National Legal Aid

NATIONAL LEGAL AID RESPONSE

FAMILY VIOLENCE: IMPROVING LEGAL FRAMEWORKS

ALRC/ NSWLRC

CONSULTATION PAPER

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PART A - INTRODUCTION

National Legal Aid (NLA) represents the Directors of each of the eight state and territory Legal Aid Commissions. The Legal Aid Commissions ("Commissions") are independent statutory authorities established under respective state or territory enabling legislation. The Commissions are funded by federal and state or territory Governments to provide legal assistance to disadvantaged people, including in the areas of family law, child protection, family violence and criminal law. Taken together the Commissions constitute the largest legal practice for the areas they cover in the country.

NLA welcomes the opportunity to provide feedback in respect of the comprehensive ALRC and NSWLRC Consultation Paper *Family Violence: Improving Legal Frameworks.* The time frame for a response to the Consultation Paper has affected our capacity to answer all questions as fully as we would have liked. We would welcome the opportunity nationally, and/or in each state and territory, to elaborate and to provide any further information which it was thought could usefully assist the Law Reform Commissions in preparing their Report.

The management of family violence issues within the legal frameworks of family law, child protection, family violence and crime, to ensure the safety of vulnerable victims and children and the protection of the rights of individuals charged with criminal offences, is a particularly complex task. Hester[1] describes the systems associated with family violence, child protection and child contact (family law) as separate planets with different cultures.

In the family violence jurisdiction the focus is on the adults and ensuring the safety of victims from the alleged/perpetrators of violence. Usually the alleged/victim is female and the alleged/perpetrator is male. In the child protection jurisdiction the emphasis is on the safety of children and the

[1] Hester, M Prof. "*The Planet Metaphor: A Challenge for Professional Practice, Research and Policy Makers*" University of Bristol (2009)

responsibility of parents, and often the mother in particular, to exclude the alleged/perpetrator from the family home to ensure that safety. In the family law jurisdiction the focus is on maintaining relationships between children and their parents with contact being a priority even in circumstances where there has been a history of family violence.

The responses from our different practice areas to some of the proposals and questions in the Consultation paper reflect these planetary differences, or diversity of perspectives, which have also been influenced by local experience, in relation to law reform within Legal Aid Commissions.

The NLA response supports the view of Professor Chisholm in his report on the management of family violence in the federal family courts[2] that family violence needs to be **disclosed** (identified), **understood** and **acted upon** by the professionals interacting with these families.

Legislative reform, although necessary in some areas, will not, by itself bring about an alignment of the family violence, child protection and family law "planets". NLA considers that there is a need for integrated service delivery which requires:

- improved systems for information sharing,
- collaborative professional approaches and
- coordinated case management

in order to ensure the safety of affected family members, and to facilitate the rehabilitation of the perpetrators of violence.

Appropriate levels of resourcing will be required to support this approach.

Integrated service delivery requires a holistic response to client needs and a supportive culture in each of the organisations involved. The supportive culture must be based on mutual respect and trust, and the development of a

[2] Chisholm, R *Family Courts Violence Review: A Report by Professor Richard Chisholm (27 Nov 2009).*

perception of shared responsibility for the safety of vulnerable families and children as the overriding concern.

The response that is required to ensure the safety of victims should be a systems response, rather than the responsibility of the victim.

Initiatives including joint or cross agency training involving professionals from relevant agencies will facilitate the cultural shift required to promote collaborative and coordinated working arrangements.

There is a need for courts and service providers to:

(i) articulate a shared vision to provide safety for the victims of family violence;
(ii) commit to sharing information and resources as far as is practicable and permissible pursuant to provisions of their legislation in individual cases;
(iii) commit to ensuring that education and training are provided to judicial officers and service providers to facilitate the development of a common language for communication in relation to family violence issues. This will help to ensure the workability of the arrangements;
(iv) commit to address any case management issues that are identified in a co-operative manner;
(v) maximise the ability of the courts to make timely, informed decisions in respect of family violence related issues;
(vi) use resources efficiently.

In NLA's view, the potential to bring the management of protection orders made in the context of family law and child protection matters into the Family Court of Western Australia should be explored, with family violence offences including sexual assault to be dealt with separately in the criminal courts, rather than establishing a specialist family violence court to deal with all of these issues.

The above perspectives of an increased need for a systems response (rather than one which relies on the victim having to take control of proceedings), of co-operation, collaboration and information sharing across providers, and of the

need for increased education and training to those involved in the system will be apparent as reoccurring themes in our responses to the proposals and questions in the Consultation Paper.

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.

NLA supports Proposal 4-1 (b).

It will be important that shared recognition of the types of physical and non-physical violence that constitute family violence does not restrict the broad definitions currently in place in some jurisdictions. There may be some need to monitor whether this approach produces consistent outcomes.

The definition that is used across the state and territory jurisdictions should be:

(a) consistent;
(b) reflect contemporary understandings of family and domestic violence;
(c) include all behaviours that evidence-based research have found to be damaging.

Consistency

Consistency in judicial decision-making and court orders is vital.

Consistency is a critical pre-condition for a coordinated response to family violence. It is important for ensuring consistent messages to both victims and

abusers, and enabling an effective and well co-ordinated response to family violence. Research indicates that a consistent legal/judicial response is a key feature of making abusers accountable and of changing behaviour. [3]

Reflect contemporary understandings of family and domestic violence

Laws reflect shared community values and understandings and societal norms of acceptable behaviour. Ensuring that definitions of family and domestic violence reflect contemporary understandings (eg to include the multi-faceted nature of family violence, including emotional and psychological abuse) advances community understanding of this issue. The legal/justice system should embody language, discourse and definitions appropriate to contemporary understandings and current research.

Laws impact profoundly on the experience of those living in circumstances of family violence. Having definitions consistent with current understandings and research validates and supports the reality of the experience of victims of family violence. Conversely, unduly narrow or out-dated/out-moded definitions deny and mute the experience of victims of family violence, leaving them without an appropriate acknowledgement of what has occurred.

Include all behaviours that are damaging

Research over the past 10 years has dramatically changed our understanding of what are damaging behaviours in the context of family violence. We now know that children, even pre-verbal children, are affected by exposure to family violence and that the consequences can include neurological and developmental impacts. Given one of the primary aims of family law and family violence legislation is protection from/prevention of harm, then it is essential that the definition of family violence include all those behaviours which research shows are damaging.

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[3] *"Batterer Intervention Systems: Issues, Outcomes, and Recommendations",* Gondolf E, Sage Publications, 2002

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?

NLA supports the inclusion of "any other form of behaviour that coerces, controls or dominates a family member or causes that family member to be fearful" in the definition of family violence in family violence legislation.

Such a description better fits contemporary theories of family violence which cannot be adequately conceptualised on an incident-based model but must be understood as part of a pattern of behaviour within a 'control–based' model:

> "…*a control-based theoretical analysis of domestic violence is preferable because it has the capacity to recognise a number of features of domestic violence such as that: domestic violence includes a range of behaviours and coercive tactics not all of which are immediately discernible to others; it is often repetitive, meaningful and strategic, reflecting deeply held attitudes and beliefs rather than an isolated incident; and there are social and cultural dimensions that give meaning to the violence, that may authorise and sustain gender-based violence and may constrain women's options in dealing with violence*."[4]

Such provisions could require increased resources to enable social science professionals with expertise in family violence to give evidence in court to support allegations in respect of the effects of the relevant behaviour.

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'.

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[4] Stubbs J, '*Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice*', in 'Restorative Justice and Family Violence', 2002, Cambridge University Press, edited by Strang H and Braithwaite J at pp.43-44

Legal Aid NSW considers that a single definition for domestic violence should be included in the Act. There are currently numerous definitions of domestic or family violence in various pieces of legislation in NSW but no comprehensive definition in the core legislative framework for domestic violence, the *Crimes (Domestic and Personal Violence) Act 2007 (NSW).*

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.

NLA supports this proposal. It is understood from available research that sexual assault is a common occurrence in family violence but is greatly under-reported. Express recognition may both encourage community understanding and support and encourage increased reporting of sexual assault in family violence situations.

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.

NLA supports this proposal.

It can be expected that it will be difficult to successfully prosecute such matters because of the possible alternative explanations for controlling financial behaviour. The alleged perpetrator might, for example, argue that they are simply frugal and have different spending habits and attitudes towards saving and lifestyle.

From the Tasmanian experience, a point which has been raised and remains unresolved by Supreme Court decision is the extent to which it is *reasonable* to control a family member in certain ways, such as circumstances where one party takes control of the finances because the other party is a problem gambler or suffers from a mental illness or disability.

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.

Examples can be useful to ensure that certain types of behaviours or situations are correctly interpreted as constituting family or domestic violence. It is possible that examples could also assist in achieving more consistent responses from the justice system in responding to family violence.

It must be clearly stated that the examples are not exhaustive and merely describe some of the types of abuse that constitute family violence.

The inclusion of examples in legislation should not be a substitute for appropriate education/training about family violence for judicial officers, police, prosecutors, lawyers, and support services.

Members of the vulnerable groups referred to in this proposal should be consulted in relation to the appropriateness of the examples selected and the cultural implications of their inclusion in the legislation.

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?

Tasmanian family violence legislation does not list examples of types of conduct, but the Legal Aid Commission of Tasmania considers the potential to treat examples as exhaustive rather than illustrative to be concerning. From experience in Tasmania, many matters do not reach court where police have the power to impose Police Family Violence Orders, nor do the majority of matters where police attend an incident and decide not to take action. It is therefore essential that police as well as all other service providers receive adequate and ongoing family violence education/training to ensure that the legislation is appropriately applied and the examples used are not treated as exhaustive. Adequate records should be kept in respect of the decisions that are made in relation to the making of Police Orders and there should be a process for monitoring those decisions as part of professional development.

Anecdotally, in Tasmania, there is adequate recording of decisions to impose an order or lay charges, but in matters where police decide not to take action there may be no record of the incident on management systems. This can have implications including where other agencies such as child welfare authorities rely on information that is shared by police.

From the Tasmanian experience it is also suggested that higher courts (which do not deal with family violence on a daily basis) and defence lawyers have a tendency to 'read down' both the legislation and the necessity for protective provisions, and that this is symptomatic of general unresponsiveness at that level to family 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.

It is considered that the application of the Intervention Orders (Prevention of Abuse) Act 2009 SA is not likely to make it difficult for victims of sexual assault to obtain intervention orders.

Section 8(1) defines abuse to include physical, sexual, emotional, psychological or economic abuse. Section 8(2) states an act is an act of abuse if it results in or is intended to result in amongst other things:
(a) physical injury or
(b) emotional or psychological harm.

Sexual assault is likely to result in both or either of physical injury and emotional or psychological harm. Section 8 (4) provides examples of acts of abuse against a person resulting in emotional or psychological harm, and section 8(4)(a) specifies sexually assaulting the person or engaging in behaviour designed to coerce the person to engage in sexual activity.

Proposal 4–7 The *Domestic Violence and Protection Orders Act 2008* (Qld) and *Domestic and Family Violence Act 2007* (NT) should be amended expressly to recognise kidnapping or deprivation of liberty as a form of family violence.

"Kidnapping" as defined in s 354 of the Queensland *Criminal Code* involves unlawfully and forcibly taking a person, with certain specified intent. Deprivation of liberty involves the unlawful confinement or detention of a person against their will, absent any specific accompanying intent. The present definition of "domestic violence" at s 11 of the Queensland *Domestic Violence and Protection Orders Act 2008* would encompass this type of behaviour by way of s 11(1)(c) "intimidation or harassment of the other person".

Kidnapping or deprivation of liberty would be considered to be family violence pursuant to ss 5 and 6 of the *Family Violence Act 2007* (NT), however, the proposed amendment would provide clarification and would be supported.

Proposal 4–8 The *Family Violence Act 1994* (Tas) should be amended to recognise damage to property and threats to commit such damage as a form of family violence.

NLA supports this proposal.

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.

NLA supports this proposal.

Animal abuse is closely linked to domestic violence and a signal of escalation in the violent behaviour of perpetrators. The inclusion of animal injury and harm in The *Crimes (Domestic and Personal Violence) Act 2007 (NSW),* would encourage discourse on this issue and highlight the trend of women and children staying in abusive relationships for fear of violence towards their animals.

If harm or injury to an animal is included in the definition of family violence, women may be more likely to seek assistance and protection through the Magistrates Courts and remove themselves, their children and their animals from the harmful situation.

Increased dialogue on this issue and the inclusion of harm to animals within the definition could assist in an increase in services directed at assisting women to house their animals when they are in a family violence situation. In turn, women may be more likely to leave the violent situation if there were support services and funding available to them to assist with the accommodation of their animals.

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.

The exposure of children to family violence is a separate category of family violence and warrants inclusion in the definition. Hester (2009)[5] identified that children were present in 55% of the incidents of family violence considered in her research.

Research has also established that children who experience and are exposed to domestic violence are more likely to be the victims of other forms of abuse and that men's violence to female partners is the *most common context* for child abuse and that male family violence perpetrators are more likely to be abusive to children and the more severe the violence to a female partner, the more severe the abuse of children in the same context.[6]

The definition needs to clearly capture what 'exposure of children to family violence' means in practical terms, recognising that although the children may not have witnessed a violent act take place, they are still adversely affected by remaining in a family violence situation.

Exposure of children is not included in the definition of family violence in the *Restraining Orders Act 1997* (WA), but is expressly identified as a separate ground for a restraining order pursuant to s 11B.

In Tasmania the exposure of children to family violence is aggravating in terms of sentencing for family violence offences. There is also a special category of assault for those who knowingly assault a woman who is pregnant. The fact that a child is aware of the incident (although there is a tendency to limit the understanding of that to saw-or-heard, rather than recognising that the impact is

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[5] Hester,M (2009) "*Who does what to whom/Gender and domestic violence perpetrators"*. Bristol:University of Bristol and Northern Rock Foundation.

