orders when criminal proceedings are also involved.

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?

In our experience, most orders made in this context are appropriate to the needs of the person needing protection.

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?*

It is not appropriate to include such an exception. This could lead to an offender placing pressure on a victim to object to the making of the order. Such an exception would be a step backwards for NSW. Prior to the introduction of section 16(2) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), pressure was often brought to bear on persons in need of protection to say that they had no fears of the defendant and magistrates had no option but to dismiss the application for an order in such circumstances.

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.*

WLS NSW supports this proposal provided that the defendant (and prosecution) can make submissions as to the appropriateness of the orders.

Proposal 6–4 *State and territory legislation should provide that a court, before which a person pleads guilty or is found guilty of an offence involving family violence, must consider any existing protection order obtained under family violence legislation and whether, in the circumstances, that protection order needs to be varied to provide greater protection for the person against whom the offence was committed, irrespective of whether an application has been made to vary the order.*

WLS NSW supports this proposal.

Question 6–7 *In practice, are the conditions which judicial officers attach to protection orders under state and territory family violence legislation sufficiently tailored to the circumstances of particular cases?*

The conditions that are attached to protection orders in NSW are dependant on what the applicant (in the case of private applications) or the police/prosecutor asks for in the initiating application, sometimes amended at court by further negotiation between the parties or by submission to the magistrate. In practice, magistrates rarely recommend orders. They usually rely on the ability of the applicant to propose particular orders and then may decline to make certain orders on the basis that they are not necessary for the safety and protection of the protected person (section 20 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW)).

Whether, in individual cases, orders are sufficiently tailored to the needs of the protected person is dependent on the quality of the advocacy they receive, rather than just on what the magistrate decides. In our experience, most conditions are adequately tailored.

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.*

WLS NSW supports this proposal.

Proposal 6–6 *Application forms for protection orders in each state and territory should clearly set out the full range of conditions that a court may attach to a protection order. The forms should be drafted to enable applicants to indicate the types of conditions that they would like imposed. In particular, the application form for a protection order in Western Australia should be amended in this regard.*

WLS NSW supports this proposal. Further we would recommend that the list of orders possible is not exhaustive and that there should be scope, as there is in NSW, for drafting a specific order to cover circumstances that may not be covered by the 'standard orders'.

Proposal 6–7 *State and territory family violence legislation should require judicial officers considering the making of protection orders to consider whether or not to make an exclusion order—that is, an order excluding a person against whom a protection order is made from premises shared with the victim, even if the person has a legal or equitable interest in such premises.*

WLS NSW supports this proposal. It may also need to be combined with education of judicial officers about using exclusion orders when appropriate to ensure that they are taken advantage of to protect victims of violence.

Proposal 6–8 *State and territory family violence legislation should specify the factors that a court is to consider in making an exclusion order—that is, an order excluding a person against whom a protection order is made from premises shared with the victim, even if the person has a legal or equitable interest in such premises. Judicial officers should be required to consider the effect that making or declining to make an exclusion order will have on the accommodation needs of the parties to the proceedings and on any children, as recommended by the ALRC in the Report Domestic Violence (ALRC 30) 1986.*

WLS NSW supports this proposal. See comment above.

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?*

If this was accepted there is a need to define 'reasonable efforts'. WLS NSW is concerned that this requirement may dissuade police from applying for an exclusion order where appropriate to do so. We do not believe that the provision would practically be of any benefit in NSW due to a lack of available accommodation options that would mean that ' reasonable efforts' would never result in a public or social housing accommodation outcome.

Proposal 6–9 *State and territory family violence legislation should require a court to give reasons for declining to make an exclusion order—that is, an order excluding the person against whom a protection order is made from premises in which he or she has a legal or equitable interest—where such order has been sought.*

WLS NSW supports this proposal.

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?*

An express presumption along these lines should be included. However, this should be assessed in terms of the safety of the victim and any accompanying children. In some circumstances victims do not wish to remain in the premises. The value of a presumption of this kind is if it acts as a prompt to judicial officers to seriously consider an exclusion order.

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.*

WLS NSW does not support this proposal. There is insufficient evidence to demonstrate that counselling and rehabilitation programs for family violence offenders are effective. We have concerns that false hope regarding these types of programs may lead to victims remaining in unsafe situations. We are also concerned that the option of an order directing defendants to rehabilitation programs may, in practice, become an alternative to other more appropriate orders.

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.*

WLS NSW does not support this proposal. See reasons outlines in answer to proposal 6-10. This approach also risks placing considerable pressure on victims of family violence to provide solutions for conduct of the offender which are best dealt with seriously and appropriately as family violence (with associated legislated protections and criminal justice responses).

Question 6–11 *Do judicial officers in jurisdictions, such as NSW and Queensland, in which family violence legislation does not specify expressly rehabilitation or counselling programs as potential conditions attaching to a protection order, in fact, impose such conditions as part of their general power to impose any orders that they consider to be necessary or desirable?*

In our experiences, judicial officers in NSW do not impose such conditions. The legislation gives power to make orders *prohibiting* certain behaviours and it is generally accepted that the magistrate has no power to make a coercive order.

Question 6–12 *Are overlapping or conflicting obligations placed on persons as a result of conditions imposed by protection orders under family violence legislation requiring attendance at rehabilitation or counselling programs and any orders to attend such programs either pre-sentencing or as part of the sentencing process?*

This does not occur in NSW as such orders are not made in protection orders (see answer to question 6-11 above). A perpetrator will only be ordered to attend such programs if there are criminal charges.

Question 6–13 *In practice, are courts sentencing offenders for family-violence related offences made aware of, and do they take into account, any protection order conditions to which the offender to be sentenced is or has been subject?*

Yes, in NSW matters are dealt with concurrently.

Question 6–14 *Have there been cases where there has been overlap or conflict between place restriction or area restriction orders imposed on sentencing and protection order conditions which prohibit or restrict the same person's access to certain premises?*

Usually this does not occur in NSW as the protection order and criminal charges are dealt with together.

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.

WLS NSW supports 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.*

WLS NSW supports this proposal.

Proposal 6–14 *State and territory family violence legislation should empower a court hearing an allegation of breach of a protection order to grant leave to proceed in an application to vary or cancel a protection order of its own motion where:*

(a) there is evidence that the victim for whose benefit the protection order was made gave free and voluntary consent to the breach; and

(b) the court is satisfied that the victim wants to vary or revoke the protection order.

WLS NSW does not support this proposal. We are concerned that providing the court with this power would place a victim at risk of being pressured, in the midst of a hearing, to agree to changes in a protection order that are not in their best interests.

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.*

WLS NSW supports this proposal.

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?*

WLS NSW view is that judicial discretion in sentencing should not be limited in this way.

Question 6–17 *In practice, where breach of a protection order also amounts to another criminal offence to what extent are police in each state and territory charging persons with breach of a protection order, as opposed to any applicable offence under state or territory criminal law?*

In our experience it depends on the extent of the breach. Police in NSW vary in their practice across and within local area commands, however it is not uncommon for criminal charges for offences other than breach of a protection order to also be laid.

Proposal 6–16 *State and territory courts, in recording and maintaining statistics about criminal matters lodged or criminal offences proven in their jurisdiction should ensure that such statistics capture separately criminal matters or offences that occur in a family-violence related context.*

WLS NSW supports this proposal.

Question 6–19 *Should there be consistency of maximum penalties for breach of protection orders across the jurisdictions? If so, why, and what should the maximum penalty be?*

WLS NSW supports a consistent national approach. We believe that that the NSW penalties are appropriate.

Question 6–21 *Should state and territory family violence legislation contain provisions which direct courts to adopt a particular approach on sentencing for breach of a protection order—for example, a provision such as that in s 14(4) of the Crimes (Domestic and Personal Violence) Act 2007 (NSW), which requires courts to sentence offenders to imprisonment for breach of protection orders involving violence, unless they otherwise order and give their reasons for doing so?*

WLS NSW supports this approach. We note that the requirement to give reasons for not ordering imprisonment is an important safeguard in the NSW legislation.

Question 6–22 *What types of non-financial sanctions are appropriate to be imposed for breach of protection orders where the breach does not involve violence or involves comparatively low levels of violence?*

The most common sanction for a low level breach in NSW is a good behaviour bond. WLS NSW considers this to be appropriate as the consequences for the defendant if they offend again include sentencing them for the original offence as well as the new offence. If a fine only is imposed, there is no ongoing sanction if a further offence is committed, other than reference to the prior conviction in sentencing.

7. Recognising Family Violence in Criminal Law

Proposal 7–1 *Commonwealth, state and territory governments, and Commonwealth, state and territory directors of public prosecution respectively, should ensure that police and prosecutors are encouraged by appropriate prosecutorial guidelines, and training and education programs, to use representative charges to the maximum extent possible in family-violence related criminal matters where the charged conduct forms part of a course of conduct.*

WLS NSW supports this proposal.

Question 7–8 *Should the sentencing legislation of states and territories be amended to allow expressly for a course of conduct to be taken into account in sentencing, to the extent that it does not already do so?*

WLS NSW supports this proposal.

Proposal 7–2 *State and territory sentencing legislation should provide that the fact that an offence was committed in the context of a family relationship should not be considered a mitigating factor in sentencing.*

WLS NSW supports this proposal.

Proposal 7–3 *The Australian Government—in conjunction with state and territory governments, the National Judicial College of Australia, the Judicial Commission of NSW, and the Judicial College of Victoria—should develop, and maintain the currency of, a model bench book on family violence, which incorporates a section on sentencing in family violence matters.*

WLS NSW supports this proposal.

Proposal 7–4 *State and territory criminal legislation should provide defences to homicide which accommodate the experiences of family violence victims who kill, recognising the dynamics and features of family violence.*

WLS NSW supports this proposal.

Proposal 7–5 *State and territory criminal legislation should expressly allow defendants to lead evidence about family violence in the context of a defence to homicide. Section 9AH of the Crimes Act 1958 (Vic) is an instructive model in this regard.*

WLS NSW supports this proposal.

8. Family Violence Legislation and Parenting Orders

Proposal 8–1 *State and territory child protection laws should be amended to require a child protection agency that advises a parent to seek a protection order under state or territory family violence legislation for the purpose of protecting the child to provide written advice to this effect to ensure that a federal family court does not construe the parent's action as a failure to 'facilitate, and encourage, a close and continuing relationship between the child and the other parent' pursuant to s 60CC(3)(c) of the Family Law Act 1975 (Cth).*

WLS NSW supports this proposal.

WLS NSW agrees with the Commissions' endorsement of the recommendations for reform of the 'friendly parent' provision contained in the recent Chisholm and Family Law Council reviews. Proposal 8-1 was made in the event that these recommendations are not adopted. However, WLS NSW considers the proposal to have broader benefits and accordingly supports this proposal even if the 'friendly parent' provision is amended. WLS NSW sees many advantages in alerting the federal family courts directly, and in writing, to the child protection agency's opinion.

Proposal 8–2 *Application forms for initiating proceedings in the federal family courts and the Family Court of Western Australia should clearly seek information about existing protection orders obtained under state and territory family violence legislation or pending proceedings for such orders.*

WLS NSW supports this proposal. However, we consider that amendment to court forms is not sufficient to properly identify family violence, and accordingly support Professor Chisholm's recommendation for an identification and risk assessment process.

In addition, WLS NSW proposes that the family courts' Response forms should also clearly seek information about state and territory protection orders.

WLS NSW also recommends that the family courts should obtain copies of protection orders from the state or territory court that made the protection order.

Proposal 8–3 *State and territory family violence legislation should provide mechanisms for courts exercising jurisdiction under such legislation to be informed about existing parenting orders or pending proceedings for such orders. This could be achieved by:*

(a) imposing a legally enforceable obligation on parties to proceedings for a protection order to inform the court about any such parenting orders or proceedings;

(b) requiring courts making protection orders to inquire as to any such parenting orders or proceedings; or

(c) both of the above.

WLS NSW supports proposal (b).

WLS NSW considers that it is necessary for judicial officers to actively ask for information, rather than rely upon the parties to disclose, since some applicants may choose not to inform the court regardless of potential penalties for non-disclosure. WLS NSW is also particularly concerned that parties who do not have sufficient English language skills may consequently not disclose, and would prefer to see the onus placed upon the court to inquire.

Proposal 8–4 *Application forms for protection orders in all states and territories, including applications for variation of protection orders, should clearly seek information about existing parenting orders or pending proceedings for such orders.*

WLS NSW supports this proposal.

Proposal 8–5 *The 'additional consideration' in s 60CC(3)(k) of the Family Law Act 1975 (Cth), which directs a court to consider only final or contested protection orders when determining the best interests of a child in making a parenting order, should be:*

(a) repealed, and reliance placed instead on the general criterion of family violence contained in s 60CC(3)(j);

OR

(b) amended to provide that any family violence, including evidence of such violence given in any protection order proceeding—including proceedings in which final or interim protection orders are made either by consent or after a contested hearing—is an additional consideration when determining the best interests of a child.

WLS NSW supports proposal (b). WLS NSW agrees with the concern noted by the Commissions at paragraph 8.77, that option (a) may decrease the visibility of family violence as a factor in making parenting orders.