[6] Hester, M Prof. "*The Planet Metaphor: A Challenge for Professional Practice, Research and Policy Makers*" University of Bristol (2009)

felt in wider circumstances) may logically affect whether a child is included on a protection order. It is also recognised in the *Children, Young Persons and their Families Act* 1997 (Tas.) as a form of child abuse.

Any offence should recognise that a person could not have a restraining order against them or commit a family violence offence by exposing a child to family violence by reason of being the victim of family violence.

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.

Policy reasons should be expressed broadly to ensure that they cannot be used to assert that a specific act of violence is **not** in fact a family violence offence.

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.

NLA supports the amendment s 44 of the *Crimes Act 1900* (NSW) to ensure it is appropriately expressed for modern society and is gender neutral.

Proposal 4–13 The definitions of family violence in a state or territory's family violence legislation and criminal legislation—in the context of defences to homicide—should align, irrespective of whether the criminal legislation limits the

availability of defences to homicide in a family violence context to cases involving 'serious' family violence.

NLA supports this proposal. Please see the response to Proposal 4-1 and Question 4-1.

Proposal 4–14 The definition of 'family violence' in s 9AH of the *Crimes Act 1958* (Vic)—which largely replicates the definition in s 3 of the *Domestic Violence Act 1995* (NZ)—should be replaced with the definition of 'family violence' in s 5 of the *Family Violence Protection Act 2008* (Vic). Alternatively, the definition of family violence in s 9AH of the *Crimes Act 1958* (Vic) should be amended to include economic abuse.

NLA supports this proposal. Please see the response to Proposal 4-1 and Question 4-1.

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?

None raised with NLA.

Proposal 4–15 State and territory governments should review their family violence and criminal legislation to ensure that the interaction of terminology or definitions of certain conduct constituting family violence would not prevent a person obtaining a protection order in circumstances where a criminal prosecution could be pursued. In particular,

(a) the definition of stalking in *Domestic and Family Violence Act* (NT) s 7 should be amended to include all stalking behaviour referred to in the *Criminal Code Act* (NT) s 189; and

(b) the Queensland government should review the inclusion of the concepts of 'wilful injury' and 'indecent behaviour without consent' in the definition of 'domestic violence' in s 11 of the *Domestic and Family Violence Protection*

Act 1989 (Qld), in light of how these concepts might interact with the *Criminal Code* (Qld).

The definition of stalking in s 7 of the *Domestic and Family Violence Act* (NT) does cover all stalking behaviour referred to in s 189 of the *Criminal Code Act* (NT), but through the operation of a number of different sections of the Act. Amendment is not essential, but might be of benefit to achieve consistency between these Acts. The main challenge of stalking legislation is the provision of the evidence necessary to establish the elements.

The Legal Aid Commission of Tasmania suggests that this proposal does not necessarily address situations where the offender tries to involve the victim in activities such as lying for him (for example to provide an alibi). Anecdotally, it is not uncommon for an offender to involve the victim in his offending and then to use her 'complicity' to intimidate and prevent her from receiving support from 'official' organisations. The court would be unlikely to make a protection order when convicting the offender, but the victim could use evidence of the pressure applied by the offender to support the making of a family violence order. It is understood that this is because the criminal court is concerned with the evidence related to the elements of the particular offence. Courts should be alert to these sorts of circumstances wherever an opportunity to make a family violence order arises. Courts should also be alert to such situations in the event that the victim is prosecuted.

Proposal 4–16 The South Australian Government should review whether the interaction of the definition of 'emotional or psychological harm' in the definition of 'abuse' in s 8 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA), and 'mental harm' in s 21 of the *Criminal Law Consolidation Act 1935* (SA) is likely to confuse victims and their legal representatives involved in both civil family violence and criminal proceedings. In particular, the review should consider whether it would be desirable for:

(a) the *Intervention Orders (Prevention of Abuse) Act* to distinguish between emotional and psychological harm;

(b) the *Criminal Law Consolidation Act 1935* to define 'psychological harm'; and

(c) both above mentioned Acts to adopt a commonly shared understanding of the meaning of 'psychological harm'.

The Legal Services Commission South Australia does not consider that the definition of 'abuse' in s 8 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA), and 'mental harm' in s.21 of the Criminal Law Consolidation Act 1935 (SA) is likely to confuse victims and their legal representatives.

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

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

(b) on the disclosure of evidence or information about family violence?

It is suggested that the main concern is the difference between the State's protective response (limit contact with perpetrator to avoid incidents of violence) and the family courts approach (children spending time with the non residence parent is usually a priority even in circumstances of family violence).

Research indicates that there is a close relationship between the safety of mothers and the welfare and safety of their children, that contact in circumstances of family violence may not necessarily be in the best interests of children and that the quality of contact is particularly important where the welfare of children is concerned.[7]

Different definitions and court responses send mixed, and sometimes contradictory, messages to both victims and abusers, do not support or validate

[7] Radford,l &Hester,M (2006) *Mothering through Domestic Violence*. London:Jesicaa Kingsley.

victims and cause confusion rather than educating the community and promoting a shared understanding of family violence.

The Legal Aid Commission of Tasmania notes that Family Violence Orders made by police (the most frequently obtained orders) are not specifically recognised by the Family Court under its legislation, as they are not orders made by a court. However, in practice, Police Family Violence Orders are generally included in documentation filed in the Family Court, and the *conduct* alleged to have led to those orders is taken into account.

In relation to paragraph (b) practitioners generally do particularise all behaviours which cause apprehension or fear, or which appear to constitute harassment in federal family court proceedings.

It is noted that requirements in respect of disclosure of evidence or information about family violence in a Form 4 and supporting affidavit do not generally reflect the victim's emotional response to violence. NLA notes Recommendation 2.3 of the Report "Family Courts Violence Review"[8] by Professor Richard Chisholm that the "Government consider amending s.60K so that it provides that in each parenting case the court must conduct a risk identification and assessment rather than providing for the filing of a document that will require the courts to take particular action".

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*?

It is considered that the broad discretion and the approach taken in the Family Court of Australia's Family Violence Strategy are of assistance. A common recognition of family violence as referred to in Proposal 4 could however

[8] Chisholm, R *Family Courts Violence Review: A Report by Professor Richard Chisholm (27*

(a) facilitate further disclosure and identification of family violence issues,

(b) further develop the understanding of the dynamics of family violence on the part of parents, lawyers, family consultants, court staff and the judiciary;

(c) support an approach that recognises the implications of family violence for "live with" and "spend time with" arrangements.

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.

NLA supports this proposal.

The Legal Aid Commission of Tasmania notes that the *Family Violence Protection Act 2008 (Vic)* appears to be much wider than the Tasmanian legislation in one respect in that the Tasmanian legislation applies only to spouses or *de facto* partners. The Victorian legislation also covers extended family such as grandparents, aunts, uncles and children. The Tasmanian legislation was designed to focus on family violence issues arising between former intimate partners as it was considered that the dynamics of, for example, elder abuse, might be quite different.

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.

NLA supports consistent definitions of family violence in legislation. We refer to our responses above. If Proposal 4-17 is implemented, then this proposal is also supported.

Question 4–6 How is the application of the definition of 'relevant family violence' in the *Migration Regulations 1994* (Cth) working in practice? Are there any difficulties or issues arising from its application?

Victims on spouse visas are particularly vulnerable to coercion and control. This vulnerability is contributed to by factors such as isolation, language barriers, unfamiliarity with local laws and processes, and lack of family support or friends. Challenges include enabling increased knowledge about laws and support services which might facilitate leaving a family violence relationship.

The *Migration Regulations 1994* (Cth) establish a procedure for non-judicially determined claims of family violence which involves referral to an "independent expert" if the decision maker is not satisfied that an applicant has suffered relevant family violence. The independent expert's opinion about whether the applicant has suffered relevant family violence, if lawfully made, is then binding on the decision maker. In Legal Aid NSW experience, there have been some cases in which independent experts have formed an opinion based on their own notion of what constitutes family violence rather than applying the definition of 'relevant family violence' set out in the Regulations.

There is very limited transparency and accountability in relation to decisions of independent experts, despite the fact that they are accorded considerable power in the decision making process. Applicants are not generally provided with the expert's full reasons for decision unless a specific request for access is made. In Legal Aid NSW experience, decision makers have tended to give little or no consideration to the issue of whether the expert's opinion was properly formed in accordance with the definition of 'relevant family violence'.

Although in some cases it may be possible to seek judicial review of decisions on the basis that the independent expert's opinion was not given in accordance with the Regulations, many applicants (and particularly unrepresented applicants) are likely to be unaware of this.

NLA recommends:

- that applicants be provided with the independent expert's full reasons for decision (not just an extract of those reasons) at primary and merits review stages;
- that the Migration Regulations 1994 (Cth) be amended to remove the provision which requires a decision maker to take an independent expert's opinion as correct; and
- that further training be provided to independent experts on the application of the definition of 'relevant family violence'.

Case Study

Legal Aid NSW acted for an applicant in Federal Magistrates Court proceedings seeking review of the decision of the Migration Review Tribunal ('the Tribunal') that the applicant had not suffered relevant family violence. The applicant had been unrepresented in the Tribunal proceedings. The Tribunal had referred the matter to an independent expert who concluded that the applicant had not suffered relevant family violence. The Tribunal decided that it was bound to accept the independent expert's opinion as correct, and therefore found that the applicant had not suffered relevant family violence.

Legal Aid NSW assisted the applicant to make a request pursuant to the *Freedom of Information Act 1982* (Cth) for access to the independent expert's full reasons for decision. These revealed that the expert's opinion had been formed on the basis that there was no evidence that the alleged perpetrator had intended to intimidate or cause ongoing fear or trepidation; that there was no "cycle of violence", and that the applicant did not hold ongoing fears at the time of the assessment (which occurred a long time after the parties had separated). This indicated that the independent expert had taken irrelevant matters into account and/or misunderstood or misconstrued the relevant legal standard.

The judicial review proceedings settled in the applicant's favour prior to hearing. It was conceded that the Tribunal had erred by taking the independent expert's opinion as correct in circumstances where the expert's opinion was not given in accordance with the Regulations. Consent orders were made remitting the matter to the Tribunal for redetermination according to law.

The Legal Services Commission of South Australia has encountered difficulties with DIAC's requirement to make an assessment about the bona fides of the relationship. DIAC currently seems to place an extraordinary burden on the victim to establish not only that family violence has occurred ***but also*** that the victim was in a genuine relationship with the perpetrator. It is suggested that if those involved have been granted a temporary visa on the basis of their relationship this should be taken as evidence that it is genuine unless there is considerable ***independent*** evidence (i.e. from someone other than the sponsoring partner, their family or friends) to the contrary.

Case Study

A recent family violence client in South Australia was assessed by a Centrelink social worker as 'not at risk' if she was to return to her husband because there had been 'no physical abuse'. There had been serious sexual abuse. The victim had explained that the husband didn't need to hit her because the sexual abuse and his other abuse left her in no doubt as to what she could expect from him if she did not comply. She had also indicated that she was aware that he had behaved in the same way with his previous wife.

It is the experience of the Legal Aid Commission of Tasmania that, where family violence has been disclosed to DIAC, these women *have* been able to remain in Australia. This outcome has, however, occurred after a period of uncertainty for the clients. The threat of deportation has been used by the offenders against the victims in these matters.

In Western Australia it is considered that the challenges for this client group are generally less legal and more practical, and of the kind referred to in the introduction to the response to this question.

Proposal 4–19 The Tasmanian Government should review the operation of the *Family Violence Act 2004* (Tas) and the *Justices Act 1959* (Tas) pt XA to establish equality of treatment of family members who are victims of family violence.

The Legal Aid Commission of Tasmania is concerned that including other relationships in the family violence response (*or a child protection response*) without a better understanding of the dynamics of those situations and whether they are the same as or different from inter-spousal violence, and without the resources and services to address those questions may be counter-productive.

It may be that the family violence (or inter-spousal violence) context is not the 'plug' for gaps in responses to these other forms of violence, even if it appears there is a considerable overlap (for example, the high rate of co-occurrence of inter-spousal violence and child abuse).

There may also be a different range of services and organisations involved with some groups, such as the elderly. A concern is that the appropriateness of having complementary but differently nuanced responses has not been much explored.

There is also a concern that including those other relationships in the family violence response may 'dilute' the message about inter-spousal violence.

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.

In South Australia this approach has been taken in s 8 of *Intervention Orders (Prevention of Abuse) Act 2009* (SA).

The definition of "family and domestic relationship" under s 4 of the *Restraining Orders Act 1997* (WA), includes persons who are related "taking into consideration the cultural, social or religious backgrounds of the two persons". It is understood that this was intended to cover all persons who fell within Indigenous concepts of family.

In Tasmania it is anticipated that the inclusion of wider family dynamics in the *Family Violence Act 2004* (Tas) would require greater understanding of those dynamics and whether they are the same as or different from the dynamics of inter-spousal violence. If they are different, then that has flow-on effects for the identification and development of effective interventions and responses. There would be financial and other resource implications associated with including other family relationships in intensive management systems.

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

Please refer to the response above.

In South Australia these relationships have been recognised in s 8 of *Intervention Orders (Prevention of Abuse) Act 2009* (SA).

In Western Australia, although not explicitly identified, carer relationships may be covered by the definition of "family and domestic relationship" under the *Restraining Orders Act 1997* (WA), under the provision "other personal relationship".

The NSW *Crimes (Domestic and Personal Violence) Act 2007* would cover such relationships.

Some protection order matters dealt with in children's courts are not the typical power imbalance situations that it is understood that family violence legislation is trying to address. It may involve conflict between siblings, between children and their parents or between young people and their carers. The making of protection orders in such situations is not always the most effective way to deal with conflict involving young people. Breaching such orders can lead to conviction and the possibility of incarceration. The making of an order and/or

the breaching of an order can have consequences for a young person that will stay with them throughout their life.