Directing judicial officers to consider protection orders as one of the best interest factors avoids the potential situation where a judicial officer does not give any weight at all to the existence of a protection order. Clients have reported to WLS NSW that some judicial officers see protection orders as easy to obtain or as a tactical move for family law proceedings. In combination with the affidavit evidence of the nature and extent of the violence, judicial officers should be encouraged to consider protection orders as good evidence of the existence of family violence.

WLS NSW notes that many protection orders are consented to because there is little chance the defendant would succeed if the application proceeded to hearing due to the police being able to obtain sufficient evidence of the violence. This means that many of the most serious cases of family violence would involve protection orders made by consent. Unfortunately, as a result of the defendant consenting to the protection order, the police may not investigate further so evidence from witnesses is not obtained. This means that the protection order itself will often be the main contemporaneous evidence available to the judicial officer when determining subsequent parenting proceedings.

Despite our support for the second option, WLS NSW notes a potential concern. This proposal could negatively impact the number of defendants choosing to consent to the protection orders. Presently, defendants are advised of the implications of section 60CC(3)(k) and WLS NSW understands that some defendants choose not to contest the protection order on the basis of this advice. Accordingly, there is a risk that by amending this section to include all protection orders, there may be an increase in the number of orders being contested.

Proposal 8–6 *Rule 10.15A of the Family Law Rules 2004 (Cth) should apply to allegations of family violence in addition to allegations of child abuse. A substantially equivalent rule should apply to proceedings in the Federal Magistrates Court.*

WLS NSW supports this proposal.

We note the Commissions are interested in views on whether parties should be able to lodge applications for consent orders in the Federal Magistrates Court without initiating proceedings (at para 8.91). WLS NSW is not aware of any Federal Magistrates Court that does not share a registry with the Family Court. Since applications for consent orders are dealt with by a registrar, it is our understanding that the application can be filed at any family law court registry. If this is not the case, and there is a Federal Magistrates Court which stands alone, we are of the opinion that parties should be able to file an application for consent orders at that registry, and accordingly the necessary reforms should be made.

Question 8–2 *How often do federal family courts make consent orders that are inconsistent with current protection orders without requiring parties to institute parenting proceedings? Are additional measures needed to prevent this—for example, by including a requirement in the Family Law Rules 2004 (Cth) for parenting proceedings to be initiated where parties propose consent orders that are inconsistent with current protection orders?*

WLS NSW is unable to comment on the frequency with which inconsistent orders are made, however, we agree with the Commissions' concerns (expressed at paragraph 8.90). We are not aware of a court requiring parties to institute parenting proceedings after an application for consent orders failed to adequately address inconsistencies with a protection order.

WLS NSW is concerned that the proposal would force people into court proceedings in circumstances where they are unable to fund litigation. Legal aid is extremely limited, and the potential cost of court proceedings can be very high, especially in complex cases such as those involving family violence. This is exacerbated by legal aid merit assessments. Some clients have had difficulties meeting the merit criteria where they have raised concerns about domestic violence and seek to limit the time the other parent spends with children due to a perception that there case does not have good prospects of success.

Therefore, whilst we are very concerned about the issues raised by the Commissions, we do not support the introduction of the additional measure provided as an example in the question.

Question 8–3 *Are additional measures necessary to ensure that allegations of family violence in federal family courts are given adequate consideration in interim parenting proceedings? If so, what measures would be beneficial?*

WLS NSW considers that additional measures are necessary. In particular, adequate court time and resources are necessary to allow adequate assessment of family violence issues and to reduce delays, both before and after the interim hearing.

Decisions made at interim hearings tend to prioritise contact with both parents over the safety of the child and mother. The lack of court time and resources allocated to interim hearings means that family violence issues cannot be assessed comprehensively.

There can be considerable delays before an interim hearing is heard, and interim orders are often in place for considerable lengths of time due to court workloads. As such, these orders

are 'interim' in name only. As the interim orders are in place for extended periods of time, the failure to consider fully family violence issues at interim hearings can leave women and children in considerable danger.

The delays may also contribute to the orders made, as a decision-maker may be reluctant to make no-contact orders because the lengthy delays will mean that the interim orders have a significant impact on the final orders. If delays were reduced, a no-contact or limited contact order would prejudice the final orders less, and interim decision-makers might be more willing to err on the side of safety.

Proposal 8–7 *State and territory courts hearing protection order proceedings should not significantly lower the standard of protection afforded by a protection order for the purpose of facilitating consistency with a current parenting order. This could be achieved by:*

(a) a prohibition to this effect in state and territory family violence legislation; or

(b) guidance in relevant state and territory bench books.

WLS NSW supports this proposal. WLS NSW considers that legislative direction is a stronger option and that the second option alone is likely to be insufficient. However, we recognise that the second option would be quicker and easier to implement. Accordingly, we support both (a) and (b).

WLS NSW shares the concerns raised at paragraph 8.94 and 8.95 in relation to the potential that a magistrate could decide not to make a protection order if they are informed of existing proceedings for parenting orders.

WLS NSW is aware of cases where local court magistrates have regarded the situation as a 'family law' problem that should be dealt with in the family law courts, despite the woman clearly expressing fear of violence. In our experience, magistrates regularly make protection orders knowing that the parenting orders override the protection order where there is conflict. While magistrates' views vary, in our experience most magistrates confronted with the hypothetical at 8.97 would not amend the parenting orders.

Question 8–4 *Is s 68P of the Family Law Act 1975 (Cth), which requires a family court to specify any inconsistency between a family law order and a family violence protection order, working in practice? Are any reforms necessary to improve the section's operation?*

In our experience the requirements of this section are not commonly followed.

WLS NSW does not consider the obligations of this section to be overly burdensome on family courts or overly complex for people affected by an inconsistent order.

WLS NSW considers that compliance with this section ensures the family court undertakes a valuable process: first, judicial officers are directed to consider the implications of their orders and ensure that there are no unintended consequences; and second, steps are taken to make certain that affected people clearly understand the full impact of the family law orders.

WLS NSW notes that legislation already *requires* judicial officers to undertake the steps outlined which means it is unlikely legislative reform would ensure this section is followed. WLS NSW considers the most effective way to improve the operation of the section would be through education of lawyers and the judiciary. If legal practitioners are alerted to the

requirements of the provision any failure to comply should be raised, and where appropriate, appealed.

Question 8–5 *Is s 68Q(2) of the Family Law Act 1975 (Cth), which permits certain persons to apply for a declaration of inconsistency between a family law order and a family violence protection order, working in practice? How frequently is this provision used?*

WLS NSW considers that this question is important. We are not aware of declarations under this section being sought or made. We can envisage declarations under this section have the potential to be a very valuable tool.

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?*

In our experience magistrates vary in their willingness to exercise their power under this section, and we note that work has been done to increase the use of this provision in some local courts in NSW.

However, in our experience, a large majority of magistrates do not use this provision. Many are reluctant to vary parenting orders, which may have been made after a lengthy hearing in a family court, on the basis of evidence limited to a discrete incident. Some magistrates are unwilling to entertain an oral application under the section, which significantly limits the opportunity for a variation to be raised. Many magistrates express the view from the bench that it would be more appropriate for the issue to be resolved in the family law courts. WLS NSW notes that there may be a lack of understanding about the practical difficulties entailed in seeking to vary parenting orders, particularly where a grant of legal aid would be required.

Proposal 8–8 *Family violence legislation should refer to the powers under s 68R of the Family Law Act 1975 (Cth) to revive, vary, discharge or suspend a parenting order to give effect to a family violence protection order by:*

(a) referring to the powers—the South Australian model; or

(b) requiring the court to revive, vary, discharge or suspend an inconsistent parenting order to the extent that it is inconsistent with a family violence protection order—the Victorian model.

WLS NSW supports this proposal and prefers option (b).

WLS NSW is of the opinion that the most significant barrier to the exercise of these powers is a lack of awareness on the part of state and territory court magistrates and legal practitioners appearing in protection order proceedings, and therefore consider that an amendment in line with the Victorian legislation could be very beneficial.

WLS NSW prefers the second option in which state and territory legislation includes the content of the courts powers rather than a cross-reference to the provisions of the Family Law Act.

WLS NSW also prefers the second proposal as it places a stronger obligation on the courts, requiring them to exercise their powers, than the wording of section 68R in which courts 'may' amend existing orders. In circumstances where a protection order has been made

creating a conflict with existing parenting order, it is essential that magistrates turn their minds to whether or not there needs to be a change to the parenting orders.

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.*

WLS NSW supports this proposal.

WLS NSW considers that this would be a simple amendment that could provide protection order applicants with a clear opportunity to raise the necessity of change to a current parenting order, which they would otherwise have thought was not possible.

WLS NSW notes that many protection orders are initiated by Police and accordingly recommend that the Police be directed to obtain information from the protected person about whether a variation, suspension, or discharge of a current parenting order should be sought.

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?*

In our experience many lawyers and police acting in protection order proceedings are unaware of the court's power to amend existing parenting orders. Neither police nor lawyers seem to be asking the protected person if a variation is needed or advising them that such amendment is possible. Parenting orders are commonly treated as a fixed backdrop rather than something that could be changed to ensure the safety of the protected person. Often, lawyers representing protection order applicants have a criminal rather than a family law background and are uncomfortable seeking the variation.

Question 8–9 *Should the Family Law Act 1975 (Cth) be amended to direct state and territory courts varying parenting orders to give priority to the protection of family members against violence and the threat of family violence over a child's interest in having contact with both parents?*

WLS NSW supports this proposal if the current structure of primary considerations is maintained. We note that our preference is for there to be no primary considerations.

WLS NSW notes that in parenting proceedings involving family violence, there is a direct conflict between the question of division of time and the risk of harm. In our experience, current court practice is to resolve the conflict in favour of prioritising time over considerations relating to risk of harm.

WLS NSW considers the priority presently given to the division of time over risk of harm to be of serious concern. Our concerns are greater if courts making protection orders also prioritise contact arrangements, and consider that the safety of women and children should be the priority in such proceedings.

If there is to be any primary consideration or principle in the Family Law Act and across the family law system, it must be protecting children from harm or a risk of harm.

This proposal would provide a clear resolution of the existing conflict in favour of safety. WLS NSW notes also that amending the Act this way would go some way to ensuring that

the family law system operates cohesively with the state child protection systems to ensure the safety and protection of children.

Question 8–10 *Should s 68R of the Family Law Act 1975 (Cth) be amended to empower state and territory courts to make parenting orders in those circumstances in which they can revive, vary, discharge or suspend such orders?*

WLS NSW sees clear benefits in a system that allows people in need of protection orders to resolve issues with parenting arrangements as a result of family violence in one court. We note that the provisions in section 68R are expressed widely enough that the local courts can entirely discharge the existing orders replacing them with wholly new orders if considered necessary. This means that there is a clear inconsistency between people with current parenting orders who could have new orders made by the local court during the course of proceedings for protection orders, while people without existing orders must use the family law courts (unless both parties consent).

While we acknowledge that empowering state and territory courts to make parenting orders could speed up the process, WLS NSW is concerned that making final orders at this acute point in separation, and in busy local courts that have limited work in the family law jurisdiction, may not be appropriate.

Question 8–11 *Do applicants for interim protection orders who seek variation of a parenting order have practical difficulties in obtaining new orders from a court exercising family law jurisdiction within 21 days? If so, what would be a realistic time within which such orders could be obtained?*

WLS NSW notes that current family court time frames make a 21-day period unrealistic in almost all cases and can see that there could be a benefit to extending the period where a protection order is set down for hearing more than 21 days in the future. If at the time a final protection order is made, the local court can then exercise its powers under section 68R on a final basis. We note that there is no barrier to a local court extending the period for a further 21 days when further interim protection orders are made.

Rather than extending the timeframe, WLS NSW recommends that the family courts should be properly resourced so that they are able to list a matter within three weeks. We consider that the current timeframe is an appropriate limit on how long a matter involving domestic violence should wait before receiving a first court date, and submit that the family courts should be sufficiently resourced to allow the timeframe to be met.

Question 8–12 *Should there be a defence to a breach of a parenting order where a parent withholds contact beyond 21 days due to family violence concerns while a variation or suspension of a parenting order made by a state or territory court is awaiting hearing in a federal family court or the Family Court of Western Australia?*

WLS NSW does not support the proposal that a defence be created where a contravention has occurred because the 21-day period has elapsed as we consider it unnecessary. The current law provides that there is a reasonable excuse where the contravention was necessary to protect the health and safety of the child or a parent.

Proposal 8–11 *The Tasmanian Government should undertake an evaluation of the protocol negotiated between the Magistrates Court of Tasmania and the Tasmanian Registry of the Family Court in relation to coexisting family violence protection orders and parenting orders. On the basis of this evaluation, other states and territories should consider whether adopting cooperative models would be an effective strategy to deal with coexisting orders.*

WLS NSW supports this proposal.

WLS NSW notes that the Tasmanian arrangement is likely to resolve the issues raised above in relation to section 68T.

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.*

WLS NSW supports this proposal.

WLS NSW concurs with the comments of the Kearney McKenzie Report in relation to the divestiture of responsibility for women and children's safety by the local court, and notes that this is of additional concern given that the family courts presently tend towards a prioritisation of time over safety (as discussed above in relation to Question 8-9).

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?*

WLS NSW would need to give this further consideration since we are concerned that the automatic exception may put women at risk. Making changes to the parenting arrangements when a protection order is needed could result in positive changes in behaviour on and around changeover. However we note that clients seeking a protection order often come with an expectation that parenting arrangements will continue.

Proposal 8–13 *The Australian Government—in conjunction with state and territory governments, the National Judicial College of Australia, the Judicial Commission of NSW and the Judicial College of Victoria—should provide ongoing training and development for judicial officers in state and territory courts who hear proceedings for protection orders on the exercise of their powers under the Family Law Act 1975 (Cth).*

WLS NSW supports this proposal.

9. Family Violence Legislation and the *Family Law Act:* Other *Family Law Act* Orders

Question 9–1 *In order to improve the accessibility of injunctions for personal protection under the Family Law Act 1975 (Cth) to victims of family violence, should the Family Law Act provide separate procedures in relation to injunctions for personal protection and other family law injunctions available under s 114 of the Act? If so, what procedures would be appropriate?*

Separate procedures will assist with dealing with personal protection injunctions under the *Family Law Act* more efficiently and expeditiously, but only if this includes changes in relation to the recognition and enforcement of injunctions.

A separate procedure for personal protection injunctions will have the added benefit of educating the wider community about the existence of this power under the *Family Law Act*. To this end it would also be advantageous to use a common name in both federal and state or territory jurisdictions, for example, 'protection order'.

If a personal protection injunction is made it should be issued as a separate court order to reduce confusion and to assist with recognition and enforcement by police when there is a breach. This may also be assisted by amending the definition of 'external protection order' in the relevant state or territory family violence legislation to allow the registration of orders made under the injunction provisions of the *Family Law Act*.

Additionally it may be necessary to look at changes to procedures, such as being able to consent to an injunction on a 'without admission' basis or entering into undertakings.

We agree with the suggestion in paragraph 9.39 for the removal of filing fees. Other procedures could include a separate check box on the Initiating Application and Response to Initiating Application forms for a 'personal protection injunction' or a prompt to apply for an injunction on the Notice of Child Abuse or Family Violence form.

The non-filing of an affidavit in support of an application for a personal protection injunction is more difficult. We do see benefits to enabling victims of family violence to seek an injunction without an affidavit, such as cost and time savings. However the court will still need to be satisfied of the need to grant the injunction and this may result in victims being required to give oral evidence at length or being exposed to traumatic questioning, particularly if the perpetrator is self represented.

We also note that any change must not undermine or erode the extensive work that has been done to establish that protecting victims of family violence is a public responsibility not a private battle. Victims who seek a *Family Law Act* injunction must not be disadvantaged by the constraints of jurisdiction and so consideration must be given to making legal aid automatically available or creating some kind of 'police prosecutor' role. We also note that it is important that there is consistency across jurisdictions in relation to definitions and sanctions, particularly as state or territory courts are likely to deal with enforcement issues for both state or territory protection orders and *Family Law Act* injunctions.

Judicial officers making personal protection injunctions may also need to clarify that consenting to an injunction will not impact the assessment of parenting arrangements, property entitlements or liability for costs.

As noted by the Commissions in paragraph 9.11, *Family Law Act* injunctions are not available to childless same-sex or childless unmarried couples. We are concerned about the human rights implications of this situation, particularly for same-sex couples who are not able to marry under current Australian law, and submit that all people should have access to protection orders.

Proposal 9–1 *The Family Law Act 1975 (Cth) should be amended to provide that a wilful breach of an injunction for personal protection under ss 68B and 114 is a criminal offence, as recommended by the ALRC in Equality Before the Law (ALRC 69).*

WLS NSW supports this proposal. However we are concerned about the requirement for a threshold of 'wilful breach'. This imports a higher standard of proof than is currently required in the state legislation, for example, the requirement in the NSW *Crimes (Domestic and Personal Violence) Act 2007* is 'knowingly contravenes' (section 14).

Issues arising in relation to procedures for recognition and enforcement of *Family Law Act* injunctions are dealt with in our response to Question 9-1.

Question 9–2 *In practice, how often does a person who has obtained an injunction under the Family Law Act 1975 (Cth) subsequently need to seek additional protection under state or territory family violence legislation?*

We are not in a position to comment on this as our clients almost exclusively use only the state family violence legislation.

Question 9–3 *Should a person who has sought or obtained an injunction for personal protection under the Family Law Act 1975 (Cth) also be able to seek a protection order under state or territory family violence legislation?*

The following response assumes that the protection sought under the state or territory family violence legislation is not currently being provided by the injunction and that no change has been made to the enforceability of injunctions.

Whilst it may be preferable for personal protection issues to be dealt with by the one court, given the current issues around delay, cost, complexity of proceedings and enforcement under the *Family Law Act* victims need to continue to have access to the state or territory family violence legislation.

WLS NSW is concerned that prohibiting victims of violence with *Family Law Act* injunctions from also seeking relief under the state or territory family violence legislation will put victims at risk. If victims are forced to stay within the family law system they may elect not to pursue personal protection injunctions because it is too daunting and difficult without police assistance or established enforcement mechanisms. This is particularly the case where the victim is unable to afford legal representation.

Any such prohibition on using state or territory family violence legislation requires further thought about things such as, the role of police applications in the family law system, automatic granting of legal aid for victims of family violence seeking a *Family Law Act* injunction and requirements for police to serve *Family Law Act* court documents.

It is also unclear how such a proposal fits with the current obligations on police to apply for protection orders in certain circumstances. At the very least there would need to be a

national protection order database including both state or territory family violence protection orders and *Family Law Act* injunctions accessible by police and courts as per Proposal 10-15.

Such a database may also assist with issues arising from related parties making personal protection applications in alternate jurisdictions as per 9.45 and 9.50.

Question 9–4 *In practice, do problems arise from the provisions dealing with inconsistencies between injunctions granted under ss 68B and 114 of the Family Law Act 1975 (Cth) and protection orders made under state and territory family violence legislation?*

We are not able to say as our clients almost exclusively use only the state family violence legislation.

Proposal 9–2 *The Family Law Act 1975 (Cth) should be amended to provide that in proceedings to make or vary a protection order, a state or territory court with jurisdiction may revive, vary, discharge or suspend a Family Law Act injunction for the personal protection of a party to a marriage or other person.*

WLS NSW conditionally supports this proposal. It is agreed that there are clear benefits to the state or territory courts having jurisdiction in respect of dealing with *Family Law Act* injunctions as proposed, but only if other amendments also occur, such as Proposal 9-1, to make the injunctions more effective and protective.

We are concerned that victims may be pressured into agreeing to revive an injunction rather than obtaining a protection order and be put at greater risk because the current injunctive protection is largely toothless.

Proposal 9–3 *Section 114(2) of the Family Law Act 1975 (Cth), which permits a court to make an order relieving a party to a marriage from any obligations to perform marital services or render conjugal rights, should be repealed.*

WLS NSW supports this proposal. The current wording of section 114(2) gives a false impression that there is such a thing as conjugal rights.

Question 9–5 *Is evidence of violence given in protection order proceedings being considered in the context of property proceedings under pt VIII of the Family Law Act 1975 (Cth)? If so, how?*

We assume that this question is asking if consideration is being given to both the existence of violence and/or to specific documentary or other evidence that was before the state or territory courts.

We have some direct experience with family violence and related protection orders being taken into account in property proceedings.

In one case we acted for a client at a conciliation conference, which was conducted as a shuttle negotiation with both parties represented. There was a current protection order in place and the other party had been convicted of assault. There were also pending proceedings relating to a breach of the protection order and an attempt by the other party to detain the victim to pressure her not to commence property proceedings.

We made submissions about the impact of the violence on our client's contributions during the marriage, but placed greater emphasis on the significant psychological injuries suffered by our client and the impact of the violence upon her earning capacity and opportunity to accrue her own superannuation.

We were successful in negotiating a 60/40 division of the property in our client's favour. The Registrar did not specifically refer to the violence but did comment that the favourable result for our client was supported on the facts.

It is likely that the relatively small pool in this matter allowed us to avoid lengthy arguments about contributions and we were able to make the violence a central factor in the submissions using section 75(2)(a) and (b).

Proposal 9–4 *The provisions of the Family Law Act 1975 (Cth) dealing with the distribution of property should refer expressly to the impact of violence on past contributions and on future needs, as recommended by the ALRC in Equality Before the Law (ALRC 69).*

WLS NSW supports this proposal. However we do not believe that the violence that is to be taken into account should be limited to conduct directed towards a spouse as discussed in paragraph 9.99.

Our clients regularly tell us about the ways in which they are impacted by violence directed towards their children. For example, they may be unable to work or study because they feel they must be available to deliver children to and from school or adopt other such measures of vigilance as a means of safeguarding or supplementing protection orders which they perceive as being easily circumvented by determined perpetrators. In effect their whole existence becomes about keeping themselves and the children safe and their capacity to contribute in other ways is diminished.

We also strongly support specific reference to the 'impact of violence', as the existence of a protection order alone does not provide a true sense of the dynamics of a relationship. For example, we are aware of cases where protection orders have been made against female defendants by relying on evidence of injury inflicted by the woman in self-defence. In these cases it would clearly be inappropriate for the man to use the protection order to alter property interests in his favour.

Proposal 9–5 *The Australian Government should commission an inquiry into the treatment of family violence in property proceedings under pt VIII of the Family Law Act 1975 (Cth). The inquiry should consider, among other issues, the manner in which family violence should be taken into account in determining a party's contribution under s 79(4) and future needs under s 75(2); the definition of family violence for the purpose of pt VIII proceedings; and interaction with other schemes—for example, victims' compensation.*

WLS NSW supports this proposal. Note comments for Proposal 9-4 above in relation to the manner in which family violence should be taken into account in determining contributions.

Any such inquiry should also consider reference of state power to the Commonwealth to make personal protection injunctions for childless de facto couples, siblings and other family members as flagged in paragraph 9.11. It is important and fair to create a level playing field, particularly for de facto couples who should not be disadvantaged by potentially having to run proceedings in two jurisdictions.

Additionally we note that any lump sum victims' compensation payments should be excluded from the asset pool and should not be taken into account when assessing eligibility for legal aid.

Question 9–6 *How often are persons who have been the subject of exclusion conditions in protection orders made under family violence legislation or victims of family violence taking possession of property which they do not own or have a right to possess, or denying the other person access to property? If so, what impact does this have on any property proceedings or orders relating to property under the Family Law Act 1975 (Cth)?*

We are not able to say how often this occurs. The most common fact scenario that we see is where victims of family violence have left the home taking only limited personal effects with them. Once they are in a safe place away from the perpetrator there may no longer be any immediate risk of violence so they may not be eligible for a personal protection order and thus cannot obtain an ancillary property recovery order.

Women in this situation tell us that they are regularly denied access to or possession of their property. In some cases their property has been damaged or destroyed by the perpetrator of violence.

Our clients often state that it is not worth the hassle and opt to 'keep the peace' rather than find a way to get their property back. It is our experience that victims of family violence will always choose children over property and often bargain away property rights on the strength of oral promises from the perpetrator that they will let them keep the children.

Additionally the property pool is often quite small, and may even be just about transferring responsibility for a debt, so the costs associated with hiring a lawyer for a *Family Law Act* property division are prohibitive or disproportionate. Legal aid is generally unavailable in these types of matters.

We also wish to flag a couple of other areas of concern. For example, some clients are worried about what to do when the other party refuses to collect items that belong to them or is unable to for reasons such as being in prison. The current methods for dealing with such items are unclear, for example, in some cases state or territory legislation dealing with uncollected goods may apply.

Our clients also report being pursued by creditors in relation to joint debts. This liability often arises in the context of family violence where victims have been bullied or harassed into signing documents.

Proposal 9–6 *Provisions in state and territory family violence legislation dealing with exclusion orders should:*

(a) limit the types of property which a court may order an excluded person to recover to clothes, tools of trade, personal documents and other personal effects, and any other items specified by the court; and

(b) provide that any order to recover property should not include items—

(i) which are reasonably needed by the victim or a child of the victim; or

(ii) in which title is genuinely in dispute; and

(c) provide that an order to recover property should not be made where other more appropriate means are available for the issue to be addressed in a timely manner.

WLS NSW supports this proposal. We note that it may be useful to have discretion for the court to order and/or the parties to agree that other types of property, for example, items of furniture, can be recovered if that could finalise all property matters between the parties. Any later dispute in a family law context would be assisted by consideration of the itemised list of property recovered by the excluded person.

We note it may be difficult for people to identify all property to be recovered at the time the exclusion order is made.

Question 9–7 *Are there any types of property other than those set out in Proposal 9–6 which should, or should not, be subject to recovery by an excluded person under state and territory family violence legislation—for example, should an excluded person be able to recover property of his or her child?*

Recovery of property by excluded persons is not a major problem reported by our clients. We are far more likely to see cases where women have left home fleeing violence and are faced with trying to recover property for themselves and their children.