The use of protection orders for carers can work to the disadvantage of young and vulnerable people if the effect of the order is to exclude them from the residence as a result. A joint agency working party in NSW (AVLICC) has recommended that these types of relationships be excluded from the definition of "domestic relationship".

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

If the legislative provisions themselves are sufficiently clear then it is suggested that there is no need for guiding principles to be included in the legislation, particularly given that the legislation will have specified its objects. The inclusion of guiding principles in legislation cannot be a substitute for the provision of education/training to police, prosecutors, legal practitioners, care and protection workers, judicial officers, and others working in the family violence, family law and child protection systems.

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. 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.

NLA suggests that the nature, features and dynamics of family violence are matters to be addressed in providing comprehensive education, rather than for inclusion in legislation.

If family violence legislation must refer to the particular impact of family violence on certain groups then it is suggested that consultation should take place in drafting this provision to ensure it is appropriate for the relevant groups. Issues could arise if groups are unintentionally omitted.

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.

Please refer response above.

Proposal 4–24 The *Restraining Orders Act 1997* (WA) should be amended to include an objects clause.

Legal Aid WA agrees that the *Restraining Orders Act 1997* (WA) should be amended to include an objects clause.

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.

NLA supports this proposal.

The core purposes of protection and accountability must also operate in the context of the fundamental right of a defendant to a fair trial.

Proposal 4–26

(a) The objects clause in the *Domestic and Family Violence Protection Act 1989* (Qld) should be amended to specify core purposes, other than the existing main purpose of providing for the safety and protection of persons in particular relationships; and

(b) the objects clause in the *Family Violence Act 2004* (Tas) should be amended to specify more clearly the core purposes of the Act.

NLA 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?

NLA suggests that the inclusion of a purpose like "ensuring minimal disruption to the lives of those affected" would be useful in countering orders which are inappropriate to the victim's situation, for example, where the victim needs to remain in a relationship with the defendant for economic reasons but police and child protection authorities insist on separation. However, the core purpose should clearly relate to the victim and not the defendant, whose behaviour has resulted in the need to intervene.

The concept of "minimal disruption" also needs to be considered in the context of the interplay with child protection legislation, where child protection agencies are of the view that staying in the family home is harming a child's welfare and development.

Other core purposes might be to minimise retraumatisation and retelling by victims of family violence, and to encourage and support the independence of the victim.

If the proposals relating to each of core purposes, examples of family violence, guiding principles, international conventions and details of the dynamics of family violence, are to be implemented then care will need to be taken that they do not have the effect of making the legislative provisions and their interpretation too complex to the detriment of victims of family violence.

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

NLA supports a consistent approach.

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.

The history of family and domestic violence does need to be the subject of consideration at all times as the best predictor of future conduct is past conduct and courts generally take this into account in their determinations.

There may be circumstances in which it appears reasonable to fear future family violence without family violence (particularly under the more narrow definitions) towards that person having occurred. An example is where the offender has murdered a previous wife, has married whilst in jail, has shown some concerning behaviour towards the new wife, is about to be released, and the new partner is thinking of leaving the relationship.

The Legal Aid Commission of Tasmania has expressed concern that if victims are required in *fact* to fear family violence, it could prevent police from obtaining family violence orders in circumstances where the victim insists she wishes to

continue the relationship with no order in place and is not fearful of the offender despite what is objectively very good reason to expect further violent or abusive conduct, and the presence of children in the household who may be exposed if there is further violent conduct. This could also have implications for the involvement of child protection authorities in ensuring the safety of affected children.

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.

Tests differ between States and Territories. Commissions are supportive of respective tests. It may be there is no issue in practice.

There is some concern that a definition not require victims to in fact fear family violence. Please see response to proposal 4-28.

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?

The vast majority of criminal proceedings that may overlap with family violence matters involve the bringing of charges for State offences and not Federal offences.

Question 5–2 Are you aware of any cases where an offence against federal criminal law has formed the basis for obtaining a protection order under state or territory family violence legislation?

Telecommunications offences are contained in Commonwealth legislation. Phone calls, voice messages and text messages are very frequently the basis or part of the basis for a protection order. Evidence of text messages from a perpetrator kept by the victim demonstrating abusive conduct has been of great assistance to victims bringing applications for Orders. There are some issues in relation to the lack of availability of software that allows the messages from a telephone to be copied to a document on a computer and then printed. This is not generally available and would greatly facilitate the provision of relevant evidence.

Facebook is also a common source of evidence either of denigration or abuse, or of a party's attitudes, more usually relevant to Family Law proceedings, but sometimes relevant for the purposes of protection orders.

Commonwealth provisions in relation to using carriage services to make threats, menace, harass or cause offence are not prosecuted as frequently as they occur. However, such messages and phone calls do generally fall within the definition of family violence in family violence legislation.

Anecdotally, it is common for victims of family violence to disclose that they have been encouraged by the perpetrator to defraud Centrelink, and that, having done so, the perpetrator subsequently uses the fact of the offence to control them. In other cases, the financial abuse that is suffered by the victim causes them to commit offences of this kind to obtain money to feed the family.

Another challenging situation arises in respect of the application of State protection laws and the use of police powers when offences are committed or partly committed on Commonwealth ground, which has arisen in the context of the Defence Forces.

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.

NLA agrees that state and territory family violence legislation should include as the basis for obtaining a protection order, conduct which would be capable of constituting a federal offence.

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.

NLA suggests that limited resources would be best directed elsewhere.

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.

See response to Proposal 5-1 and 5-2.

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?

Education and training in all aspects of the dynamics of family violence and family violence offences, is necessary to ensure lawyers act appropriately for their clients.

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?

The NSW experience is that in NSW local courts protection orders and criminal charges are often treated as co-existing avenues of redress.

In WA feedback from clients, family violence lawyers, refuge workers and other family violence workers suggests that in some cases police advise a client to

obtain a protection order rather than investigate and prosecute for criminal offences. Such cases are difficult to map. Review of the statistics in respect of the number of charges laid in comparison to the number of domestic violence incident reports filed may assist quality assurance in respect of the police family violence response.

Police in Tasmania are encouraged by *Safe-at-Home* to bring both criminal and protection order proceedings where that is possible. In the context of criminal proceedings “possible” means that there is sufficient evidence to succeed to the requisite standard of proof. It appears that this practice is embedded in police policy and there are appropriate reviews to ensure that it happens consistently.

In some circumstances it may be that protection orders are made where criminal proceedings might succeed but the victim is unwilling to give evidence, and a balance needs to be achieved between prosecuting all possible cases and not putting victims in situations where they disengage from the system. This is a very delicate balance.

The Tasmanian Act allows magistrates who find an offender guilty of a family violence offence to “automatically” impose a final Family Violence Order. This does appear to save court time without being unfair to the offender, and it is possible to adduce further evidence in relation to the Orders that are ‘necessary or desirable.

In the ACT it is not the police who apply for domestic violence orders, except very rarely in emergency telephone order situations. There is a Family Violence Intervention Program which involves legal, police, magistrates and services. All criminal matters that involve family violence are marked "Family Violence" - they go into the "Family Violence List" - this takes them before a magistrate who is on the Intervention Program committee. It is still treated the same way in terms of criminal law but by a judicial officer who has an awareness of the significance of family violence. There is no option for police bail if a person is arrested for a family violence offence. Protection orders are applied for by individuals.

In Victoria both intervention orders and criminal charges are used. Since the introduction of Family Violence Safety Notices allowing the police to remove alleged perpetrators from the home, criminal charges seems to be used only for the most serious cases. Family Violence Safety Notices should be used to ensure the safety of the victim and not as an alternative to criminal charges in appropriate circumstances.

Question 5–5 Are criminal offences for economic and emotional abuse in a family violence context necessary or desirable?

Such offences may be difficult to prove. For example, in relation to economic abuse it could be argued that the alleged perpetrator is simply frugal or greedy rather than controlling.

The existence of such offences could however act as a deterrent for people and increase understanding of the seriousness of that conduct as family violence. They may also be important in respect of compensation.

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

In NSW there have been two studies by the NSW Bureau of Crime Statistics and Research which suggest that protection orders do increase a victim's *sense* of safety (*An evaluation of the NSW Apprehended Violence Order Scheme - 1997)* and (*An Evaluation of the NSW Domestic Violence Intervention Court Model pilot (DVICM)* there is no research of which we are aware that measures the impact of the police issuance of protection orders on the actual safety of victims in a longitudinal sense.

Police and prosecutors should be adequately trained and resourced to ensure appropriate responses to family violence, including in relation to responding to a complaint, investigating matters thoroughly, and making decisions about when it

is appropriate to both bring criminal charges and issue/seek protection orders as a result of an incident involving family violence.

Legal Aid WA believes that police orders, which can be issued with effect for up to 72 hours, have improved victim safety in Western Australia. Police orders were introduced in WA through legislative amendments made in December 2004 to the *Restraining Orders Act 1997* (WA)[9]. The amendments required the Attorney General to review the operation and effectiveness of police orders as soon as practicable after two years, as a result of which a report was tabled in Parliament in March 2008 ("The WA 2008 RO Review Report")[10]. The report involved a summary of police order statistics and extensive consultations across WA. Critically, police orders were thought to increase victim safety."[11]

It is strongly recommended that historical evidence of such Orders be provided to the Magistrates Courts to ensure that the court is aware of their existence when dealing with subsequent applications for ex parte Violence Restraining Orders.

In Tasmania, anecdotally, the safety and protection of victims has been increased by the issuing of such orders. These provisions were implemented based on research that identified that police-issued orders do have a preventative effect.

Victims, in circumstances where there was not a long or severe history of violence, have indicated that the order did sometimes serve as a 'wake-up call'; in other circumstances it lessened the frequency or changed the nature of the conduct (usually to less physical forms).

It appears that the police power to make a protection order has significantly increased the protection of victims, by allowing a wider range of people to be

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[9] The *Acts Amendment (Family Violence) Amendment Act 2004* (WA)

[10] A Review of Part 2 Division 3A of the *Restraining Orders Act 1997*, Department of the Attorney General, March 2008

[11] ibid. at p11

protected, at an earlier stage. Police orders can be made at the time of the incident or soon afterwards. This appears to be the stage at which victims are most likely to want to press charges and receive protection orders, before the process of second-guessing and considering priorities other than safety begins. It is also the stage at which a victim is most likely to want to leave the relationship.

There are also reports of family violence conduct beginning again immediately the order expires, or, in the case of one offender's miscalculation of the date, the day *before* it expired, suggesting a preventative effect. This generally provides a good basis for longer orders, subsequently imposed by courts.

It is also recognised that there are some instances where orders will not be necessary to re-establish safety. As imposition of a Police Family Violence Order is required to be based on sufficient evidence of family violence being committed, this should create less concern about placing the onus of making the application to discharge the order on the person against whom the order is made. The risk of offenders using court proceedings to place additional pressure on victims may also be avoided by the use of police orders.

When police take out a protection order there is a strong perception that the victim has no control over whether that order is made. This is useful for victims who are too afraid to stand up to their partners on their own, or who are pressured to take no action.

The *Family Violence Act 2004* (Tas) recognises the complexities of the relationships between offenders and victims, and the need to intervene in scenarios earlier, and that there are situations in which victims do not recognise what is necessary for the protection of themselves and their children.

Anecdotally there have been incidents when victims were initially unhappy to have a police protection order but were subsequently glad of its existence when a serious breach has occurred and the order has facilitated an appropriate response.

In South Australia anecdotal evidence from victims of violence indicates that police orders are sometimes difficult to obtain.

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.

The experience of police issued protection orders in Tasmania is that they are a vital and significant aspect of the whole of government approach to dealing with family violence.

It is also considered that s 14 of the *Family Violence Act 2004* (Tas) goes some way to addressing possible concerns about the amount of power allocated to Tasmania police:

- only police officers of the rank of sergeant or above may issue a protection order so the final decisions are being made by senior and experienced police. This also subjects attending police to automatic review;
- a protection order can only be issued on an objective assessment that the circumstances satisfies the test that family violence has occurred and is likely to do so in the future. Without it, a protection order cannot be made;
- a copy of the order must be served on the offender and the magistrates court so that they are made aware of the orders. This streamlines court applications to vary or revoke the Order; and
- there is power within the *Family Violence Act 2004* (Tas) for the court to vary or revoke any protection order upon the application of various parties, including the police, the person to be protected or the respondent.

Other safeguards include:

- the conditions that can be applied in the protection order are finite in their type and wording, and pre-approved by a Chief Magistrate, which limits police discretion; and
- a risk assessment is used to assist police in assessing whether there is a likelihood of family violence reoccurring, which limits the amount of personal discretion available to police.

Other Commissions consider that long term orders should be made by Magistrates.

It is the experience of Legal Aid NSW family violence lawyers that judicial officers invariably change the orders sought by police and do not necessarily grant all of the protection orders sought.

In Western Australia one of the main rationales for the introduction of police orders was the perceived failure of the existing telephone protection order system, which operated after business hours when most family violence incidents occur. The statistics showed that in the 12 months prior to introduction of police orders, seven telephone protection orders had been made. Following the introduction of the police order regime, the number of orders has consistently been at about 6000 per year. The "*2008 Restraining Order Review Report*"[12] concluded that "police orders have been well received by victims and service providers involved with family and domestic violence in Western Australia. There was universal agreement amongst those consulted during the review that police orders should be retained.

Legal Aid WA supports the proposal that police issued protection orders should only be permitted for a short/interim period and in emergency or crisis

[12] A Review of Part 2 Division 3A of the *Restraining Orders Act 1997*, Department of the Attorney General, March 2008

situations. The question of whether a long-term order should be made is a matter that should be considered by a Magistrate.