Proposal 9–7 *State and territory family violence legislation should require applicants for protection orders to inform courts about, and courts to consider, any agreement or order for the division of property under the Family Law Act 1975 (Cth), or any pending application for such an order.*

WLS NSW supports this proposal. However we note that many of our clients do not use the provisions of the *Family Law Act* to effect a property settlement. This can be for reasons such as small property pools, prohibitive litigation costs or ineligibility for legal aid.

We are also concerned that awareness of potential or actual property proceedings under the *Family Law Act* might result in state or territory courts electing to refrain from making ancillary property recovery orders. It is important to ensure that property will still be recovered with police assistance when required.

Proposal 9–8 *Application forms for protection orders in family violence proceedings should clearly seek information about any agreement or order for the division of property under the Family Law Act 1975 (Cth) or any pending application for such an order.*

WLS NSW supports this proposal. We are concerned though that the addition of more questions will make application forms for protection orders too long and complex,

particularly for many of our client who are from culturally and linguistically diverse backgrounds.

Proposal 9–9 *State and territory family violence legislation should provide that personal property directions made in protection order proceedings are subject to orders made by a federal family court or another court responsible for determining property disputes. Section 87 of the Family Violence Protection Act 2008 (Vic) should be referred to as a model in this regard.*

WLS NSW supports this proposal.

Proposal 9–10 *State and territory family violence legislation should provide that personal property directions do not affect any ownership rights. Section 88 of the Family Violence Protection Act 2008 (Vic) should be referred to as a model in this regard.*

WLS NSW supports this proposal.

Question 9–8 *In practice, what issues arise from the interaction between relocation orders and protection orders or allegations of family violence? If so, what legal or practical reforms could be introduced to address these issues? For example, should there be a presumption that, in some or all cases where a family court determines there has been family violence, it is likely to be in the best interests of a child to be able to relocate to a safe distance from the person who has used violence? If so, to which type of case should such a presumption apply?*

As we have previously submitted the 2006 reforms appear to have placed greater restrictions on victims of family violence seeking to relocate so we welcome further consideration of this issue.

In most cases involving family violence it could be beneficial to have a presumption in favour of relocation, such as when a victim of family violence has to respond to an application for a recovery order. However there are some areas of concern we wish to raise.

We are concerned that such a presumption may send the message that it is enough to simply relocate away from the perpetrator. Victims will almost always experience ongoing fear and it can be hard to establish a 'safe distance', particularly when there is emotional or psychological abuse. Any legislative reform of relocation matters must be supplemented by enforceable protection arrangements that are easily recognised in all states or territories. The courts must also be prepared to make no arrangements for the children to spend time with or communicate with the perpetrator of the violence.

Another issue we wish to raise is that some victims of family violence do not wish to relocate. This may be so as not to disrupt children's schooling or because of the support they receive from family and friends in the area. Ideally what they would like is for the other party to move away, but this is outside the jurisdiction of the courts. Victims should not be forced to feel their only option is to flee.

Therefore if a presumption is introduced it must be clear that the presumption will not apply if the victim does not wish to relocate. The effect of the legislation must not replicate the power imbalance that has been present in the violent relationship or cause victims to feel that they are still not in control of their own lives.

Question 9–9 *Should the Family Law Act 1975 (Cth) be amended to include provisions dealing with family violence in relocation matters in addition to the provisions of the Act that apply to family violence in parenting proceedings?*

We support amendments that facilitate better and quicker outcomes in cases involving family violence but are concerned that these types of reforms may actually make the *Family Law Act* legislation and procedures more complex.

Question 9–10 *In practice, what issues arise from the interaction between protection orders under state and territory family violence legislation and recovery orders under div VII of the Family Law Act 1975 (Cth) for return of a child pursuant to the Convention on the Civil Aspects of International Child Abduction, as implemented by the Family Law (Child Abduction Convention) Regulations 1986 (Cth)? If so, what legal or practical reforms could be introduced to address these issues?*

Many victims tell us that they want to escape the violence first and once they are safe deal with other issues such as seeking a protection order and any family law matters. However in doing this they are worried that as soon as they leave the other party may be successful in obtaining an ex parte recovery order because the court will not have been advised of the family violence.

This highlights a need for a procedure whereby victims can notify the courts that they have left and taken the children because of family violence. To be effective this would need to include a shared database accessible by all courts having jurisdiction under the *Family Law Act*, which flags a family violence notification. Then if the other party makes an application for a recovery order the court will see that there has been a family violence notification. This may tie in with issues around information sharing which are being addressed elsewhere in this submission.

In making such a notification victims would then have to bring the family law and/or protection matter before the courts within a specified timeframe.

In cases where there is a current protection order in place concerns arising from ex parte applications may also be addressed by a national protection order database as per Proposal 10-15.

In relation to Hague Convention recovery orders we support the proposal for a non-molestation undertaking to trigger proceedings for a protection order.

Question 9–11 *Should the Family Law Act 1975 (Cth) be amended to include provisions dealing with family violence in recovery matters, in addition to the provisions of the Act that apply to family violence in parenting proceedings?*

We support amendments that facilitate better and quicker outcomes in cases involving family violence but are concerned that these types of reforms may actually make the *Family Law Act* legislation and procedures more complex.

10. 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.

WLS NSW supports this proposal, however, proposal 10-1 (c) in relation to a written safety plan is unclear. The terms of the order should be clear enough that an additional safety plan is not required.

Proposal 10–2 *Before accepting an undertaking to the court from a person against whom a protection order is sought, a court should ensure that:*

(a) the applicant for the protection order understands the implications of relying on an undertaking to the court given by the respondent, rather than continuing with their application for a protection order;

(b) the respondent understands that the applicant's acceptance of an undertaking does not preclude further action by the applicant to address family violence, if necessary; and

(c) the undertaking is in writing.

WLS NSW supports this proposal.

Question 10–1 *What practical reforms could be implemented in order to achieve the objectives set out in Proposal 10–2?*

In NSW implementing the proposal would require amendments to protection order legislation or rules to require magistrates to explain the effects of undertakings and to require undertakings to be in writing.

Question 10–2 *In practice, do victims of family violence, who rely on undertakings to the court from a person against whom a protection order is sought, often return to court because the undertaking has been breached, or to seek further protection from family violence?*

This is not our experience in practice. In NSW, undertakings are generally only offered and accepted in appropriate cases where there is a low possibility of later breach. In cases where we consider the use of undertakings appropriate, it is rare that the undertakings are later breached. Where the applicant for the protection order is the Police, prosecutorial guidelines dictate that undertakings may only be accepted in a limited range of circumstances if at all.

There is nothing to preclude a person from applying for a further protection order if undertakings are breached and then the earlier undertakings noted on the court record may be used as evidence.

Proposal 10–3 *Court forms for applications for a protection order under state and territory family violence legislation should include information about the kinds of conduct that constitute family violence in the relevant jurisdiction.*

WLS NSW supports this proposal. This would be helpful in assisting applicants understand the types of conduct that constitute family violence, would facilitate ease of applying for a protection order and would ensure full particulars of relevant behaviour are included on applications.

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

WLS NSW supports this proposal. Currently applications in NSW are unsworn. Many magistrates will not make ex parte or interim orders without sworn oral evidence from the victim. Sworn applications may reduce the need for victims to retell their story in the witness box in preliminary proceedings.

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

WLS NSW does not support this being mandatory but we do not oppose applicants being able to be supported by affidavit evidence. However, the preparation of affidavits is a legal task and applicants would require legal assistance in the course of their proceedings. Police are not legally trained to prepare affidavits and police prosecutors, many of whom are legally trained, would not have the time to attend to this. Applicants applying privately (without police assistance) for protection orders would either need to pay a lawyer to prepare an affidavit or there would need to be a funded scheme to assist applicants. While there is benefit in properly prepared evidence, it would not prevent applicants from needing to give oral evidence and being cross-examined on hearing.

Question 10–5 *What are the advantages or disadvantages of providing written rather than oral evidence to a court when seeking a protection order? Would a standard form of affidavit be of assistance to victims of family violence?*

Any mandatory requirement for written evidence would disadvantage parties who are of low literacy, have an intellectual disability or are from a CALD background. Our system of allowing for evidence to be tested or for an accused to face their accuser will require personal evidence and it is hard to see how written evidence could replace oral evidence to any great extent.

Question 10–6 *Are there any other ways to facilitate the use of evidence given in proceedings for a protection order under state and territory family violence legislation in pending, concurrent or subsequent family law proceedings where family violence is alleged?*

Access to orders made in other courts and the obtaining of transcripts from other courts would be of assistance.

Question 10–7 *Are the provisions in state and territory family violence legislation that allow the court to hear protection order proceedings in closed court effective in protecting vulnerable applicants and witnesses?*

In NSW there is no general right of a victim of domestic violence or witnesses who do not fall under the 'vulnerable persons' provisions in the *Criminal Procedure Act 1986* (NSW) to give evidence by CCTV. We support a proposal to amend NSW legislation to provide for this protection.

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.

WLS NSW supports this proposal provided funding for a legal practitioner to conduct the cross-examination is available. Legal aid is only available in limited circumstances to defendants. The above proposal may result in an inability of a person to adequately defend an application for protection order, cross-examination being crucial to testing the evidence of the applicant. This proposal would result in substantial disadvantage where the applicant is legally represented and the defendant unrepresented. This would also be disadvantageous in the situation of cross-applications, where two people have each applied for a protection order against the other: there would be no cross-examination at all unless one or both parties could afford a private solicitor.

Question 10–9 *Should state and territory family violence legislation allow a court to:*

(a) make an order that a person who has made two or more vexatious applications for a protection order against the same person may not make a further application without the leave of the court; and/or

WLS NSW does not support this proposal. A person should always have access to a court to decide an application on proper grounds. Previous applications could be raised by the other party as evidence of a lack of fear on the part of the applicant.

(b) dismiss a vexatious application for a protection order at a preliminary hearing before a respondent is served with that application?

WLS NSW does not support this proposal. It is difficult to define what constitutes 'vexatious' and victims sometimes make applications and then withdraw them due to pressure from the defendant or other persons, or for some other reason. A victim may be disadvantaged by such a proposal. It is appropriate that a judicial decision be made on any allegations raised in an application.

Proposal 10–5 *State and territory family violence legislation should provide that mutual protection orders may only be made by a court if it is satisfied that there are grounds for making a protection order against each party.*

WLS NSW does not support this proposal. Each application should be considered on its merits and any variety of outcomes are possible upon evidence being heard. Courts are already required to be satisfied that there are grounds for making a protection order against a party, in the context of mutual and individual protection orders. The criteria for mutual or cross protection orders should be, and are, the same as for an individual protection order.

Proposal 10–6 *State and territory family violence legislation should require the respondent to a protection order to seek leave from the court before making an application to vary or revoke the protection order.*

WLS NSW does not support this proposal. A respondent should have access to justice by putting a case for judicial decision.

Proposals 10–7 to 10–15 and Questions 10–12 to 10–20

WLS NSW considers the issues raised in this series of proposals and questions to be very important and complex, requiring further consultation and consideration than has been possible during this Inquiry process.

We understand the basis for the proposals and questions aimed at increasing the capacity to disclose confidential information and we support efforts made to improve the system's responsiveness to disclosures of family violence. Many women report to us the difficulties that they experience in bringing evidence before the courts of family violence. The lack of available evidence regarding family violence and sexual assault is one of the biggest hurdles for victims in family law proceedings. Also, many women expect that their disclosures to people working in the family law system will be listened to and acted upon.

However, there are real concerns about a range of issues that arise in moving towards a system where there is more disclosure and sharing of information. These include potential risk of harm to the person disclosing violence; the integrity of counselling relationships and family dispute resolution processes; and the possibility that failure to indicate family violence could inappropriately lead to an assumption that there is no family violence. These and other concerns must be fully considered.

Central to a move towards more disclosure and sharing of information is a requirement for prior informed consent. The makers of disclosures must be fully informed of the consequences of disclosure and have control over how the information is used in family law proceedings.

We support further consideration of these important proposals and questions.

11. 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 s 60I of that Act—to ensure that victims of family violence are not inappropriately attempting or participating in family dispute resolution? What other reforms may be necessary to ensure the legislation operates effectively?*

In our view it is necessary to reform the 'false allegations' and 'friendly parent' provisions since in our experience these provisions are contributing to the family law system's failure to provide an effective response to family violence – including the decision to participate in family dispute resolution.

Both the exception to family dispute resolution, evidenced by a section 60I certificate, and by applying directly to court for the orders sought should be available to parties who have experienced violence. Both these processes need to be accessible for clients and, in many cases, seeing a family dispute resolution practitioner for the purposes of obtaining a section 60I certificate is the preferable course: it is usually less expensive; having a certificate, rather than not, may have more credence with the court; and the client may have an opportunity to participate in safe family dispute resolution if appropriate to do so.

In our view family dispute resolution practitioners need to be supported to provide the crucial gate-keeping role that they play in issuing section 60I certificates, since in many circumstances a client attending for the purposes of obtaining a certificate is a legitimate and cost effective service.