The WA *2008 RO Review Report* obtained substantial input from Aboriginal people, including from rural and remote areas. Whilst there was a range of Indigenous views, the majority of feedback supported police orders as a "cooling off" process which was not necessarily long term and would not necessarily trigger a criminal response or long term orders/severing of relationships/separations of families, unless the applicant specifically sought it. There was also significant feedback from Aboriginal people that it would be beneficial for police orders to invoke some programmatic or other response designed to change the behaviour of the violent/abusive person. Where the police have the power to issue a protection order the issuing of this order must be communicated to the Magistrates Court to ensure that a person restrained by a police order cannot lodge an application and obtain their own restraining order in circumstances where the court does not have knowledge of the police protection order against that person.

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.

NLA supports this proposal which would take the onus off the victim to apply for a protection order. The reasons should be able to be referred to or used in future investigations or applications for subsequent orders.

This change was enacted in WA through the 2004 family violence legislative amendments. It was supported and driven internally by senior WA Police at the time and in the experience of Legal Aid WA and other domestic violence

workers it has played a significant role in improving police response to family violence.

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?

Please refer to the response to Proposal 5-5.

A requirement on police to apply for a protection order should have a legislative basis. This should be supported by appropriate education/training.

The experience of the Legal Aid Commission of Tasmania is that a requirement that police apply for the protection order on behalf of victims is an approach which assists in shifting "responsibility" for policing safety and for the intervention itself away from the victim and on to a target less subject to pressure, namely the police. It may also assist in lessening victim's guilt at involving their partner or former partner in the system and in preventing the former partner from blaming the victim for the response and taking retaliatory action.

Police are given powers by the legislation, and their policy requires them to make decisions in accordance with Safe-at-Home principles, which generally appears to be sufficient where police are educated as to what is required and why. Police are not required to (by legislation or policy), and generally do not, obtain protective orders for other family members or friends caught up in the alleged offender's conduct.

Police being required to apply for protection orders on behalf of victims would send a community message about support for victims and non-acceptance of family violence.

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?

There should be appropriate consultation with indigenous people and services to identify what is required.

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

In NSW such proceedings can be instituted by the complainant or a police officer on behalf of the person in need of protection. The vast majority of such matters are instituted and conducted by the police (approximately 90%). A prosecutor from the office of the Director of Public Prosecutions would only seek a restraining order as a consequence of a person being convicted of a relevant offence on indictment.

The Tasmanian Office of the DPP has not to the knowledge of the Legal Aid Commission of Tasmania taken an active role in participating in *Safe-at-Home* or seeking orders.

Question 5–10 Do any issues arise in relation to the availability, scope and exercise in practice of police powers in connection with family violence to:

(a) enter premises;

(b) search for and seize firearms or other articles; and

(c) arrest and detain persons?

Police have sufficient powers in connection with family violence and it is necessary that they maintain them.

Anecdotal evidence from victims suggests that police in South Australia are reluctant to use these powers to their full extent.

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.

NLA supports this proposal.

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

The Legal Aid Commission of Tasmania considers that the powers in the Tasmanian legislation protect victims, without having a greater-than-necessary impact upon alleged offenders. It is also suggested that the assertion in the Consultation paper that there is no time limit for detention in the Tasmanian legislation is misleading.

Although time limits are not specified in hours, the period must only be "such time as is reasonably practical" after the person has been taken into custody to get the person before the court or the period "reasonably required" to determine the charge or charges, carry out risk screening or safety audit, implement safety measures where it is practical to do so, and to make and serve a protection order or an application for a protection order.

Guidance as to what it is reasonable to do is set out in s 4 of the *Criminal Law (Detention and Interrogation) Act* 1995. Police also retain the discretion as to whether or not to release the person on police bail.

In some circumstances it is impossible to make the former residence sufficiently safe for a victim and/or children, and in those circumstances it is necessary to use the time that a person is in detention to put arrangements in place for the victim to flee. In other cases the victim actively wants to leave the house with the children rather than remain usually for reasons of safety, protection and secrecy.

It is helpful to the accused and the protected person where the police assist a person the subject of protective bail or a police order access money, clothing or work tools.

Criminal law lawyers are of the view that it would be preferable that a fixed period of time for detention be defined in order that arguments as to what is reasonably practicable do not arise.

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

This is a matter for education/training rather than legislative amendment. At the core of this issue is the need for the effective education/training of police in undertaking a proper investigation of an incident before laying charges.

NSW is aware of a number of incidents where if a proper investigation of the incident had taken place, charges against the victim should not have been laid. Specifically, it is critical that police have an understanding of the complex nature of domestic violence and the manipulation and power dynamics that are involved. They need to be trained to be able to appropriately analyse family violence situations in practice when attending incidents. This is a very complex area and training should be comprehensive.

Anecdotally in WA there are numerous cases where women have been issued with police orders and evicted from their homes despite a history of family violence towards them by their partner.

The possibility of retaliatory acts or pre-emptive strikes on the part of people who are usually victims should be taken into account. Injuries may be inflicted in self-defence.

Case Study

An Aboriginal woman, a victim of family violence, was at court in the East Kimberley region of WA. Legal Aid had represented her in criminal proceedings over the previous few months as a consequence of an incident involving her husband where she reacted with violence that was considered disproportionate to the particular incident. She spent a few months in rehabilitation and was then placed on a community based order. There was no local family violence counselling available for "offenders", so she was not receiving any counselling. She was an offender in the eyes of the criminal court, but also a victim of long standing abuse. She had to appear in court as the complainant against her husband who had pleaded not guilty to a serious assault against her. She had also applied to cancel her protection order. Her expressed reason for this was because she didn't want her children hating her. They thought it was her fault their father was not in the home and they weren't living together as a "family" any more.

A lawyer from the Legal Aid Commission arranged to meet with the local Family Violence Service to get the client to engage in counselling for victims of family violence, with a view to the children also obtaining counselling if possible. The problem with this plan was that the service was not funded to provide counselling to individuals still in a relationship with the perpetrator. However, the service offered to try to engage with the client and arrange alternate counselling if possible. By working together they were able to ensure that the client would get some counselling that wouldn't have otherwise been available. The lawyer then appeared in court and varied the protection orders so that there could be some contact between the parties to enable the father to return to the family home.

It was apparent from the history between the parties and from the client's instructions that this would have happened in any case. In addition, as the client was able to understand that she didn't have to cancel the protection order, she still has some protection from further violence.

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 WA, there is a concern that the workloads of the court and the prosecution, and the associated lack of time and resources, may impact on the information available to Magistrates in the making of decisions about bail.

In Tasmania s 12 of the of the *Family Violence Act 2004* effectively reverses the onus in respect of bail so that an offender needs to show the courts that they are not a safety risk to the victim.

It would be a concern if the presumption changed in relation to police officers making decisions in respect of police bail. Final decisions should be made by a court because of the complexities of family violence and the complexity of the decision about victim safety.

Initially s12 led to a large number of offenders being remanded in custody where they otherwise would not have, but this is no longer the case. The factors, which a court is able to take account of, are not limited, and allow for the exercise of discretion by the court. Tasmanian Supreme Court decisions and continuing application of the section by the Magistrates has continued to guide court decisions in relation to bail. This has led to a considerable change in the court's approach to bail decisions and a decrease in offenders being detained without good cause. Courts are requiring reliable material on which to base their decisions, and flexibility to respond to the circumstances of the case:

In Re S [2005] TASSC 89 (19 September 2005) His Honour Slicer J stated:

> *"It is evident from the legislation that a purpose is the removal of a person from the home who is alleged to have been violent, both as a "cooling off" mechanism and a medium to long-term form of control and risk avoidance. The legislation establishes a policy regime designed to address a complex*

> *social problem. Effectiveness depends on general confidence in the administration of the policy and its outcome in particular cases. Public confidence is diminished by arbitrary approach and outcome. It may be that executive policy is designed to place responsibility for future risk with the courts, rather than a discretionary exercise or arrangement made by public officers. Such might be desirable, but requires the provision of reliable material to a court required to deal quickly with the issue of deprivation of liberty, consequences to the family unit, and assessment of future risk."*

Other relevant cases are *S v White* [2005] TASSC 27 and *Olsen v State of Tasmania* [2005] TASSC 40.

In the north of Tasmania it appears that such factors as the willingness of the victim to take part in proceedings, the seriousness of the offending, and the history of the violence between the parties for example are properly being examined in the application of s 12. The effect of this is that it is rare for offenders to be locked up in situations where victims are, for example, unwilling to give evidence in relation to the criminal charges.

In practice the presumption does not actually reverse the onus of bail, it requires the courts to be satisfied about the victim's safety and where this is the case the offender will be bailed.

This approach adequately reflects the complexities of family violence, and the degree of risk to which a victim can be potentially be exposed.

Commission criminal law lawyers are concerned that a presumption against bail unduly compromises the rights of accused people. The view is that the best approach is to allow the Magistrate to independently form an opinion as to whether the risk of re-offending is unacceptable in the specific circumstances of the case and to determine conditions of bail to moderate any risk where appropriate.

The experience in the Australian Capital Territory of the presumption against bail in relation to domestic violence offences in s 9F of the (ACT) *Bail Act* is that it can sometimes lead to injustice because it seems police are reluctant to make a decision in relation to bail preferring to leave it to the Court to decide. This has resulted in children who exhibit challenging behaviours being refused bail by police.

In family violence courts that have family violence resource workers Magistrates are able to arrange risk assessments which assist them to make decisions about bail including relevant conditions. Such information is useful regardless of whether a presumption against bail does/not exist.

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?

NLA agrees that it is imperative for victims of family violence to be informed about a decision to release the offender as a matter of safety for themselves and their children. It is also necessary that victims know what they are required to do.

In NSW, anecdotal information suggests that victims are more often than not informed of decisions to release offenders on bail and the conditions of their release. However, victims are generally not informed when alleged/offenders are released from correctional facilities.

In WA and South Australia, victims are generally not informed by the police. At the Legal Services Commission of South Australia, the domestic violence worker regularly liaises with Family Violence Units and prosecution of South Australia police to obtain such information on behalf of victims. The Charter of Rights for Victims of Crime provides victims with a right to information about the prosecution of the accused, any bail conditions imposed on the accused and their release from custody (*Victims Rights Act 1996*, s 6)

Prior to the *Safe-at-Home* response in Tasmania, victims had very little information in relation to decisions concerning bail. Generally, since the commencement of the *Safe-at-Home* legislation victims are much more often informed of bail conditions and orders, and provided with additional copies promptly if the first copy is lost. Similar considerations apply to informing the victim of the release of offenders from prison. This is often a problem if they have been serving long sentences and protection orders have expired, as there is not likely to have been any violent or abusive conduct in the mean time to ground the extension of orders.

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.

NLA 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?

Inconsistent bail requirements and protection order conditions do occur, although this is usually where bail conditions have been imposed prior to the conditions of the protection order being determined at the first mention. If the prosecutor or legal practitioner does not raise the inconsistency or apply for a change in bail conditions, inconsistent conditions might continue.

Police have access to the terms of any restraining orders, bail conditions or police orders. They should endeavour not to double up unnecessarily, or to at least keep the terms the same, so as to avoid confusion by the accused.

People often become confused about the difference between police orders, which expire within a matter of hours or days, and protective bail. Sometimes people with protective bail conditions come to court thinking that the bail conditions have also expired. Clear information about the requirements of a protection or restraining order and early access to advice are crucial to the effectiveness of such orders.

In SA victims experience the problem that police will refuse to obtain a protection order when bail conditions exist. In WA, Magistrates often refuse a protection order where protective bail conditions exist. The difficulty then arises that if the criminal charge is dealt with quickly due to a plea of guilty, there may no longer be the protection of bail conditions and the protected person will generally not be aware of their removal.

In Tasmania due to the immediate imposition of Family Violence Orders and Police Family Violence Orders, it is rare for inconsistent bail and protection order conditions to be put in place, and as a consequence there are few circumstances in which inconsistent conditions would make breach of bail by the offender is likely. If an offender breaches and is bailed with conditions on the breach, it is made apparent to the offender by the court that he must keep both sets of orders.

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).

NLA supports this proposal.

NLA supports the use of a process whereby interim protection orders are automatically made upon family violence charges being laid and final protection orders being made where a person is convicted of a family violence offence.

This obviates many of the problems that can otherwise arise between the operation of bail for criminal charges and protection orders.

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.

NLA supports this proposal. In NLA's view, where there are charges and protection order/s arising out of the same alleged conduct, then the criminal charges should be dealt with first, with interim protection orders being made until the resolution of the criminal proceedings, and the protection order proceedings being finalised thereafter.

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?

Where there have been restraining order proceedings where evidence has been given and there is a criminal trial relating to the same issues as were raised in the restraining order proceeding, a protected person may be cross examined in relation to statements made in the earlier proceeding where they are inconsistent with the evidence given in the criminal proceeding. This is part of the basic entitlement to cross-examine on the basis of prior inconsistent statements.

NLA supports the approach of the final protection order hearing following the hearing of the criminal charge, with a protection order being automatic on a finding of guilt. This alleviates the need for two hearings.

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.

Please refer to our response to Proposal 6-1.

It is important in a criminal trial that the Magistrate or the jury in a trial on indictment determine the issue of the guilt of an accused on the basis of the evidence presented at the trial. Whether or not the accused is the subject of a protection or restraining order is not relevant evidence in relation to the criminal charge and there are many circumstances by which such an order may be made. For example, the person the subject of the order may not have responded to the application or may have consented to the application. This does not mean that the person the subject of the order necessarily agrees with what the protected person was stating was the foundation for the order. Where a Magistrate has made a determination concerning a restraining or protection order, then a different standard of proof is applied to the determination of the matter. It would be misleading and unhelpful to present evidence of the making

of the restraining or protection order in a later criminal proceeding and has the potential to result in a miscarriage of justice.