Law and policy should support uniform screening and risk assessment for family dispute resolution that assesses the violence first, and the appropriateness for family dispute resolution second. In our experience, to make the latter decision first leads to a potentially dangerous 'playing down' of the violence.

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.*

WLS NSW supports this proposal.

We note the Commissions' view (Consultation Paper Summary, p 143) expressed that the extent of violence in the separating and divorcing populations is such that violence is likely to be core business for most professionals in the family law system. This accords with our experience, and confirms the need for this proposal.

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.*

WLS NSW supports this proposal. Further, we support the Family Law Council's recommendation in its 2009 report that screening and risk assessment frameworks, tools and materials should be endorsed by an expert panel and reference group (Consultation Paper Summary, p 143).

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.*

WLS NSW supports this proposal.

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

We are not able to say whether it is the current definition of family violence that is causing problems. However, we support a broadening of the definition of family violence in the *Family Law Act* and support the adoption of the current Victorian definition. Such an evidence based definition of family violence that will then inform practice is a necessary first step. However, other strategies such as education and resources are required to provide the players in the family law system with a common understanding of and consistent response to the nature and dynamics of family violence.

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.*

WLS NSW supports this proposal. However, care needs to be taken that the exception is an option and not automatically included; and further that it clearly refers to family dispute resolution processes as ordered or directed by the Family Court, or provided under the *Family Law Act*.

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?*

In NSW there has been a strong view taken and supported by government, courts and Legal Aid that mediation in protection order proceedings is inappropriate. In our view ADR processes should never be used in protection order proceedings since living free from violence is an absolute right and not one that should be subject to mediation. In coming to this view it is important to make the distinction between mediation about the protection order itself and mediation about other issues when there is violence or a protection order in place. The former is not appropriate and the latter may be, depending on the circumstances and the risk assessment and safety plan put in place.

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?*

We are strongly of the view that alternative dispute resolution mechanisms in child protection need to be legislatively based and properly resourced.

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?*

We were unable to consult with our Aboriginal Women's Consultation Network within the timeframe of this consultation. WLS NSW recommends that the Commissions undertake

additional culturally appropriate consultation with Aboriginal women and organisations on this important question.

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?*

We were unable to consult with our Aboriginal Women's Consultation Network within the timeframe of this consultation. WLS NSW recommends that the Commissions undertake additional culturally appropriate consultation with Aboriginal women and organisations on this important question.

Part C – Child Protection

13. Child Protection and the Criminal Law

Question 13–1 *Should offences against children for abuse and neglect be contained in child protection legislation or in general criminal laws?*

Offences should be contained in general criminal laws.

Question 13–6 *In what circumstances is it appropriate for police to make child protection notifications when responding to incidents of family violence?*

Recent changes to NSW child protection legislation, following the Wood Inquiry, specify that child protection notifications are only made where the risk of harm is 'significant'. Police and other agencies have child wellbeing units set up to assist families and reporting should only occur in cases where intervention is warranted. It is incumbent on child protection authorities to respond appropriately and take into account that a victim of family violence (usually the mother) should not be penalised and further harm perpetrated on her by the actions of child protection agencies.

WLS NSW supports the Commissions' view that automatic reports to child protection authorities although well intentioned, could be counter-productive.

WLS NSW considers that more training could assist police in making decisions about the appropriate circumstances in which to make child protection notifications. In particular, training should be provided on the impact of removing a child from their parent/s and home, and the different cultural perspectives of child rearing in the context of Aboriginal families. There is a need for greater education for child protection professionals and the police on kinship relations and cultural differences in caring for children, including the role of siblings.

WLS NSW supports a holistic approach to child and family well being rather than a forensic examination of what may or may not be occurring. For example, there is a greater emphasis placed on evidence of abuse/neglect rather than on the development of the individual child/ren. As Canadian academic, James Anglin, asserts 'the essential problem is dealing with primary pain without unnecessarily inflicting secondary pain experiences… through punitive or controlling reactions'.[2] This is particularly pertinent in the context of family violence where mothers are the victims of family violence.

Children and mothers who are victims should not be penalised by child protection authorities because of the perpetrator's violence. The complexity of family violence relationships must be understood and the negative impact on mothers who are held

[2] Anglin, J., 2002 "Pain, normality and the struggle for congruence: reinterpreting residential care for children and youth", *Child and Youth Services,* Vol. 24 (1/2), 1-165, p55.

accountable for not protecting children from violence at a time when they are under intense pressure as victims of family violence.

Case study

Tracey was violently assaulted by her ex-partner and had serious and obvious injuries. The children were not present when the assault occurred. She escaped from him and went to the police station.

The police took Tracey's statement and then informed the Department of Community Services that she had been involved in domestic violence.

The Department removed Tracey's children that day. Tracey had not had any dealings with the Department prior to this notification by the police.

Proposal 13–1 *State and territory child protection legislation should contain an exemption from the prohibition on the disclosure of the identity of the reporter, or of information from which the reporter's identity could be deduced, for information disclosed to a law enforcement agency where:*

(a) the information is disclosed in connection with the investigation of a serious offence alleged to have been committed against a child or young person; and

(b) the disclosure is necessary for the purpose of safeguarding or promoting the safety welfare and wellbeing of any child or young person, whether or not the victim of the alleged offence.

WLS NSW does not support this proposal. Such provision in the child protection legislation may lead to counsellors and other mandatory reporters being less likely to report. The fear of the mandatory reporters identity being exposed more easily could lead to a fear of being called as witnesses more often, and this could undermine the professional relationship between the mandatory reporter and their client/patient.

Further, we note that some exemptions already exist under NSW legislation and these appear to be sufficient.

14. Child Protection and the *Family Law Act*

Question 14–1 *Can children's courts be given more powers to ensure orders are made in the best interests of children that deal with parental contact issues? If so, what powers should the children's courts have, and what resources would be required?*

WLS NSW strongly supports children's courts having the power to make contact orders in child protection matters. Schedule 1.2 [24] of the *Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009* (NSW) will limit contact to interim orders or if the permanency plan involves restoration. WLS NSW sees this as crucial so that orders are made in the best interests of children. Without this power, there is a reluctance on the child welfare authority and foster care agencies to facilitate contact with parents which we understand is due to pressure from foster carers to not disrupt a placement or from the department to allocate resources to make contact happen. In our view the decisions are made on pragmatic grounds, rather than on a judicial determination of what is in the best interests of the child. It is not a proper matter for the courts to take into account the departmental resources required to implement a decision taken that is in the best interests of a child.

Question 14–5 *Is there any role for a referral of legislative power to the Commonwealth in relation to child protection matters? If so, what should such a referral cover?*

WLS NSW sees that there are significant benefits in the one court hearing all children's matters, including family law (parenting) matters as well as child protection matters. We see considerable differences in the approach taken by the two separate jurisdictions that are very difficult to reconcile in the best interests of children as well as for the safety of women and children. We believe this single court should be the Family Court. Therefore, WLS NSW advocates a referral of judicial powers in child protection matters to the federal family law jurisdiction. The non-judicial powers, such as those relating to prevention, crisis response, investigative and service provision aspects of child protection, should remain with the states.

Proposal 14–1 *To ensure appropriate disclosure of safety concerns for children, the Initiating Application (Family Law) form should be amended by adding an additional part headed 'Concerns about safety' which should include a question along the lines of 'Do you have any significant fears for the safety of you or your child(ren) that the court should know about?'.*

WLS NSW supports this proposal. WLS NSW also recommends the same question be included in the Response to an Initiating Application.

Question 14–6 *What other practical changes to the applications forms for initiating proceedings in federal family courts and the Family Court of Western Australia would make it clear to parties that they are required to disclose current or prior child protection proceedings and current child protection orders?*

The current questions asking about existing orders, agreements or undertakings should be listed individually with a yes and no tick box for each individual type of order, agreement or undertaking. The terminology for each jurisdiction should also be included.

Question 14–7 *In what other ways can family law processes be improved to ensure that any child safety concerns that may need to be drawn to the attention of child protection agencies are highlighted appropriately upon commencement of proceedings under the Family Law Act 1975 (Cth)?*

If a box is ticked to indicate current protection orders or agreements are in place, an information management system should be in place such that the orders are automatically sent from the Local Court to the Family Court and vice-versa.

While it may be necessary to set out the questions relating to previous orders, agreements or undertakings in a clearer manner in the Initiating Application and Response, the form should not be too long to fill in. Raising child safety concerns at the commencement of proceedings will not necessarily occur as a result of a more detailed form.

There should be a question that specifically asks if any of the parties in the matter are currently involved in child protection proceedings. For example, a matter may be in the Children's Court with the mother and maternal grandmother as parties and the father tries to seek contact through family law court orders. Family law court orders may be made if the Federal Magistrates/Family Court is not aware the matter is being heard in the Children's Court.

WLS NSW supports the recommendation made in the Chisholm Report that a risk assessment be made in all parenting cases. The risk assessment should not be limited to the completing of forms and should include a screening interview, for example, with a social worker at the court. This is a particularly important way of promoting and supporting access to justice for people who may be disadvantaged in some way, including people who are self-representing.

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

WLS NSW supports this proposal. WLS NSW also acknowledges the importance of national consistency in screening and risk assessment frameworks. Risk assessment should also be seen as a continuous process as risk may change over time.

WLS NSW further recommends that Proposal 14-2 not be limited to state and territory child protection agencies only. Consideration should also be given to drawing upon the expertise of other domestic violence workers and services.

In determining a risk assessment framework, risk issues should be distinguished from lifestyle issues.

It should be acknowledged there is no one homogenous family unit or way of doing things. There should be a great awareness of cultural experiences and practices. For example, it is a common practice in the majority world for older, school aged children to remain at home to help the mother care for the younger children. While WLS NSW is not advocating this practice in Australia, it is important that child protection agencies understand this practice and the importance of connecting parents to services so there is no need for the practice to continue.

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

Child protection agencies should specialise in prevention, investigation of risk of harm and out of home care. This is particularly important, as the Commissions have acknowledged, because the Family Court does not have an investigative arm and is reliant upon information provided by the parties or from the child protection agencies.

If a child is identified to be at risk, evidence should be provided to the Family Court. All available options for placement with family members should be considered by the Family Court before out-of-home care is considered. Consideration must be given as to how all potential family carers be assessed in a timely fashion so that the issue of care is resolved as quickly as possible. The matter should be referred back to the child protection agency if out of home care is required.

Child protection agencies should be joined as a party if requested to do so by the court.

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?*

WLS NSW believes amendments to legislation are required and supports the proposals within this question.

Question 14–12 *How, in practice, can information exchange best be facilitated between family courts and child protection agencies to ensure the safety of children? Are changes to the Family Law Act 1975 (Cth) necessary to achieve this?*

If family violence and keeping children safe is the core business of family law courts, then information exchange should not be limited to an MOU and/or protocols. Rather, it should be enacted in legislation that is binding.

WLS NSW supports the sharing of orders and undertakings; however, we propose that there should be further consideration about the type of other information that is shared. For example, should all affidavits which have been filed, including those which can be objected to, be shared? Additionally, should untested evidence, such as notifications made to Community Services, be included?

See also our comments on information sharing in relation to Chapter 10 questions and proposals.

Proposal 14–3 *All states and territories should develop a Memorandum of Understanding or Protocol to govern the relationship between federal family courts and child protection agencies.*

WLS NSW supports this proposal and refers to the response to question 14-12.

Question 14–13 *Does the variation in the content of the protocols cause any difficulties and, if so, what changes should be made to facilitate the flow of information between the family courts and child protection agencies? What measures should be taken to ensure that the protocols are effective in practice?*

Different practices in different states and territories can be problematic. There is a need for consistency across the jurisdictions particularly given the transient population. We refer to our response to question 14-12.

Question 14–14 *How could the Memorandums of Understanding and Protocols for exchange of information between federal family courts, child protection agencies and legal aid commissions be better known within courts, and beyond them?*

The exchange of information can be better known within and beyond courts if instead of being an MOU or Protocol it is in fact included in legislation. In this way, legislation can be an important educative tool.

If this proposal is not accepted, the MOU and Protocols should be:

- displayed on the front page of the websites of agencies and organisation involved in the process
- be included in fact sheets which are included with sealed copies of court applications

See also our comments on information sharing in relation to Chapter 10 questions and proposals.

Proposal 14–4 *The Australian Government should encourage all jurisdictions to develop consistent protocols between federal family courts and state and territory child protection agencies which include procedures:*

(a) for electing the jurisdiction in which to commence proceedings;

(b) for dealing with requests for documents and information under s 69ZW of the Family Law Act 1975 (Cth);

(c) for responding to subpoenas issued by federal family courts; and

(d) which permit a federal family court to invite a child protection agency to consent to an order being made which allocates parental responsibility in the child protection agency's favour, in circumstances where it determines that no order should be made in favour of either parent.

WLS NSW supports this proposal.

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

WLS NSW questions the underlying assumption that the principles of the Magellan project should be applied in other courts. WLS NSW believes family violence and abuse should be considered core business of the Family Court.