Similarly, reference to current, incomplete proceedings could be unfairly prejudicial. There may be less of a concern about reference to evidence given in family violence proceedings, as long as the weight that is given to that evidence in the criminal proceedings is appropriate, taking into account the type of evidence and the degree of scrutiny to which it has been subjected in the criminal proceedings.

This proposal would create resource implications for Commissions because both the criminal proceedings and the protection proceedings would be of equal significance to the criminal proceedings outcome for the defendant.

Question 6–2 How is s 62 of the *Domestic and Family Violence Protection Act 1989* (Qld)—which renders inadmissible in criminal proceedings certain evidence about protection orders where those proceedings arise out of conduct upon which a protection order is based—working in practice? In particular:

(a) how is it interacting in practice with s 18 of the *Evidence Act 1977* (Qld) which states that 'proof may be given' of a previous inconsistent statement;

(b) does it provide a model for other states and territories to adopt in their family violence legislation in order to provide legislative clarity about the matters raised in Proposal 6–2 above; and

(c) is there a need to make express exception for bail, sentencing and breach of protection order proceedings?

s. 62 of the *Domestic and Family Violence Protection Act 1989* (QLD) is operating effectively in practice. In a criminal proceeding arising from the same incident that led to the domestic violence proceedings, it is desirable that the complainant can be cross-examined about a prior inconsistent statement as allowed by s 18 of the *Evidence Act 1977*. This can be done in a way that does not offend against s 62.

The effect of s 62 is that evidence about the making of a domestic violence order or an application for a domestic violence order is inadmissible in a criminal trial for offences that led to that order being made. The fact that a complainant gave a prior inconsistent statement such as in the form of an affidavit accompanying a domestic violence order application is still something upon which they can be cross examined, however, the proceedings themselves can not be mentioned. The way that this is raised in practice is that the question would be phrased "you provided an affidavit on another occasion" or "you gave evidence on another occasion". In this way the prohibition in s 62 is not infringed.

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 Tasmania courts do exercise powers to make protection orders in criminal proceedings. Generally, though when the prosecution presents the charge, the prosecution will also bring an application for protection orders where orders are not already in place. If the conduct the subject of the charge/s is denied, an interim Family Violence Order is made until the final determination of the charge. Final protection orders are made following the determination of the charge as appropriate.

The WA experience is that it is not usual for Magistrates to exercise their powers to make protection orders in criminal proceedings on their own initiative where they have discretion to do so. Orders are made in some cases in the superior courts pursuant to the Prosecutions Victim Support Policy.

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?

NLA supports this general approach, noting that there is concern that the discretion not to make an order be retained.

The current provisions requiring the making of a restraining order on the finding that an offence is proven or following a plea of guilty is working in NSW where the making of such an order almost invariably follows a conviction for a family violence related offence. There is a discretion not to impose such an order. The court should have this discretion as there will be circumstances where such an Order is not in the interests of either party. A mandatory protection order upon conviction adds weight to the serious nature of the order and results in the victim not being required to make that decision.

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?

NLA considers that victims should be consulted, particularly in relation to the conditions of an Order but that an exception should not be made where a victim objects to the making of an order in circumstances where there are reasonable grounds to believe that her safety might be compromised. The requirement that courts make a protection order in certain circumstances results in the victim often not feeling pressured (or coerced) to make a decision regarding the making of an order, especially when the parties are living together.

Question 6–6 To what extent are prosecutors in the Northern Territory making applications for protection orders where a person pleads guilty or is found guilty of an offence that involves family violence? Is it desirable for legislation to empower prosecutors in other states and territories to make an application for protection orders where a person pleads guilty or is found guilty of such an offence?

Please refer to our response at Question 6-5 above.

In the view of the Northern Territory Legal Aid Commission it is desirable for prosecutors to make applications for protection orders where a person pleads guilty or is found guilty of an offence involving family violence, but the ability to make such applications is not generally utilised by Northern Territory Prosecutors.

There have also been occasions where Magistrates have refused to entertain applications because the Police Domestic Violence Unit has not been present and do not have a view, despite this not being a requirement of the legislation.

It would be beneficial to victims in that currently in circumstances where criminal charges have been laid women have to apply for protection orders or extension of such orders. The victim has to provide another statement for the court, and appear in protection order proceedings separate to the criminal charges. This is traumatic, stressful and time consuming for them.

Case Study

There had been serious assault, statements taken, the defendant was in custody and pleaded guilty on the day the protection order expired. The prosecution made no application and the victim had to attend the Legal Aid Commission to assist her to apply for a new protection order.

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.

NLA supports this proposal. It is suggested though that prosecutions policies about making applications for protection orders must still be developed and implemented. Education and/or training in relation to family violence must be provided to courts, prosecutors and lawyers, amongst others.

It would also be appropriate for the court to have the power to make a protection order to ensure the safety of the children of the relationship between the alleged offender and the victim.

Case Study

The mother and the father had been living in a de facto relationship and had one child aged almost six months. There was a history of severe family violence during the relationship. The parties had recently separated following a violent incident, which took place at the family home. The father was charged with assault x 2, deprivation of liberty and threats to kill (both mother and child). The instructions of the mother were that the father "went berserk", smashed up the house, threw things at the baby, attempted to strangle her and hurt the child. The father was subject to protective bail conditions in respect of the mother and the child and the charges were to be the subject of a District Court trial.

The mother attended the magistrates court on the advice of the police to obtain a protection order for herself and the child. The magistrate granted the protection order for the mother but refused to grant a protection order for the child on the basis that it was a family court matter. He referred the mother to the family court to seek orders that the father "spend no time" with the child. The magistrate also advised the mother that the Family Court of WA would be able to obtain a copy of the transcript of the interim protection order hearing. The mother was very fearful that the father would seriously harm or kill the child if he was to spend any time with the child. The client was extremely anxious and frightened and was advised by Legal Aid not to commence family court proceedings.

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.

NLA 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?

Generally, yes. Conditions are most likely to be appropriate where the parties are legally represented/have legal assistance and/or where a family/domestic violence support service is involved.

In NSW local courts services such as the Women's Domestic Violence Court Advocacy Service work with police and legal representatives to ensure that conditions are tailored to meet the victim's specific needs.

In WA the experience is that some judicial officers give great consideration to the circumstances and appropriate terms, others adopt a more standard approach. Issues have arisen where Justices of the Peace who are not legally trained hear interim protection order applications. This occurs in the Perth Magistrates Court which deals with the highest volume of protection order applications of any court in the state. There have also been problems where protection orders have been made in remote Aboriginal communities with insufficient regard to the practicalities of everyday life, eg the need of both parties to use the only local grocery shop.

In the ACT judicial officers use a precedent list of conditions and exceptions. The applicant ticks the boxes. Judicial officers are required to go through the list to make sure each condition or exception is relevant to the particular circumstances of the case. The precedent list is sufficiently thorough to enable appropriate tailoring. Occasionally an order will go through that fails to allow exceptions that are needed for a case eg about making arrangements regarding the children.

In Victoria applicants have a choice of detailed conditions that they can tick. While this is beneficial because most behaviours are covered, standard orders may not fit the circumstances of individual cases. If one or both parties are represented then the conditions to be included are negotiated and the wording of conditions changed to reflect the circumstances of the particular case. Judicial officers will actively consider whether particular conditions should be included and what the wording of those conditions should be. It is not as common to insert new conditions altogether.

In Tasmania the standard conditions normally imposed are broad enough that they apply in most situations. Judicial officers usually determine the orders to be made in accordance with the evidence before the court. It is therefore important to ensure that issues are raised in the application. In most cases the exceptions to the not-approach orders allow for family law arrangements and negotiations concerning children (although often requiring a third party's involvement, counselling or mediation), and such matters as handovers, communication books, agreed phone calls to the children, text messages informing the other party in the event of an accident.

In addition, proper attention is given by judicial officers to the geography - such as where the person protected lives on a highway or a main road which the person restrained has reason to travel. Commonly the difference here is that the person restrained still must not enter onto the premises, but rather than not go within 100m of the property, he or she must not loiter within 100m of the property. Where there is stalking-type conduct meaning that the protection of the person overrides the inconvenience to the person restrained, the not-go-within condition can be maintained.

Examples of when general conditions do not fit and need adjusting:

1. where circumstances change, including where people initially decide to stay together, and then break up and the ongoing contact is a problem; or where people initially decide to separate and then want to reconcile.

2. it can be difficult to write in exceptions around the collection, and in particular the division, of property which are sufficiently flexible but not then open to abuse. Police generally will facilitate and supervise the collection of some basic items but cannot spend very long and can not assist in determining ownership (generally saying that if it is disputed, the item stays where it is, which is a real advantage to whoever decides to remain). Where the items require the assistance of others to help move them (eg car body), it can be difficult to set out arrangements very far in advance, but the removal of such items is necessary.
3. sometimes there is difficulty in relation to employment, such as where the person protected remains in residence of the farmhouse of a farm worked by the other person. There may need to be restrictions on access such as restricting it to daylight hours or work hours, and excluding an area around the house.
4. where the children have or develop medical conditions: Hospitalisation or involvement in treatment of children can be problematic. Hospitals appear generally to help out by making arrangements, when times are agreed, for the parents to come and go without seeing one another, and being willing to call in Police if necessary.

Some of the circumstances that arise would not have been foreseeable at the time that the orders are made, or the risk situation has changed. It will always be necessary therefore to have an effective and efficient process which enables the timely change of orders.

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.

NLA supports this recommendation. Care would need to be taken in considering whether such orders were appropriate for the individual case. It is suggested that this is a further area which education/training should cover.

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.

NLA supports this proposal noting that there will be some circumstances in which it may be necessary for magistrates to impose unique or unusual conditions which are not included on the application form, and provision should be made to enable this.

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.

NLA supports this proposal. It is a core responsibility of the police prosecutor or solicitor representing the victim to raise this issue and the responsibility of judicial officers to consider the issues involved. This is an area which it is suggested that education/training should cover.

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.

In WA the accommodation needs of both parties is a factor under s 12 of the *Restraining Orders Act 1997* (WA) which must be taken into account.

In Tasmania this has not proved necessary to improve the rate of exclusion orders.

In NSW the legislation covers these issues and requires that the needs of the victim and any children be considered in relation to any decision about exclusion. Despite the existence of the provisions, few exclusion orders are made. There are a range of reasons for this which have been identified by research.

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?

Yes, where the police can assist the perpetrator in obtaining alternative accommodation and leaving with appropriate property then it is more likely that the exclusion order will work and not be breached. The availability of short-term "bail hostel" type accommodation should be a government priority in reducing family violence, but should be implemented and managed with caution as, from the experience of the Legal Aid Commission of Tasmania, housing offenders in one place can be dangerous, as was illustrated on one occasion where offenders banded together to re-victimise the complainants in their protection order matters.

In Tasmania a fund for perpetrator housing was created, but has not been used to anywhere near the extent that was anticipated.

Police should receive appropriate education/training to ensure that they understand the basis for their obligation in this regard and to assist them to make decisions that will meet the safety plan requirements of the victim and any children that might be involved.

Victims sometimes expose themselves to further violence by allowing the excluded person access to the home out of sympathy for their situation, for example, because the excluded person is homeless. Each of the alleged offender and victim must also understand the importance of the order and what could constitute breach.

Case Study

In one NSW example, following a family violence incident in the early hours of the morning, the police took the defendant to station, charged him and issued a protection order. At the time the defendant was dressed only in shorts. After his release from the police station, the defendant returned to the home for clothes and was allowed to enter by the victim. He went to another part of house to sleep and was later charged with a breach of the protection order.

Community legal education and early access to legal advice and information materials to perpetrators are important strategies in reducing the prospect of orders being breached.

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.

NLA supports this proposal.

Question 6–9 How is the presumption in the family violence legislation of the Northern Territory—that where a victim, person who uses family violence and child reside together, the protection of the victim and child is best achieved by their remaining in the home—working in practice? In particular, has the application of the presumption resulted in the making of exclusion orders?

This presumption is regularly used in police issued protection orders that are taken out on the spot because of urgent circumstances. The police often

require the alleged perpetrator to vacate the home and defendants are they are unable to return until the order is changed later at court.

The Northern Territory experience is that many women, who are advised of the option of an exclusion order, still make the decision to leave the home because they do not feel safe. In cases where the victim has requested an exclusion order the court has made the order because of the existence of the presumption. Initially, there was a lot of concern amongst the community that this clause would be abused by people using it as a way to quickly gain control of the property circumventing the family law jurisdiction. This has not been the experience. Magistrates take these applications seriously and they are not granted as a matter of course.

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?

Please see response to Question 6-9.

Reservations about a presumption include that such a presumption may operate against genuine victims where an abuser seeks to “get in first” and manipulate the system to enable them selves to remain in the family home.

Arrangements for the victim and the children to remain in the home will be enhanced by appropriate safety planning involving the police and the implementation of arrangements including the use of personalised duress alarms.

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.

NLA supports this proposal.

There is however some concern that consenting to orders should be encouraged and that the making of a restraining or protection order should not be considered acceptance of a particular allegation with the result that there is a sanction which may be considered akin to a sentence.

Conditions to attend for rehabilitation or counselling pre-suppose that such programs exist and are accessible throughout a state or territory. This is not the case, particularly in regional and remote areas, eg the Kimberley in Western Australia. Appropriate (including culturally appropriate) and effective programs need to be available throughout Australia.

Programs should pursue “best practice” in relation to the rehabilitation of perpetrators of violence. It is our understanding that there is a limited evidence base about the characteristics of programs that may be effective in causing a change in behaviour. There are particular questions about the effectiveness of programs in which participation is mandatory. It is not sufficient to assume that attendance at a program over a short period of time (eg 8 - 12 weeks) is a successful outcome. The only way to properly assess whether these programs have been successful is to ascertain over a longer period of time whether or not the perpetrator’s behaviour has changed.