The Magellan project is designed such that serious allegations of child abuse are identified and considered and all other cases are streamed in another way. To have multiple streams

may weaken the impact and effectiveness of the Magellan project. Arguably, if a project is unique it is more likely to be acted upon and respected. Judicial officers within the Magellan project also require specialist training.

WLS NSW also proposes there should be more transparency in the Magellan project. It should also be enshrined in legislation or best practice principles and be accessible to all who need it.

Magellan cases should be in the Family Court due to complexity of such matters and they should be adequately funded.

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?*

WLS NSW has not had time to give this question the detailed consideration it requires. However we suggest that the following are some of the improvements that could be made:

- A continuous process of risk assessment, including effective screening for family violence at the beginning of court proceedings and improved intake processes, would assist agencies to ensure that appropriate referrals can be made and safety planning undertaken for women and their children when necessary. The overarching risk assessment framework and the importance of preserving safety must be imbedded in all Government policy underpinning the family law system.
- Education for judicial officers in current issues in family violence and child abuse and potentially accreditation and requirements around compulsory professional development for family consultants and family report writers. The training should not be a one off training package but a continuing professional development training that is held on a regular and consistent basis.
- Clear guidelines for judicial officers about what matters should be referred to different divisions and for court registry staff and legal practitioners on where matters should be commenced.
- Improved early intervention support for parents.
- Funded court support schemes to assist victims of violence through the family court process.

Part D – Sexual Assault

16. Sexual Offences

Proposal 16–1 *Commonwealth, state and territory sexual offences legislation should provide that the age of consent for all sexual offences is 16 years.*

WLS NSW supports this proposal as the age of 16 for consent adequately balances the need to protect children and the need to respect sexual autonomy and choice.

Proposal 16–2 *Commonwealth, state and territory sexual offences legislation should provide statutory definitions of consent based on 'free and voluntary agreement'.*

WLS NSW supports this proposal.

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.

WLS NSW supports this proposal. Consideration should be given to strengthening the provisions by providing that consent is negated if purported to be given by persons with a cognitive impairment with a person who is responsible for their care as in section 66F NSW *Crimes Act*.

Question 16–6 *To what extent are the circumstances vitiating consent set out in current legislation appropriate to sexual assaults committed in a family violence context? Are any amendments required to draw attention to the coercive environment created by family violence, or are the current provisions sufficient?*

WLS NSW supports legislative amendment which would explicitly refer to family violence as a possible circumstance in which threats of force or terror might vitiate consent as presently provided in section 61HA4(c) of the *Crimes Act 1900 (NSW).*

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.*

WLS NSW supports this proposal. WLS NSW also supports increased community education to raise awareness about the meaning of consent, factors which may vitiate consent and reasonable steps a party to sexual relations should take to ascertain consent.

Question 16–7 *Is an honest belief in consent more likely to be raised in cases where the complainant has or has had an intimate relationship with the accused? If so, will the insertion of an objective element assist in these cases? Are other measures required to clarify or restrict the defence of honest belief in these cases?*

WLS NSW regularly assists clients who report they were the victims of non-consensual intercourse over long periods of time during violent relationships. In our experience, these clients rarely report this as sexual assault and in many cases do not fully understand their right to refuse to participate in sexual acts within the context of a relationship. In our view, community education is a key aspect of ensuring the mutuality of consent in adult sexual relations.

The inquiry about whether the accused believed the complainant was 'consenting' should include a reasonableness or objective test. We believe the test should be whether the accused took reasonable steps to determine whether the person was consenting.

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.

WLS NSW agrees with this proposal. WLS NSW would further support the following amendment to proposed paragraph (d):

> (d) …on an earlier occasion, or was previously or at the time of the sexual act in a sexual relationship with that person or any other person.

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.

WLS NSW supports this proposal in principle. We suggest that the right described in (a) should be positively framed as 'a right to freely and voluntarily choose to engage in sexual activity'.

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.

WLS NSW supports this proposal.

We would further propose adding:

> (f) Sexual assault may result in trauma that can affect complainants' capacity to immediately report and participate in police investigations and court proceedings immediately.

Question 16–8 *Should such a statement of guiding principles make reference to any other factors, such as recognising vulnerable groups of women, or specifically acknowledging that sexual violence constitutes a form of family violence?*

WLS NSW supports the inclusion of relevant educative material based on social science findings including the facts that certain groups of women are particularly vulnerable to sexual violence or face particular barriers in reporting violence and that family violence can and does include sexual violence against an intimate partner.

17. Reporting, Prosecution and Pre-trial Processes

Proposal 17–1 *The Australian Centre for the Study of Sexual Assault, the Australian Institute of Criminology and similar state and territory agencies should prioritise the collection of comprehensive data on attrition rates and outcomes in sexual assault cases, including in relation to sexual assault perpetrated in a family violence context.*

WLS NSW supports this proposal. Adequate resourcing is essential to ensure that these centres continue their valuable research into other social, educative and criminological aspects of sexual assault.

Question 17–2 *To what extent is the work of specialist police hampered by lack of training and resources? In what ways can improvements be made?*

In WLS NSW's experience, there are significant differences in the capacity of specialist police to work effectively in different areas. Domestic Violence Liaison Officers (DVLOs) in particular should have a significant role in assisting clients affected by domestic violence including sexual violence. However, in our experience, while some DVLOs are very experienced and capable, more often they are junior, lack training and are unsupported by their immediate superiors to perform their role. On one occasion, a newly appointed DVLO in a rural area approached a WLS solicitor and stated frankly 'I have no idea what I am doing'. We have also been told by several DVLOs in both rural and suburban areas that they are not supported by their superior officers to attend Court on protection order list days. We are also aware of clients who have had to wait a significant amount of time so that an appropriately ranked female officer can take their statement.

In our view training and resources are necessary for specialist and general police.

Question 17–3 *Are specialised police and integrated agency responses effective in reducing the attrition of sexual assault cases during the police investigation phase? If not, what further measures should be taken?*

In our experience, support, understanding and communication skills are very important in maintaining the ability and willingness of witnesses to participate in the police investigation. We regularly hear from clients who have had negative responses from police when reporting sexual offences, including comments that constitute an assessment of the merits of their case dissuading the client from proceeding. The reporting of sexual assault should not be handled by general duty officers and there should be specialised police available in rural areas.

Proposal 17–2 *Commonwealth, state and territory Directors of Public Prosecution should ensure that prosecutorial guidelines and policies:*

(a) facilitate the referral of victims and witnesses of sexual assault to appropriate welfare, health, counselling and other support services;

(b) require consultation with victims of sexual assault about key prosecutorial decisions including whether to prosecute, discontinue a prosecution or agree to a charge or fact bargain;

(c) require the ongoing provision of information to victims of sexual assault about the status and progress of proceedings;

(d) facilitate the provision of assistance to victims and witnesses of sexual assault in understanding the legal and court process;

(e) ensure that family violence protection orders or stalking intervention orders are sought in all relevant circumstances; and

(f) require referral of victims and witnesses of sexual assault of victims to providers of personal legal advice in related areas, such as family law and victims' compensation.

WLS NSW supports this proposal except to the extent that the following should also be included:

(g) Inform and advise victims of sexual assault at the earliest opportunity about:

(i) options related to giving evidence (for example via CCTV);

(ii) the sexual assault communications privilege; and

(iii) any other applicable provisions for the protection or benefit of sexual assault complainants available in the circumstances of the case.

It is important to protect the confidentiality of these referrals of victims so that referral records are not used by the defence to seek access to counselling records resulting from those referrals. WLS NSW is aware of a client who was referred to counselling by the police and then the records of that counsellor were sought by the defence. Adequate funding is necessary to ensure the effectiveness of these guidelines and policies and to uphold victims' expectations.

Question 17–6 *What measures should be taken to reduce the attrition of sexual assault cases during the prosecution phase, including in relation to sexual assault committed in a family violence context?*

WLS NSW solicitors regularly hear from clients who have been complainants in sexual assault trials that they have received conflicting and confusing advice from police, prosecutors, court support and court staff. We also note there is a generally low level of community awareness of the applicable processes and principles in sexual assault cases.

The availability of clear and consistent advice about the process and any protective provisions available and general information about investigation and trial processes would provide complainants with a greater degree of support and security to participate. More resourcing for prosecutors to increase the time and resources they can expend on ensuring a complainant is fully advised and supported would significantly assist as would better resourcing of witness assistance schemes located within the DPP.

WLS NSW is aware of a number of cases where sexual assault victims have withdrawn their complaints when faced with their personal and confidential records being made public and

known to the accused The lack of awareness around these issues and the lack of representation for victims may be a significant factor in attrition. Public funding for lawyers to act as victims advocates in the court may be another way to decrease the attrition rate so that sexual assault victims can uphold their rights to confidentiality including the deletion of identifying information and confidential communications.

Question 17–7 *Are there any further prosecutorial guidelines and policies that could be introduced to reduce the attrition of cases of sexual assault committed in a family violence context?*

See above.

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.*

WLS NSW believes that committal hearings should be paper committals where the evidence of the complainant is tendered as a written statement. Complainants should be protected from having to give oral evidence.

If complainants are required to give evidence in Committals on the basis of 'special reasons', the definition of special reasons must be restricted to limited circumstances and be defined in the legislation to prevent being broadened via broad judicial interpretation. For this reason WLS NSW believes that the 'special reasons' test is not the appropriate threshold test to require complainants to give evidence at committals.

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.

WLS NSW supports this proposal.

The practice of separating trials for separate counts to prevent the possibility of concoction and prejudice to the accused means that juries do not get a full picture of the context and circumstances of the alleged offence. This is confirmed by the 1997 Judicial Commission of NSW study which found that separating trials reduced the likelihood of a guilty verdict.

Separating trials is particularly difficult for child witnesses in child sexual assault matters and all witnesses/complainants in interfamilial matters.

WLS NSW has spoken to several clients who have been the complainants in unsuccessful prosecutions where the same accused was convicted by a different court with respect to offences perpetrated against another family member. In these cases it is clearly likely the accused would have been convicted for the offences against our client if the trials had been joined. In many cases inconsistent outcomes between family members can cause more distress than no conviction at all. We have clients express to us the trauma of not being believed, and particularly of not being believed when another victim was. We have also

spoken to clients who have not reported sexual assaults, but indicate they would if other victims were to come forward and they could support each other through the trial. This indicates that the severing of trials is likely to lead to attrition at the time when individuals are told the trial is to be severed. A further issue raised is the different victims' compensation entitlements (more pronounced in some jurisdictions than others) of different victims of the same perpetrator based on whether or not a conviction was secured.

Trials are often separated on the basis of the 'interests of justice' and the perceived prejudice to the accused. WLS NSW believes that the interests of justice must be more broadly construed to also include the 'injustice' to complainants in severed trials. A fair trial, in our view is one that does justice to all parties including the complainant.

WLS NSW supports the creation of a presumption in favour of trying multiple counts of an indictment together. WLS NSW supports the Victorian model in section 372 of the *Crimes Act* (Vic) where the presumption is not rebutted merely because evidence on one count is not admissible on another count.

Proposal 17–5 *Commonwealth, state and territory legislation should allow the tendering of pre-recorded audiovisual material of interview between investigators and a sexual assault complainant as the complainant's evidence-in-chief.*

WLS NSW supports this proposal, but notes complainants should be advised of any possible disadvantages (including any possible effect of tendering pre-recorded material on the persuasiveness of the evidence, the experience of being cross-examined 'cold' without giving evidence in chief, potential delays etc) prior to the tendering of the evidence-in-chief. It is important that the complainant is advised they have a choice and can make an informed decision.

Proposal 17–6 *Commonwealth, state and territory legislation should permit child victims of sexual assault and victims of sexual assault who are vulnerable as a result of mental or physical impairment to provide an audiovisual record of evidence at a pre-trial hearing attended by the judge, the prosecutor, the defence lawyer, the defendant and any other person the court deems appropriate. Adult victims of sexual assault should also be permitted to provide evidence in this way, by order of the court. Audiovisual evidence should be replayed at the trial as the witness's evidence. Recorded evidence should be available for use at any re-trial following an appeal or in other proceedings in appropriate circumstances.*

WLS NSW supports this proposal, but notes complainants should be advised of any possible disadvantages (including any possible effect of tendering pre-recorded material on the persuasiveness of the evidence, the experience of being cross-examined 'cold' without giving evidence in chief, potential delays etc). It is important that adult victims who do not have a cognitive impairment make their own informed choice about the way in which they will give their evidence.

The effectiveness of this proposal relies on adequate supply of technology and staff with the skills to use it. There needs to be strict protocols and safeguards to ensure the quality of recordings and their protection. In NSW courts may not have access to adequate audio-visual equipment and/or there can be mistakes such as not recording the evidence or only partially recording it.

Proposal 17–7 *Commonwealth, state and territory governments should ensure that participants in the criminal justice system receive comprehensive education about legislation authorising the use of pre-recorded evidence in sexual assault proceedings, and training in relation to interviewing victims of sexual assault and creating pre-recorded evidence.*

WLS NSW supports this proposal. See comments above.