In Tasmania, the Family Violence Offender Intervention Program works with mandated clients and has a protocol with the Court Support and Liaison Service (who work with victims) so that victims' reports on progress can be fed back in to the therapists.

The availability, suitability and resourcing of such programs should be regularly reviewed and monitored and the courts will need to assess the suitability of a person the subject of an order for such programs.

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

See the answer to Proposal 6-10 above. There is some concern that any communications of this nature should be confidential so as to minimise the risk of retaliation or pay back towards the victim from the perpetrator.

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 NSW, protection orders restrict the behaviour of the defendant and do not direct the defendant to do anything in particular.

In Queensland Magistrates do not impose a requirement to attend specific programs or counselling as conditions on protection orders. It is suggested that issues of what would happen if the person did not comply with the conditions would arise as there is no framework or process for monitoring and subsequent applications for any breach of conditions. In some cases Magistrates will suggest to respondents that a program or counselling may be of assistance, but they do not impose a condition.

In criminal breach matters a condition can be imposed as part of sentencing and the conditions are managed by the Queensland Department of Community Safety who assess the availability of suitable programs for the individual.

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?

Access by respective courts to information held by the other should address this problem to the extent that it occurs.

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?

Courts already have significant regard to the factor that offences have occurred in a domestic relationship and have particular concern when a restraining or protection order has been breached in imposing sentence. Cases such as the *Queen v Lester* [2004] QCA 34 provide that when one party to a broken relationship resorts to violence against the other party, a substantial term of imprisonment to reflect general deterrence is required.

Prosecutors/lawyers should be mindful of informing the court of all relevant facts surrounding charges arising from domestic violence incidents and restraining order breaches, and should make appropriate sentencing submissions.

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?

Coordinated and appropriate information sharing processes between relevant agencies/courts should minimise the risk of outcomes of this kind.

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.

NLA 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.

This proposal is not supported. However, the decisions to charge and prosecute need to be made on the basis of appropriate education/training about the dynamics of family violence.

A number of women have been charged in WA with being parties to a breach of a protection order. In many of these cases it was apparent that the woman was a genuine victim of family violence and the threat or reality of charges only served to undermine their confidence in the legal/justice system.

Case Study

An Aboriginal woman living in the Pilbara had been in a long-term violent relationship. After being physically assaulted again, she obtained an interim violence restraining order against her partner on the advice of the police. Some weeks later after pressure from extended family and her children she allowed her partner to attend her house to see the children. Her partner again assaulted her and the police were called to the house. The police charged her partner with assault and breach of the restraining order. The woman was also charged with breach of restraining order as a party to the offence. She pleaded guilty and was given a fine. She remarked to the refuge that she would never seek a protection order again.

It is suggested that in the circumstances of this case study, the woman should not have been charged, and further, that consideration should have been given to varying the orders to enable the partner to be in the home whilst retaining protection orders in relation to his behaviour.

A further problem with protected persons being charged with breaches is that a protected person is potentially liable, as a result, to receive a record for a violent offence with all the potential consequences. Any criminal record is unlikely to specify that the person is a protected person charged as being a party to a breach.

The terms of this proposal are contained in the *Intervention Orders (Prevention of Abuse) Act 2009* (SA).

The view of the Legal Aid Commission of Tasmania is that, in appropriate circumstances, the victim's role in a breach should be the basis of proceedings against them. In Tasmania under the Restraint Order provisions of the *Justices Act* 1959 (which remain available for use in all situations other than family violence) prior to the enactment of the family violence legislation there were problems with the lack of enforcement of breaches of domestic violence-related Restraint Orders because of problems with enforcement (unwilling victims) and because it was seen as unfair that victims were doing what they liked without consequence while exposing the other person to criminal sanctions. By contrast, under the *Safe at Home* system, in appropriate cases people who are protected by orders and invite or encourage the other person to breach those orders are charged with Commit Simple Offence (instigate breach of Family Violence Order). Victims may participate in breaches where very serious safety issues remain, and cancellation of the order may well be inappropriate.

The proceedings are almost invariably commenced by summons rather than by arrest. The penalties are, legislatively and in practice, less than those imposed for the actual breach. Most often no conviction is imposed on an undertaking not to commit a similar offence for 6 or 12 months. This reflects, and provides

an opportunity to explain to the protected person, the importance of a number of points:

- primary responsibility for complying with the order always rests with the person restrained;
- orders have the effect of limiting someone's freedom, to a greater or lesser degree. It is important that taking away someone's freedom is done legitimately. If you have the benefit of a protection order that limits someone else's freedom, you have the responsibility not to do anything that invites or encourages a breach of that order;
- to be effective, the order has to be applied consistently;
- the order is put in place because something has happened that shows that certain situations aren't safe, the best predictor of future behaviour is past behaviour;
- orders can usually be changed to allow the protected person to do what needs to be done. It is, however, a process, and takes time. There may need to be a good, objective reason to think that things have changed before the order can be changed;
- where there are children in the household (and it seems that children are present in 40% of incidents attended by police in Tasmania), the order is in place not just to protect the protected person, but also to protect children from witnessing or being caught up in any more incidents of family violence, and suffering harm. By undermining the effectiveness of the order, a victim may be seen to be exposing the children to risk of harm.

Anecdotally, most victims who have this explained to them in detail and who receive the appropriate support from services such as counselling, court support and legal assistance reach a deeper understanding of the system. Engagement in the 'safety system' is strengthened, not lost. The availability of appropriate services is a key factor.

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.

NLA considers that if the defendant is found guilty of breaching a protection order, the fact that the victim may have consented to the breach or wishes to vary the order does not alter the fact that the defendant is guilty and should take responsibility for those actions.

NLA would support this proposal on the basis that there is an appropriate process to ensure that the consent of the victim is truly consent and the court could still make the orders that are necessary and desirable to protect the victim and any affected children from further family violence.

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.

Please refer to the response to Proposal 6-13.

The WA experience is that victims of family violence seeking to resile from or change earlier statements against their partners is a very common occurrence due to the nature of family violence and the dynamics of the relationships between victims and abusers. There is a concern that police sometimes charge women where it seems that the change in their statements arises from factors such as fear and misplaced loyalty.

Education/training for police and prosecutions about the dynamics of family violence is critical.

The Legal Aid Commission of Tasmania refers to its experience of the Safe at Home program. The Commission considers that the provision of appropriate support services for the victim is a key factor.

Question 6–15 In practice: (a) are persons who breach protection orders raising consent of the victim to the breach as a mitigating factor in sentencing; and (b) are courts treating consent of a victim to a breach of a protection order as a mitigating factor in sentencing?

Yes to both. There is concern that in some jurisdictions Magistrates are treating consent of the victim as a mitigating factor in sentencing, even when it is apparent that the consent is not genuine.

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?

When sentencing an offender the court should be able to take into account the full range of circumstances relating to an offence including any genuine consent of the victim to a breach of the protection order. Obviously if consent is obtained through intimidation, it is not mitigatory. The danger of enacting such a provision would be removing discretion from the court to take into account the full circumstances of an offence in determining the appropriate penalty.

One of the challenges is to have effective systems which involve the active seeking of the victim's views.

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?

Police will generally charge the breach of a protection order along with any other criminal offence that has different elements but relates to the one incident.

Question 6–18 If there is a practice of police preferring to lay charges for breach of a protection order, as opposed to any applicable underlying criminal offence, how can this practice best be addressed to ensure victims' experiences of family violence are not underrated?

If this practice exists it would best be addressed by providing appropriate education/training including in relation to family violence to police to best inform their decision making in relation to the laying of charges.

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.

NLA supports this proposal, noting the NSW provisions of the *Crimes (Domestic and Personal Violence) Act 200* which provides that:

> *"s 12(2) If a person pleads guilty to an offence or is found guilty of an offence and the court is satisfied that the offence was a domestic violence offence, the court is to direct that the offence be recorded on the person's criminal record as a domestic violence offence."*

It is suggested that careful consideration will need to be given to identifying the statistics that it would be useful to collect and the definitions to be set around that data so as to ensure accuracy and consistency across the country as far as possible.

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?

Consistency of maximum penalties for breach of protection orders could be helpful but consistent maximums may not translate into consistent sentences. There is some concern about the potential for a requirement for consistency to mean the reduction in current maximum penalties in some jurisdictions.

The circumstances of each breach must be considered by the court on a case by case basis.

Question 6–20 In practice, what issues or concerns arise about the sentences actually imposed on offenders for breach of protection orders?

Commission experience is that Magistrates sometimes perceive breaches to be related more to the existence of inappropriate family law orders.

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?

NLA is not generally supportive of mandatory penalties for criminal offences. It recognises that most instances of breach involving violence will justify a custodial sentence.

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?

An issue is not whether the breach involves “low levels of violence” but its impact on the victim (that is, fear). This can be a particular issue when

breaches are not considered within the historical context of the violence but treated as single incidents.

In some circumstances compensation for financial abuse or property damage might be an appropriate alternative.

7. Recognising Family Violence in Criminal Law

Question 7–1 Is it necessary or feasible for state and territory criminal laws to introduce a specific offence of committing family violence? If so, how should such an offence be conceptualised? For example, would it be feasible to create a two-tiered offence which captures both coercive conduct and physical violence in a family violence context?

NLA supports the practice of recording offences as family violence offences (as happens in NSW) as this provides a history of family violence. It is not necessary to introduce a specific family violence offence. It is more appropriate to continue to charge perpetrators under individual offences that currently exist.

Question 7–2 Which, if either, of the following options for reform should be adopted:

(a) state and territory criminal legislation should provide that an offence is aggravated—and therefore a higher maximum penalty applies—if an offender is in a family relationship with the victim and the offence committed formed part of a pattern of controlling, coercive or dominating behaviour; or

(b) state and territory criminal legislation should be amended to include specific offences—such as assault and sexual assault—which are committed by an offender who is in a family relationship with the victim, but which do not attract a higher maximum penalty?

NLA has some concerns about the legislative amendments along the lines of those suggested particularly where there is a risk that uncharged alleged

conduct may be taken into account. The significance of the family relationship is another matter which is appropriate for education/training.

Question 7–3 What kind of family relationships should be included for the purposes of the offences referred to in Question 7–2?

See response to Question 7-2, and Proposals 4-17, and 4-19.

Question 7–4 Should federal criminal legislation be amended to include specific offences committed by an offender who is in a family relationship with the victim? If so, which offences should be included and should they carry a higher maximum penalty?

See response to Question 7-2.

Question 7–5 In practice, are representative charges in family-violence related offences under-utilised? If so, why, and how can this best be addressed?

Given that family violence proceedings are often dealing with patterns of conduct, NLA supports courts being made aware in prosecutions of that context. To that end, representative charges are an important mechanism, however we note that representative charges and course of conduct evidence have the potential to complicate proceedings and could lead to evidentiary disputes and delay in the early resolution of cases.

Question 7–6 In practice, are courts imposing sentences for family-violence related offences taking into account, where applicable, the fact that the offence formed part of a course of conduct of family violence? If so, are courts taking into account (a) uncharged criminal conduct; or (b) non-criminal family violence? Should they do so?

Not to our knowledge. For example in WA, where there are a number of protection order breaches there is a charge for each breach. Where the

number of breaches constitutes stalking behaviour, the offender is charged with stalking.

Question 7–7 In practice, to what extent are guilty pleas entered to a family-violence related charge accompanied by an acknowledgement that they are representative of criminality, comprising uncharged conduct as well as charged conduct?

Our experience is that when guilty pleas are entered to a family-violence related charge reference is made to only to the specific offence without an acknowledgement that they are representative of criminality, comprising uncharged conduct as well as charged conduct.

Whilst there would be a benefit to victims if this was to occur, in that the requirement for them to provide evidence and suffer potential retraumatisation might be minimised, there would be associated procedural justice issues for the offender.

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.

NLA supports guidelines, education/training for police and prosecutors to use representative charges when it is appropriate to do so.

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?

Only conduct which has been charged and admitted/proved should be taken into account.

Question 7–9 Should the fact that an offence was committed in the context of a family relationship be an aggravating factor in sentencing? If so, to which family relationships should this apply? Is making a specific link between a family relationship and the escalation of violence an appropriate model?

The fact that an offence was committed in the context of a family relationship should have the capacity to be an aggravating factor in sentencing, similar to the aggravated nature of other offences that involve a breach of trust. Recognising the significance of family violence offences will assist to raise the profile of the serious nature of family violence. This could apply to any relationship where particular vulnerability exists.

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.

NLA 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.

NLA supports this proposal and suggests that the electronic bench book *Domestic Violence and Family Law in Canada: A Handbook for Judges*[13] should be used as a model. The opportunity to make use of that resource, which refers to relevant Australian research, should be explored.

[13] Neilsen Dr L (University of New Brunswick) National Institute of Judicial Studies Ottawa Ontario January 2009

Question 7–10 Are current defences to homicide for victims in violent family relationships adequate in each Australian state and territory?

Generally, no.

This area has been the subject of recent and extensive review and subsequent reform in Queensland.

Earlier this year, Queensland introduced into its *Criminal Code* a new defence, s 304B concerning killing in an abusive relationship.

The background to this reform is that a review was carried out by the Queensland Law Reform Commission in 2008 of the use of the defences of provocation and accident and a recommendation was made that consideration be given to the creation of a separate defence for people who are victims of seriously abusive relationships.

This recommendation led the Queensland government to appointing professors Geraldine Mackenzie and Eric Colvin of Bond University to prepare two discussion papers on possible law reform in this area. Stakeholders, including Legal Aid Queensland, were actively involved in that reform process by making submissions and attending a round table discussion.