18. Trial Processes

Question 18–1 *Should Commonwealth, state and territory evidence law and procedural rules limit cross-examination and the admission of evidence about the sexual reputation and prior sexual history of all witnesses in sexual assault proceedings?*

Yes. Cross-examination and admission of evidence on sexual reputation and history is experienced by witnesses as degrading and stressful. This is part of what makes giving evidence in sexual assault trials such a daunting task for any witnesses. While it is not submitted that relevant probative evidence exonerating a falsely accused person should be excluded, the interests of justice also require that the bringing of proceedings against an accused should not involve unsupportable levels of distress to witnesses. It is clear that the reputation of sexual assault trials as distressing based on the subject matter of cross-examination is one of the factors leading to attrition.

It is important that protections provided to sexual assault complainants are also available to sexual assault victims who are witnesses in a case but not complainants, such as tendency witnesses. Providing adequate protection for witnesses will both protect the individual involved but also potentially lead to an increase in the success of prosecutions, particularly in relation to serial offenders.

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.*

WLS NSW supports this proposal.

Question 18–5 *In sexual assault proceedings, the sexual assault communications privilege must generally be invoked by the complainant, who is legally unrepresented. Assuming complainants continue to be unrepresented in such sexual assault proceedings, what procedures and services would best assist them to invoke the privilege?*

In 2009 WLS NSW coordinated a project providing pro bono representation to sexual assault victims in Sydney seeking to maintain privilege over their counselling and medical records. The year-long project involved the NSW DPP, the Bar Association and law firms Blake Dawson, Clayton Utz and Freehills. The project aimed to provide: a stop-gap measure for legal service provision; investigate the operation of the privilege; and identify areas in need of legislative and procedural reform. WLS NSW has represented many clients in the course of the project.

We note with appreciation that paragraph 18.91 of the Consultation Paper lists many of the continuing problems that we have identified with the operation of the sexual assault communications privilege in NSW.

WLS NSW is in the process of preparing an evaluation report of our project that will analyse the cases and provide recommendations regarding legislative and procedural reform and options for legal service provision to sexual assault victims. We are happy to discuss our project and findings with the Commissions, and will provide the Commissions with a copy of the report as soon as it is available.

Proposal 18–9 *State and territory evidence legislation should provide that*

(a) the opinion rule does not apply to evidence of an opinion of a person based on that person's specialised knowledge of child development and child behaviour; and

(b) the credibility rule does not apply to such evidence given concerning the credibility of children.

WLS NSW supports this proposal subject to the following comments about the use of expert evidence regarding the development and behaviour of sexually abused children. We are concerned that using expert opinion on the development and behaviour of sexually abused children may lead to more problems than it would solve.

Child complainants may be 'syndromised' and their veracity undermined if they do not behave in accordance with 'usual' indicators of abuse. There is a vast body of well-established and accredited international research about the likely reactions and behaviours of children who experience sexually assault and trauma. However WLS NSW fear that in the same way as 'Battered Woman's Syndrome' has come to be construed by the courts and used *against* women, children who display extraordinary resilience or who may react or behave differently to most other child complainants will then not be believed.

From our experiences in the Family Court, expert opinion on the development and behaviour of children who have been sexually abused has been used as much to attack children as to bolster their credibility.

Trials will see experts for the defence arguing that the child's behaviour is inconsistent with a sexually abused child and experts for the prosecution arguing that the child has behaved consistently or has other reasons for her/his behaviour. This material can be highly prejudicial and expert opinion often carries enormous probative weight with the jury. This is certainly our experience in the Family Law jurisdiction where expert opinion on behaviour of children who have suffered abuse is regularly proffered.

For these reasons WLS NSW support the use of expert evidence on child development and the behaviour of children generally but not specifically on the behaviour of children who have alleged abuse.

Importantly expert evidence on chid development generally may contextualise the child's behaviour, the language and concepts the child uses in giving their evidence and explaining the facts and also their response to unduly harassing or aggressive cross- examination that is not managed by the judge

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.*

WLS NSW supports the proposal.

Regarding the 'concoction test' in particular, we note it is very common for an accused person to commit offences against more than one person, particularly a child sex offender who may have allegedly assaulted many children. Offender behavioural patterns suggest that offenders target sites of abuse that provide access to children and opportunities to assault.

This often means an offender may assault a number of children from a group – a family, school, sporting team or religious community – who clearly know each other.

Simply knowing each other brings a reasonable possibility of 'concoction'. This means that highly probative and corroborative evidence may be excluded – for an offence where it is notoriously difficult to find corroboration of a complainant's story.

The unique features of sexual assault offences and child sexual assault offences require, in our view, unique legislative solutions. These solutions must reflect the realities for many sexual assault complainants: complainants, particularly children, often know each other and often have some form of connection or relationship. This connection is most often not indicative of concoction.

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.

WLS NSW supports the proposal.

Question 18–13 *Are there significant gaps or inconsistencies among Australian jurisdictions in relation to 'alternative' or 'special' arrangements for the giving of evidence by complainants or other witnesses in sexual offence proceedings?*

WLS NSW has acted for clients who are witnesses in family law proceedings. These experiences have identified gaps and inconsistencies between criminal, protection order and family law proceedings. While family law proceedings are not 'sexual offence proceedings', the issue of sexual assault may be very relevant to determining a fact or facts in issue in family law matters. Sexual assault is a common form of family violence so it is likely to be an issue in many family law cases.

Protections for witnesses giving evidence about sexual assault in family law proceedings

There is a significant gap between the alternative arrangements available for sexual assault victims in the NSW criminal jurisdiction and family law proceedings. As alternative arrangements are already in place for children giving evidence in the Family or Federal Magistrates Courts, this issue mainly concerns adult victims of sexual assault. The lack of protection in the family law jurisdiction may affect parties to proceedings or witnesses who are not a party.

Case study

Our client, Julie, was subpoenaed to give evidence in relation to allegations she made that she was sexually assaulted by a man who was a party in the relevant family law proceedings. Julie was very distressed at the prospect of being in the court room with the alleged offender and would have been unable to give evidence about the incidents if the alleged offender was in the court room. As Julie was not a party to proceedings, she could not make an application to give evidence by remote witness facility. This application had to be made

through one of the parties. We assisted Julie by liaising with the party who issued the subpoena requesting them to make an application for our client to give evidence by CCTV. Although the court made an alternative arrangement it was clear that the solicitor issuing the subpoena and the court had not considered making special or alternative arrangements even though it was common knowledge that Julie was to give evidence specifically about her experience of sexual assault.

WLS NSW recommends placing an onus on the court to satisfy itself that where a witness is required to give evidence in open court about sexual assault that it is in the interests of justice for them to do so. The potential risk of harm to the witness and the impact on the witness' capacity to give evidence are factors that should be taken into account. This would assist self-represented parties who were unaware of the potential for making such alternative arrangements. It would also assist witnesses who are not a party to proceedings who may not have standing to make such an application or be aware such an option may be available to them.

It is important for the 'special' or 'alternative' arrangements for victims in sexual assault proceedings to be consistent across all jurisdictions – including the family law courts.

Inconsistency in the protection of sexual assault victims' confidential records in family law proceedings

Case Study

WLS NSW acted in a family law matter for Sarah who alleged that the father in the family law proceedings had sexually assaulted her as a child. Sarah was not a party to the family law proceedings but was subpoenaed by the solicitor for the mother to give evidence in relation to these allegations. The solicitor for the father subpoenaed a large volume of Sarah's medical and counselling records. Sarah was very distressed that such personal and private information might be seen by the alleged offender. Some of the records were likely to contain identifying information such as addresses and phone numbers and this also increased Sarah's fears of retribution by the alleged offender. Sarah was also distressed that she was not aware of subpoenas for her records until one of the subpoenaed third parties contacted her. Sarah found that the process was 'like being violated all over again' and felt like she 'had no rights'.

As Sarah was not a party to proceedings, she and her representatives were generally not entitled to access any information or documents from the Court, such as copies of subpoenas. WLS NSW was told by the Court and the Family Law Enquiry Line that as Sarah was not a party to the proceeding it was effectively none of her business. The lack of information about what was happening to her most personal and intimate records increased Sarah's sense of powerlessness and injustice throughout this process. It also created challenges for her representatives seeking to intervene in proceedings to limit production and use of the subpoenaed records. We were not notified of relevant court dates or supplied with copies of the subpoenas regarding our client.

Despite her representative's objections to production, the court ordered production of significant amounts of subpoenaed material but limited its production to the parties' representatives only with no photocopying. At the conclusion of proceedings Sarah was understandably concerned to know whether the subpoenaed documents had been returned or destroyed. Once again as she was not a party it took her representatives quite some time to receive a satisfactory answer to this question.

While Sarah was in the witness box, the father's lawyer asked her if she had made any relevant notes. Sarah said she had some papers in her bag. The father's lawyer then called on her to provide whatever papers were in her bag to the court. The paper contents of her bag were then scrutinised by the court. WLS later objected to production of the material and after argument only a minimal amount of material deemed relevant was produced to the parties. Although only a limited amount of material was produced, the process was in effect a fishing exercise and the way it was done increased Sarah's feelings of powerlessness, violation and made her feel 'like a criminal'.

The lack of court protocols and protections around handling sensitive records fails to consider the significant implications of such a pervasive breach of privacy for victims of sexual assault and/or domestic violence. Although in some cases, such personal records may be relevant to a fact in issue, it is crucial to ensure that only those records that are substantially relevant to the case are produced. It may also be of benefit to ensure that a legitimate forensic purpose be established before granting leave to issue the subpoena.

Problems of lack of consistency between family law, protection order and criminal jurisdictions

Integrity of the counselling relationship

The lack of consistency in the protection for sexual assault victims' confidentiality raises policy issues for State and Commonwealth jurisdictions. The NSW criminal and protection order jurisdictions provide for the protection of confidentiality on the basis that this protects the integrity of the counselling relationship; encourages victims to seek help and to overcome trauma and to enhance the reporting of reporting and prosecution so victims are not placed in a position where they have to choose between prosecution and privacy. The lack of corresponding protections in the family law jurisdiction bring the integrity of the counselling relationship into question and has the potential to undermine the policy objectives of criminal legislation that seeks to limit access to counselling and other therapeutic records.

Potential problems concurrent family law, protection order and/or criminal proceedings

If family law proceedings run concurrently with criminal law or protection order proceedings, this could result in the Family Court ordering the disclosure of records that would otherwise be protected in criminal or protection order proceedings. This could compromise the rights of a victim to confidentiality in a criminal prosecution. Although the family law is concerned with entirely different legal questions to criminal prosecutions, actions that would undermine protections for sexual assault victims are out of step with community expectations.

It is acknowledged that counselling or other therapeutic records may be relevant to establishing, for example, the mental state of a parent and this may be relevant to determining a child's best interests. However it is crucial that there are consistent safeguards to ensure that judicial scrutiny is applied to the issue of subpoenas and to production of sensitive material. There should be a presumption against the production of sensitive material such as medical or counselling notes unless they are held to be substantially relevant to a fact in issue. It would also be appropriate to legislate for the court to make ancillary orders to limit access to subpoenaed material such as no photocopying or access for parties' representatives only.

WLS NSW recommends that:

- if a party or witness is going to give evidence in relation to sexual assault they should receive notice of subpoenas for their records;
- if a witness objects to production of their records there should be procedures in place to provide them with relevant date sand copies of subpoenas; and
- if the records are counselling, medical or therapeutic records there should be a presumption against disclosure unless they are substantially relevant to a fact in issue.

Part E – Existing and Potential Responses

19. 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.

WLS NSW supports this proposal.

Proposal 19–2 *State and territory governments should, to the extent feasible, make victim support workers and lawyers available at family violence-related court proceedings, and ensure access to victim support workers at the time the police are called out to family violence incidents.*

WLS NSW supports this proposal.

Proposal 19–3 *The Australian Government should ensure that court support services for victims of family violence are available nationally in federal family courts.*

WLS NSW supports this proposal.

Proposal 19–4 *State and territory victims' compensation legislation should:*

(a) provide that evidence of a pattern of family violence may be considered in assessing whether an act of violence or injury occurred;

(b) define family violence as a specific act of violence or injury, as in s 5 and the Dictionary in the Victims Support and Rehabilitation Act 1996 (NSW) and cl 5 of the Victims of Crime Assistance Regulation (NT); or

(c) extend the definition of injury to include other significant adverse impacts, as is done in respect of some offences in ss 3 and 8A of the Victims of Crime Assistance Act 1996 (Vic) and s 27 of the Victims of Crime Assistance Act 2009 (Qld).

WLS NSW supports proposals (a) and (b). Additionally, we recommend that the definition of family violence for the purpose of victims' compensation include specific mention of children who are primary and secondary victims of the family violence. It should be clear in the legislation that children who are secondary victims of family violence have suffered an act of violence or injury that falls within the compensable category of family violence (called 'domestic violence' in NSW).

WLS NSW disagrees with proposal (c) without further consultation as the sections referred to in the Victorian and QLD legislation are interconnected with other provisions in that legislation.