There was a concern that existing defences such as self-defence and provocation may have only limited application to the circumstances of some killings where the victim of serious abuse during a domestic relationship ultimately responds by killing their abuser. For instance, the relevant action in response might not be closely linked in time so as to amount to a response to an assault as required in s 271 of the *Criminal Code*. When a killing does occur in response to an assault, there may not have been reasonable grounds for an apprehension of death or grievous bodily harm arising from the nature of that assault as required in s 271(2) of the *Criminal Code*.

The review resulted in the enactment of a new defence provided for in s 304B of the *Criminal Code*, namely killing in an abusive domestic relationship. It provides that a person who unlawfully kills another under circumstances that, but for the provisions of that section, would constitute murder, is guilty of manslaughter only if the deceased has committed acts of serious domestic violence in the course of an abusive domestic relationship and the person believes that it is necessary for the person's preservation from death or grievous bodily harm to do that act or make the omission that causes the death and the person has reasonable grounds for the belief, having regard to the abusive domestic relationship and all the circumstances of the case.

The affect of s 304B is that upon a trial for murder, if a jury is not satisfied beyond reasonable doubt that the defence has been disproved by the prosecution, the accused would be found guilty of the lesser offence of manslaughter. This in turn would bring into operation the sentencing discretion attached to that offence, rather than the mandatory life imprisonment attaching to murder in Queensland.

So the defence is a partial one and requires a subjective belief that the act causing death is necessary to preserve them from death or grievous bodily harm and also an objective requirement upon that belief. S.304B makes reference to the *Domestic and Family Violence Protection Act 1989* for interpretation of the terms used in s 304B such as the existence of a domestic relationship and what an act of domestic violence is. Under s 11A of the *Domestic and Family Violence Protection Act 1989*, each of the following relationships is a "domestic relationship":

- a spousal relationship;
- an intimate personal relationship;
- a family relationship;
- an informal care relationship.

The *Domestic and Family Violence Protection Act 1989* then also separately defines each of these relationships and associated terms.

Under s 11 of the Act "domestic violence" is defined as certain acts including wilful injury, wilful damage to a person's property, intimidation or harassment, indecent behaviour and threats that a person commits against another person in the context of a domestic relationship.

The new partial defence in s 304B operates in addition to and not instead of other existing defences. The possible use of the new partial defence at trial might well involve circumstances that produce some interplay with other potential defences such as self-defence, diminished responsibility and provocation.

Under the relevant transitional provisions, the new defence is potentially available in respect of trial proceedings where the alleged murder occurred before 16 February 2010 and the prosecution was on foot on that date but also in a prosecution started after that time, irrespective of when the alleged murder happened.

Legal Aid WA generally supports the proposals for reform on this issue proposed in the WA Law Reform Commission report.[14]

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.

NLA 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.

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[14] *Review of the Law of Homicide: Final Report*, Law Reform Commission of Western Australia, September 2007

NLA supports this proposal.

Question 7–11 How can the criminal law best recognise family violence as relevant to a defence to homicide? For example, should family violence be expressly accommodated within an expanded concept of self-defence or should jurisdictions introduce a separate defence of family violence? What problems or issues arise from current models which recognise family violence as relevant to a defence to homicide?

Self defence should be expanded to cover family violence. This will enshrine the way the law has tended to develop but make it clearly accessible.

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).

The situation described in this proposal arises reasonably frequently.

Although the aim of the proposal is supported, it is considered that this is not the appropriate mechanism for the state and territory child protection departments to provide relevant information to the family courts. It is suggested that it is preferable that the family law courts and child protection authorities develop and use Memoranda of Understanding about the exchange of relevant information. Further detail in relation to this proposal and response appears below.

The alternative is for the child protection authority, in circumstances where it considers there is a need for a parent to be protected by an order to protect the child, to bring an application or to enter into a protocol with police for police to bring the application. This would have the effect of making the application a systems response, rather than an action for which the victim is responsible.

In WA s 18(2)(a) of the *Restraining Orders Act1997* enables the child protection authority (Department for Child Protection or DCP) to bring an application on behalf of children at any time, with no requirement that protection proceedings be on foot. There are also hearsay exceptions (s 53E) that make evidence of representations made by children to others admissible, so DCP would not be required to call the children as witnesses.

In practice DCP rarely uses the powers to make applications for protection orders. Legal Aid WA understands that this may be due to a combination of reasons:

- department policy or attitude that mothers should demonstrate their protectiveness by obtaining a protection order;
- lack of awareness of the existence of the provisions;
- staff workloads;
- lack of staff appropriate to make the applications (although case workers could make the application with DCP Legal Services providing representation in the event of an objection to the order being lodged).

From a policy point of view, there are compelling reasons for child protection authorities to apply for a protection order rather than a parent including:

- the parent may be too fearful for their safety if they were to make an application;
- the parent may be safer and there may be less risk of violence/payback if the application is made by and is seen to be made by a government department rather than the parent ;

- based on research as to the impact of ongoing violence on the victim in terms of factors such as self-esteem, co-dependence, and minimisation, it is far more supportive for the child protection authority to have a role;
- it sends a signal to the perpetrator that this is not just a private dispute but that family violence is a public, community safety issue in which the state will intervene, especially where children are involved;
- the requirement for a victim in a family violence situation to apply for an order "or we take the kids" mirrors the abusive environment/relationship with the perpetrator and shows little understanding of the dynamics of domestic violence;
- the requirement for a victim to take out a protection order also reinforces the notion that they are somehow responsible/to blame for the perpetrator's violence.

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.

NLA supports this proposal.

However, there must be processes (including memorandums of understanding with other courts, child protection authorities and the police) to obtain copies of relevant orders. From experience, courts should not rely on self-disclosure. Access to information of this kind will ensure more appropriate decisions.

In Western Australia the Family Court of WA has memorandums of understanding in place with the Department of Child Protection (DCP) and Legal Aid WA in respect of information sharing in relation to child welfare issues and with the Department of the Attorney General, the Magistrates Courts, the Department of Corrective Services and Legal Aid Western Australia in respect of information sharing in relation to family violence issues. These memoranda of understanding are working well, particularly with respect to the Family Court's access to information from DCP and the Magistrates Courts database. DCP

now has an officer permanently located at the Family Court of WA to facilitate the information sharing process.

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.

NLA supports proposal (c) as the court should be informed about existing parenting orders or pending proceedings for such orders. However it is not sufficient to solely rely on the parties' to produce this information. There must be processes (such as memorandums of understanding) in place with family law courts which enable access to data bases to obtain copies of relevant orders.

Please refer to the response to Proposal 8-2.

In practice it seems that the Family Court of WA is making more use of the access to the Magistrates Court database than the reverse, as part of the role of the Family Consultant. It is suggested that that a memorandum of understanding is also required between the Magistrates Court and DCP to ensure that information is available from that agency when applicants seek to obtain ex parte protection orders that seek to protect children.

Question 8–1 In practice, what steps does a police officer who issues a protection order have to take in order to make 'reasonable enquiries' about the existence or otherwise of a 'family law order', pursuant to the *Domestic and Family Violence Act 2007* (NT)? Should this requirement apply to police who issue protection orders in other states and territories?

Police officers who issue protection orders should have to make 'reasonable enquiries' about the existence or otherwise of a 'family law order', but this should not compromise their ability to issue orders in an emergency situation.

Magistrates Courts and family law courts also need to have a process in place to obtain timely access to information about the existence of police issued protection orders. Currently these courts do not have access to that information without the issue of a court order or subpoena. In the case of the Magistrates Courts this means that people who have had police orders issued against them are able to apply for and obtain interim protection orders on an ex parte basis without the facts/details of the police issued protection orders.

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.

NLA supports this proposal but as indicated in response to Proposal 8-2 and 8-3 courts should not rely solely on the parties to disclose this information.

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.

NLA supports proposal (b).

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.

NLA supports this proposal.

Current research indicates that child abuse and family violence should not be treated differently given:

- exposure of children to family violence is very damaging and is in effect a form of child abuse, and
- a greatly increased likelihood of child abuse where there is family violence. In Hester's 2009 research[15] children were present in 55% of the family violence incidents considered in the study.

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?

It is assumed that this Question refers to joint applications for consent orders made in chambers.

Family violence should not prevent parties from being able to reach appropriate agreements, and the court making orders accordingly.

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[15] Hester, M (2009) "*Who does what to whom? Gender & Domestic Violence Perpetrators*." Bristol: University of Bristol & Northern Rock Foundation

Where parties are legally represented we would expect that inconsistency between protection orders and the application for consent orders would not exist.

Legal Aid Commissions have extensive legally assisted family dispute resolution conferencing programs. These programs have screening processes which identify and manage family violence issues as appropriate. There are high settlement rates. Agreements reached at the conferences are usually reflected in applications for consent orders. The Conference Chairperson and lawyers involved will be mindful that the terms of proposed consent orders are not inconsistent with existing protection orders.

We are not sure how often any inconsistency is not addressed in over-all applications for consent orders, eg where parties are not represented.

There is a difference between inconsistencies which have implications for safety and, for example, inconsistencies to ensure the workability of spend time with arrangements by reason of changed circumstances. If the latter have been addressed in the application for consent orders by noting the inconsistency with the protection order and requesting that the family court order prevail, the victim should not required to institute parenting proceedings.

Courts should have an obligation to check for the existence of relevant orders and ensure matters with a background of family violence allegations are properly scrutinised particularly where orders are sought by consent.

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?

Family Courts should be resourced to enable Family Consultants to carry out preliminary risk assessment in children's matters as recommended in the

Family Courts Violence Review[16]. If Aboriginal or Torres Strait Islander people are involved in the case then the involvement of indigenous family liaison officers could be beneficial. Processes must also be put in place to ensure that courts are able to access relevant information from appropriate sources such as child protection authorities, Magistrates Courts and the police. See the response to Proposals 8-2 and 8-3 and 10-7.

Too often when allegations are made, there is no determination of the issue of family violence until trial. The allegation remains denied/contested or the exact nature, extent and seriousness of the family violence alleged are not clear. "Spend time with" arrangements are supervised for a period if the allegations are considered to be serious. If there is no further incident, then, after a few months "spend time with" arrangements can become unsupervised. Alternatively there is supervised handover and possibly unsupervised time if the allegations are not considered to be serious. This often occurs without any examination of the alleged abuser, their behaviour, whether it has been addressed, and the psychological and emotional impacts on the children.

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.

NLA does not support this proposal. Please refer to the responses to Question 8-6, 8-10 and Proposal 8-8.

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

[16] Ibid see footnote 2.

family violence protection order, working in practice? Are any reforms necessary to improve the section's operation?

Yes, in our experience. It is considered particularly important where the parties are unrepresented that judicial officers take sufficient time to explain the inconsistency.

It is also important that judicial officers give consideration to the implications of the inconsistency for the safety of family violence victims and children.

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?

Commission experience is that this section is not generally used.

Consideration should be given to the development of protocols to enable courts to provide this information to each other to ensure that the existence and content of all relevant orders is known.

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 the experience of Legal Aid Commissions, s.68R is not frequently used and not used at all in some places. There is a concern that perhaps some courts making protection orders are not aware of the provision or are reluctant to utilise it.

For example, in NSW protection order forms include prompts about s.68R. The experience is though, that the local courts are not generally utilising the power. The Lismore Local Court is one exception. Concerns are that police prosecutors do not usually raise s.68R in protection order matters and that

Magistrates are unwilling to engage in discussions about existing family law orders. As a result, where applicants are seeking a condition on the protection order relating to the children, Magistrates will stand the matter down and ask the parties to enter into negotiations about a parenting plan. This has led to victims negotiating on family law matters without appropriate legal advice so that they can obtain a protection order that day. NSW police are also being directed by some Magistrates to assist victims to undertake this type of negotiation. This is not considered appropriate.

There is a need for police prosecutors, magistrates, judicial officers and solicitors to be appropriately trained in this area so that the section can be used effectively and appropriately.

Case Study

A mother obtained an interim protection order. The father then obtained a recovery order in a different local court in NSW. At a subsequent appearance in the protection order matter, the mother sought that the recovery order be discharged. The local court took the view that it did not have power under s 68R(4) because the court must not exercise its power to discharge an order in proceedings to make an interim protection order.

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.

NLA supports the proposition that family violence legislation should link to the powers under s. 68 R, and is concerned that this is necessary. See response to Question 8-6, and 8-10.

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

Proceedings for protection orders are often connected to and linked with prosecutions and so the court, specialist or not, needs to be one that can deal with protection orders, parenting orders which would be inconsistent, and prosecutions. There needs to be an integration of an understanding of family violence and family law at local court level. Appropriate education/training will support this.

There is general reluctance in NSW local courts to deal with family law matters and parenting orders. NSW supports the integration of family law and domestic violence in NSW local courts but does not feel that this is best achieved through the introduction of specialist state and territory courts. NSW local courts have the resources and capacity to function as specialist domestic violence courts if the judiciary, prosecutors, and practitioners were given appropriate training and protocols to assist them with this specialist role.

The preferred option is for there to be specialisation to deal with family violence and parenting orders within the existing state and territory court structure, so that rural and regional communities, in addition to communities in metropolitan centres, have access to this service.

There is also strong support for a family law duty service in local courts working alongside Women's Domestic Violence Court Advocacy Services. Many matters would be assisted by such a service.

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.

NLA supports this Proposal.

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?

Generally, yes.

In NSW practitioners are generally reluctant to seek variation of parenting orders because either/both of some magistrates have indicated they are reluctant to deal with parenting issues or because practitioners are concerned that magistrates have little experience or expertise in dealing with parenting issues properly.

The numbers of family law matters listed in the local courts in NSW in many areas has decreased over the years as a consequence of the creation of the Federal Magistrates Courts and Family Relationships Centres and the requirement for parties to file an s 60I certificate. The numbers dropped dramatically in 2009 after the NSW Attorney-General's Department directed chamber registrars not to assist clients with the preparation of family law forms. As consequence magistrates are not acquiring or practicing and maintaining the skills they have in this area.