In NSW 'injury' is defined to mean 'physical harm' or 'psychological or psychiatric harm'. The Guidelines (used by assessors) published by Victims Services in NSW outlines what 'harm' could mean, based on case law.

We are concerned that including a list of adverse effects in legislation could result in more restrictive interpretations, rather than broadening the range of matters to be taken into account in assessing injury.

We are cautious about adopting proposal (c) in isolation, without proper consideration of how it would relate to other provisions in the NSW legislation and the impact on claimants.

Proposal 19–5 *State and territory victims' compensation legislation should provide that:*

(a) acts are not 'related' merely because they are committed by the same offender; and

(b) applicants should be given the opportunity to object if multiple claims are treated as 'related', as in s 4(1) of the Victims of Crime Assistance Act 1996 (Vic) and s 70 of the Victims of Crime Assistance Act 2009 (Qld).

WLS NSW supports this proposal.

Proposal 19–6 *State and territory victims' compensation legislation should not require that a victim report a crime to the police, or provide reasonable cooperation with law enforcement authorities, as a condition of such compensation for family violence-related claims.*

WLS NSW supports this proposal.

In the contexts of Indigenous victims of family violence, the impediments to reporting and following through with complaints to the police are significant. The NSW Police Service itself has recognised that these barriers include 'the historical relationship between police and Aboriginal people … distrust of police … poor community relationships … fear of community reprisals … (and) fear of children being removed'.[3]

Regardless of cultural background, victims of family violence should not bear the burden of ensuring the perpetrator is made accountable for crimes.

Proposal 19–7 *State and territory legislation should provide that, when deciding whether it was reasonable for the victim not to report a crime or cooperate with law enforcement authorities, decision makers must consider factors such as the nature of the relationship between the victim and the offender in light of the nature and dynamics of family violence.*

WLS NSW supports this proposal.

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[3] NSW Police Force, *Code of Practice: NSW Police Forces Response to Domestic and Family Violence*, November 2009, p. 39

Proposal 19–8 *State and territory victims' compensation legislation should require decision makers, when considering whether victims contributed to their injuries, to consider the relationship between the victim and the offender in light of the nature and dynamics of family violence. This requirement should also apply to assessments of the reasonableness of victims' failures to take steps to mitigate their injuries, where the legislation includes that as a factor to be considered. Section 30(2A) of the Victim Support and Rehabilitation Act 1996 (NSW), which makes such provision in relation to a failure to mitigate injury, should be referred to as a model.*

WLS NSW supports this proposal, however we recommend that the requirement to 'mitigate' injuries in the context of family violence (and sexual assault) be removed from victims' compensation legislation. The concept of mitigation comes from general tort law and worker's compensation, where the injuries arise in a very different context to family violence and sexual assault.

Additionally, it is often assumed that counselling is a means of mitigating injury and applicants are encouraged to have counselling to show they have tried to mitigate the injury. This type of therapy however is not suitable for everyone and can be detrimental to some victims. Further, victims' compensation schemes are intended to compensate victims of crime, not victims of negligence or for injuries arising at work. We suggest that the typology of mitigation in the context of compensating victims of crime is not appropriate.

Proposal 19–9 *State and territory victims' compensation legislation should not enable claims to be excluded on the basis that the offender might benefit from the claim.*

WLS NSW supports this proposal.

Proposal 19–10 *State and territory victims' compensation legislation should ensure that time limitation clauses do not apply unfairly to victims of family violence. These provisions may take the form of providing that:*

(a) decision makers must consider the fact that the application involves family violence, sexual assault, or child abuse in deciding to extend time, as set out in s 31 of the Victims of Crime Assistance Act 2006 (NT); or

(b) decision makers must consider whether the offender was in a position of power, influence or trust in deciding to extend time, as set out in s 29 of the Victims of Crime Assistance Act 1996 (Vic) and s 54 of the Victims of Crime Assistance Act 2009 (Qld).

WLS NSW supports this proposal. We recommend that there be a presumption in favour of granting extensions of time to file applications in the circumstances outlined in proposals (a) and (b). We note in NSW there is a presumption in favour of granting leave to file an application outside the 2-year time limit where the applicant is a victim of sexual assault or domestic violence.

Proposal 19–11 *State and territory victims' compensation legislation should ensure that victims of family violence are not required to be present at a hearing with an offender in victims' compensation hearings.*

WLS NSW supports this proposal.

Proposal 19–12 *State and territory governments should ensure that data is collected concerning the claims and awards of compensation made to victims of family violence under statutory victims' compensation schemes. The practice of the Victims' Compensation Tribunal in NSW provides an instructive model.*

WLS NSW supports this proposal.

Proposal 19–13 *State and territory governments should provide information about victims' compensation in all courts dealing with family violence matters. The Australian Government should ensure that similar information is available in federal family courts.*

WLS NSW supports this proposal.

Question 19–2 *In practice, are the current provisions for making interim compensation awards working effectively for victims of family violence?*

WLS NSW considers that interim compensation awards are not working effectively for victims of family violence in NSW. Victims Services is requiring clients to provide too much evidence of the act of violence, harm and financial circumstances in interim applications. In some cases the evidence required is largely the same as the evidence required in a final application.

WLS NSW acknowledges that there must be some evidence of the compensable injury as clients should not be put at risk of reimbursing for money received if there is subsequently no final compensation award.

WLS NSW recommends that where an applicant for victims' compensation receives a Centrelink benefit this should be sufficient to show there is financial hardship. Further, interim awards should be available in a broader range of circumstances and not limited to financial hardship in cases where there is family violence.

The current interim award regime in NSW does not assist victims to leave a violent relationship. It is our experience that clients require a solicitor to make interim applications in order to satisfy the evidentiary requirements.

Question 19–3 *Should measures be adopted to ensure that offenders do not have access to victims' compensation awards in cases of family violence? If so, what measures should be introduced?*

WLS NSW does not consider that there is an effective way to prevent offenders from accessing victims' compensation awards in cases of family violence that preserves the dignity and respect of victims. Relationships and circumstances change over time.

We consider it is not the role of the state to monitor the changing nature of personal family relationships. Restrictive measures will be intrusive to victims and are likely to add to their trauma and exacerbate feelings of low self-esteem and lack of trust in them and their capacity to make decisions.

Proposal 19–14 *Australian universities offering law degrees should review their curriculums to ensure that legal issues concerning family violence are appropriately addressed.*

WLS NSW supports this proposal.

Proposal 19–15 *Australian law societies and institutes should review continuing professional development requirements to ensure that legal issues concerning family violence are appropriately addressed.*

WLS NSW supports this proposal.

Proposal 19–16 *The Australian Government and state and territory governments should collaborate in conducting a national audit of family violence training conducted by government and non-governmental agencies, in order to:*

(a) ensure that existing resources are best used;

(b) evaluate whether such training meets best practice principles; and

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

WLS NSW supports this proposal and notes that such a survey has recently been conducted in NSW by the Education Centre Against Violence. It is however crucial that a national initiative such as this leads to the actual delivery of training.

Proposal 19–17 *The Australian Government and state and territory governments should ensure the quality of family violence training by:*

(a) developing minimum standards for assessing the quality of family violence training, and regularly evaluating the quality of such training in relevant government agencies using those standards;

(b) developing best practice guidelines in relation to family violence training, including the content, length, and format of such training;

(c) developing training based on evidence of the needs of those being trained, with the ultimate aim of improving outcomes for victims; and

(d) fostering cross-agency and collaborative training, including cross-agency placements.

WLS supports this proposal. Further, as we have commented in relation to Proposal 19-16, we submit that the proposal be strengthened so that as a consequence high quality training is actually delivered.

20. Specialisation

Proposal 20–1 *Each state and territory police force should ensure that:*

(a) victims have access to a primary contact person within the police, who specialises and is trained in family violence issues;

(b) a police officer is designated as a primary point of contact for government and non-government agencies involved in responding to family violence;

(c) specially trained police have responsibility for supervising, monitoring or assuring the quality of police responses to family violence incidents, and providing advice and guidance to operational police and police prosecutors in this regard; and

(d) there is a central forum or unit responsible for policy and strategy concerning family violence within the police.

WLS NSW supports this proposal. It is important that police understand the dynamics and gendered nature of domestic violence so that their response is appropriate.

Question 20–1 *What issues arise in practice concerning the role and operations of police who specialise in family violence matters?*

The main issues are a lack of understanding of the gendered nature of domestic violence and its nature and dynamics; as well as consistency of response, particularly in general duties police who respond to incidents. The police in specialist roles need to have continuing training and monitoring to ensure consistency of response and need to be properly resourced. Many Domestic Violence Liaison Officers in NSW Police are part time or on light duties and the position is not seen as a 'career path' position and its importance not always recognised.

Question 20–2 *What are the benefits of specialised family violence prosecutors, and the disadvantages or challenges associated with them, if any? Could the benefits of specialised prosecutors be achieved in other ways, such as by training or guidelines on family violence?*

There are benefits to specialised family violence prosecutors having experience in prosecuting these matters, whether criminal charges or protection order matters. A specialist should have the background understanding of the dynamics of domestic violence, an understanding of the patterns of abuse and the issues of control and power. This would enable more effective prosecution and appropriate dealings with the victim. The main challenge is in the resource allocation and workloads of prosecutors. It appears in NSW that prosecutors have little opportunity to prepare for hearings in the Local Court and to spend time with the victim or other witnesses prior to the trial. Training and guidelines on family violence are very important to ensure matters are properly prosecuted, however are unlikely to be an adequate total response.

Proposal 20–2 *State and territory governments should ensure that specialised family violence courts determine matters relating to protection orders and criminal proceedings related to family violence. State and territory governments should review whether specialised family violence courts should also be responsible for handling related claims:*

(a) for civil and statutory compensation; and

(b) in child support and family law matters, to the extent such jurisdiction is conferred in the state or territory.

WLS NSW feels that this proposal would need careful consideration as different functions are being carried out, for example, criminal jurisdiction, civil jurisdiction for compensation and federal family law jurisdiction.

Proposal 20–3 *State and territory governments should establish mechanisms for referral of cases involving family violence to specialised family violence courts. There should be principled criteria for determining which cases could be referred to such courts. For example, these criteria could include:*

(a) where there are concurrent family-related claims or actions in relation to the same family issues;

(b) where there have been multiple family-related legal actions in relation to the same family in the past;

(c) where, for exceptional reasons, a judicial officer considers it necessary.

WLS NSW support the establishment of mechanisms for referral but notes that further consideration needs to be given as to how the courts would be run and the circumstances in which referrals would be made.

Proposal 20–4 *State and territory governments should establish or further develop specialised family violence courts in their jurisdictions, in close consultation with relevant stakeholders. These courts should have, as a minimum:*

(a) especially selected judicial officers;

(b) specialised and ongoing training on family violence issues for judicial officers, prosecutors, registrars, and police;

(c) victim support workers;

(d) arrangements for victim safety; and

(e) mechanisms for collaboration with other courts, agencies and non-government organisations.

WLS NSW supports this proposal.

Proposal 20–5 *State and territory governments should review whether, and to what extent, the following features have been adopted in the courts in their jurisdiction dealing with family violence, with a view to adopting them:*

(a) identifying, and listing on the same day, protection order matters and criminal proceedings related to family violence, as well as related family law act and child protection matters;

(b) providing victim and defendant support, including legal advice, on family violence list days;

(c) assigning selected and trained judicial officers to work on cases related to family violence;

(d) adopting practice directions for family violence cases;

(e) ensuring that facilities and practices secure victim safety at court; and

(f) establishing a forum for feedback from, and discussion with, other agencies and non-government organisations.

WLS NSW supports this proposal.

Proposal 20–6 *State and territory governments should establish centres providing a range of family violence services for victims, which would have the following functions:*

(a) recording victim statements and complaints;

(b) facilitating access to victim support workers for referrals to other services;

(c) filing all claims relating to family violence from victims on behalf of the victim in relevant courts; and

(d) acting as a central point of contact for victims for basic information about pending court proceedings relating to family violence.

WLS NSW supports this proposal but feels it would need careful consideration as to the functions of the centre and the qualifications of workers, for example, the recording of victim statements and complaints may require careful training, if not legal training, depending upon the use of statements. Statements are vital documents in the criminal, family law and victims compensation processes and need to be properly prepared.

Proposal 20–7 *The Australian Government should assist state and territory governments in the establishment, development and maintenance of specialist family violence courts by, for example, facilitating the transfer of specialised knowledge and expertise in dealing with family violence and sexual assault across federal and state and territory jurisdictions; and establishing and maintaining national networks of judicial officers and staff specialising in family violence or family law.*

WLS NSW supports this proposal.

Proposal 20–8 *The Australian Government should create positions for Family Law Courts liaison officers. These officers should have the following functions:*

(a) facilitating information sharing between federal family law courts and state and territory courts;

(b) developing and promoting best practice in relation to information sharing between the federal family law courts and state and territory courts; and

(c) representing the federal family law courts in relevant forums for collaboration with agencies, courts and non-government organisations.

WLS NSW supports this proposal subject to further discussion as to what information is proposed to be shared. Court records of orders are appropriate to share but unverified information and allegations need to be treated differently and not automatically shared.