In South Australia legal practitioners have very little involvement in protection orders. The police obtain these orders and generally maintain conduct of the matter before the court.

In Western Australia many legal practitioners are unaware of the potential to seek variation of parenting orders in the magistrates courts in the context of protection order applications. Some legal practitioners are also influenced by the attitude of some protection order magistrates that anything to do with children is the province of the Family Court and the person should address related issues in that court. This does not take into account the Family Court filing requirements in children's matters (exemption and certificate requirements), documentation, time delays and issues associated with access to the location of the Family Court.

In Tasmania the state courts see their role in making protection order conditions as very different from the parenting issues addressed in Family Court or Federal Magistrates Court. In many respects this is a recognition of the different nature of the business of these courts, the lack of time available to properly consider complex matters in courts that manage a high volume of work which includes a range of other areas of law (criminal & civil). There is also a perceived advantage in keeping the issues separate. Magistrates are generally very reluctant to interfere with the orders of a superior, specialist court that are often complex and refer to other related provisions that must be followed.

Proposal 8–10 The *Jurisdiction of Courts of Summary Jurisdiction (Children) Proclamation 2006* (Cth) should be reviewed to clarify its intended application to magistrates courts in Western Australia seeking to exercise their powers under div 11 of the *Family Law Act 1975* (Cth).

This proposal is supported. Clarification is required to determine whether Magistrates or Justices of the Peace have power to make a protection order that "conflicts" with an existing parenting order. This would depend on whether they have power to revive, vary, discharge or suspend an existing parenting order.

The proclamation provides that on and after 1 July 2006, proceedings in relation to matters arising under Part VII of the *Family Law Act 1975* ("the Act") may not be instituted in, or transferred to, a court of summary jurisdiction in the Perth metropolitan region, other than the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia.

The Proclamation states that it does not apply to proceedings under s 68T of the Act which contains special provisions relating to proceedings to make an interim (or interim variation of) a family violence order. It is unclear why this section has been specified as it is not a power conferring section. The previous Proclamation (1 December 1996) which it revoked as a consequence of the 2006 amendments to the Act specified s 68T, but, following the 2006

amendments, s 68T became s 68R which does provide for the powers of the magistrates court making a family violence order in relation to reviving, varying, discharging or suspending existing orders, injunctions or arrangements in children's matters under the Act. It is possible that the 2006 Proclamation intended to remain consistent with the previous proclamation but did not take into account the fact that s 68T had been amended.

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?

NLA suggests that such an amendment should not be necessary. Appropriate education/training to people working in the family law, family violence, and child protection systems should overcome the concern that this proposed amendment is intended to address.

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?

NLA considers it preferable for the family courts, which are specialists, to make parenting orders, but thinks that state and territory courts should have the power to make parenting orders in those circumstances in which they can revive, vary discharge or suspend such orders, where there are situations of urgency and so the matters of people living in regional and remote areas can be readily addressed. The power should be in relation to interim orders only. These powers should be supported by specialist training in family law for state and territory judicial officers. This specialist training is essential. The situation should be monitored and appropriate resourcing allocated.

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?

Yes, the extent of the difficulty where it exists varies though. In NSW, for example, applicants have practical difficulties in obtaining orders within 21 days if the parenting issue is not dealt with by the state or territory court. Currently, the time frame for an applicant to seek urgent orders from the Federal Magistrates Court, allow the other party to respond and the court to list a parenting matter for an interim hearing and determine the matter would be up to 16 weeks in some registries although Lismore office reports an interim hearing could be listed in the FMC within eight weeks of the protection order proceedings.

It is difficult to suggest a realistic time frame given variations of the time it takes to get heard in the different family law courts. NLA suggests that the general issue of how long it takes to be heard in some locations requires urgent attention. Priority should be given to the court listing matters where s.68R Orders have been made.

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?

NLA has no difficulty with this approach.

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.

Anecdotally, the Tasmanian protocol has not often been used because of the "reasonable excuse" situation and because most of the family violence matters come before the state courts soon after the breakdown of the relationship and well before there are any orders made by family law courts in place. It is also possible that because of the controlling behaviours associated with family violence, victims have not chosen to obtain family court orders to manage their care arrangements.

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.

This proposal is supported. The applicant needs to state why this is necessary so that the court can make an informed decision. It is noted that some events such as Christmas and remarriage can escalate the risk of violence for victims.

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?

Case Study

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

The mother was referred to the duty lawyer service at the Family Court of WA, to make an urgent ex parte application for suspension of the parenting orders which took a number of hours to prepare. The Family Court decided not to hear the matter on an ex parte basis (possibly because the children were in the mother's care) and listed the proceedings for an urgent Case Assessment

Conference some days later. The mother was very fearful that the father would insist on compliance with his spend time with orders pending the Family Court hearing, particularly once he was served with the interim protection order and her family court application. As a consequence, the mother was left with no alternative but to move into a refuge for a week pending the Family Court listing to ensure that she and the children would be safe.

In many cases the exception condition enables protection for victims whilst facilitating the children having a relationship with the defendant in situations where the victim does not have concerns about the safety of the children spending time with the defendant. This is especially the case if each set of orders is made with the other set in mind. Courts should however give consideration as to the appropriateness of inclusion of the condition in the order having regard to the circumstances of the particular case.

Fathers regularly attend on legal aid practitioners for advice about spending time with children after protection order proceedings have been commenced against them. They are often advised to seek this condition in the protection order proceedings in addition to taking steps to seek agreement/orders/ supervised time about spending time with the children.

In NSW this exception is not generally included in matters where there have been serious assaults on the victim. The alternative (number 7 – must not approach or contact by any means whatsoever, except through the defendant's legal representative) is usually imposed.

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).

NLA supports this proposal. This will help ensure consistency across the various jurisdictions. To enable judicial officers to make educated and informed decisions they need to understand the dynamics of family violence and the impact of this violence on victims and their children. Training for State and Territory Magistrates in family law to enable them to appropriately use their powers under the *Family Law Act 1975* is also necessary.

Question 8–14 Should the provisions for resolving inconsistent orders under pt VII div 11 of the *Family Law Act 1975* (Cth) be expanded to include inconsistencies resulting from:

(a) a party's rights or responsibilities under the *Family Law Act* other than those pursuant to an order, injunction or undertaking, such as those deriving from the concept of parental responsibility; and/or

(b) laws other than family violence laws prescribed in reg 12BB of the *Family Law Regulations 1984* (Cth), such as protective bail conditions?

NLA would support this proposal, to the extent that it is about specifying and explaining inconsistencies with other laws or orders relevant to the case.

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?

State and territory processes for obtaining protection orders are simple, quick, and low cost.

Appropriate procedures in the family courts would replicate the efficiency, and effectiveness of state and territory systems, and as well the Family Court of Australia is an inappropriate jurisdiction for applications initiated by the police.

Service and enforcement are also matters to be taken into account.

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).

NLA does not support this proposal.

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?

The experience of Commissions is that a person who needs protection rarely seeks an injunction under the *Family Law Act 1975.* Clients who present with safety issues are currently advised by legal aid practitioners to seek a protection order under state or territory family violence legislation because they are simple, quick and low cost. There is also clarity in relation to service and enforcement.

There may be an issue in relation to maximum duration of orders in some jurisdictions, ie in many cases orders may be limited to one or two years duration.

Case Study

Proceedings were commenced in the Family Court. The father was spending supervised time with children pursuant to court orders. The protection order for the mother's protection was about to expire. The solicitor requested the family court judge to make injunctions to protect the wife. The Judge refused stating that the mother should apply to local court if she wanted further protection. This

suggests that judicial officers are also very aware of the practical limitations of the protection of family law injunctions for some families.

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?

See Response to Question 9-2.

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?

Please refer to our responses above.

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.

NLA is supportive of the proposal on the basis that appropriate education/training in relation to family law and family violence has been provided to state and territory judicial officers, and that consideration of the issues is supported by the provision of relevant documentation from the Family Court proceedings.

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.

NLA supports this proposal.

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?

To the extent that it is relevant to the issues being determined, evidence of violence given in protection order proceedings should be considered in property proceedings. K*ennon & Kennon* (1997) FLC 92-759 is the main authority on family violence and property.

Legal Aid Commissions' core family law business is in relation to children's matters rather than property.

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).

NLA supports this proposal.

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.

NLA supports this proposal.

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)?

Commission experience is that this is a common problem.

Threats are sometimes made by offenders about destroying property or throwing it away. There have been cases of destruction, particularly items of sentimental value and the victim's clothes. There are also issues in relation to motor vehicles.

Often the victim will not have the funds to instruct a private solicitor to pursue the matter, and in any event there may be no cost/benefit to do so. In any application for a grant of legal assistance, cost benefit would be a factor taken into account. It is usually uneconomical to pursue disputes over furniture, white goods, personal belongings and liability for debts in the family courts.

Legal Aid NSW has seen this situation a number of times particularly with culturally and linguistically diverse (CALD) clients, and more particularly first generation CALD clients who have no capacity to represent themselves in property proceedings.

Case Study

The parties were from Iraq. Following family violence the mother and children went to a refuge. When the mother returned to the former matrimonial home (rented accommodation) the father had removed nearly all of their property including the children's bedding, clothes and toys. The mother had no practical legal remedy.

Case Study

The parties were from Iraq. At the date of separation the father took the only significant asset of the parties which was an unencumbered motor vehicle registered in his name. The mother had the care of the children, but no practical legal remedy to seek transfer of the motor vehicle into her name.

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.

NLA supports this proposal. Police should accompany the excluded person who is recovering property.

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?

Generally, it is thought that property of the child should remain/go with the child, although there may be issues in relation to this in the longer term.

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.

NLA supports this proposal where the agreement or order for the division of property could have relevance to the protection order.

Section 19(3) of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) requires the applicant to inform the court of any relevant Family Law Act order, including any orders under the Domestic Partners Property Act 1996.

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.

NLA supports this proposal.

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.

NLA 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.

NLA 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?

NLA would not support such a presumption or limitation on the judge's discretion to weigh all factors. Primary considerations for the court in determining what care arrangements are in a child's best interest include the need to protect the child from physical or psychological harm, from being subjected to, or exposed to, abuse, neglect or family violence and family violence is also an additional consideration the court is to consider under s 60CC(3)(k) and (j).

Case Study

The child was the victim of abuse by the father. The mother was allowed to relocate overseas.

Orders provide for the father to spend time with the child twice a year, up to a week each time, for day only supervised time consistent with the recommendation of the Child and Family Psychiatrist who found the child had need for significant contact with the father. (Child had feelings of guilt associated with breaking up family and child enjoyed time with father).

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?

Relocation cases are usually complex cases that need to be dealt with on their particular facts. The introduction of any specific provisions in relation to family violence and relocation should be approached with caution. Family violence might not be the only relevant consideration in a particular matter.

It may be timely to review the issue of whether there should be specific provisions in relation to relocation having regard to recent case law.

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?

In practice, Commissions are not aware of issues arising from the interaction between protection orders under state and territory family violence legislation and recovery orders for return of a child pursuant to the Convention.

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?

It is suggested that what is important is that the courts making decisions in relation to recovery orders give appropriate consideration to evidence of family violence. As such, a specific provision may not be necessary.

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.

NLA is generally supportive of this proposal.

b) this approach could be problematic in respect of the real effect of the option for the victim to proceed to trial. It is not appropriate to expect victims to force matters on to findings of fact in the state courts where there is an agreement that the necessary protective orders will be made ;

(c) while there is clearly value in the use of safety plans in some situations, any risk that the preparation of a safety plan may delay the process of issuing an order should be taken into account. Questions include who will draft the plan, what training will be provided to the drafter/s and makers, what period of time should plans have to be developed in etc. These matters will need to be addressed in the detail of the proposal.

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.

NLA's view is that undertakings are not an appropriate or effective means to ensure the protection and safety of victims of family violence.

If undertakings are to be accepted all parties should be properly and appropriately informed of the limitations of undertakings compared to protection orders and the lack of consequences of any breach. Specifically, the court should reinforce to the applicant that they have a right to seek a protection order rather than accepting an undertaking.

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

Please refer to our response to Proposal 10-2. If undertakings are to be acceptable, legislation should set out that the court must ensure that conditions (a)-(c) referred to in Proposal 10-2 are complied with.

Procedures will need to be put in place to receive the written undertakings, note the information that was provided to applicants and defendants, and an oral or written response recorded from the victim regarding their understanding of the implications of undertakings.

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?

Victims often return to court seeking protection orders where undertakings have been ineffective and not resulted in any change in the perpetrator's behaviour. Breaches of undertakings do not have any legal consequences and are not dealt with by the court.

Undertakings are, as a matter of policy, not acceptable for clients in the *Safe at Home* system in Tasmania, the reasoning being that if there is no risk, no order is appropriate, if there is a risk, there should be a clearly enforceable order. Undertakings are only accepted by Applicants who have brought their own applications, independent of the *Safe at Home* system. It is understood that if the undertaking is breached and the victim called police, the police may then have sufficient evidence of family violence to themselves charge or obtain an order.

Question 10–3 In practice, do victims of family violence who rely on undertakings to the court from a person against whom a protection order is sought inform federal family courts of the existence of such undertakings during family law proceedings?

The experience of Legal Aid NSW is that victims include information about the undertakings in their supporting affidavits to the same extent they include information about protection orders. LANSW is less familiar with the undertakings being attached to the Initiating Application even though this is requested in Part F of the Initiating Application.

The LSCSA has some concerns that some victims have been advised by some legal practitioners not to raise undertakings. This is not the approach that the Legal Aid Commissions would take. Education/training is required for all participants in the family violence system, including lawyers.

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.

This could be helpful for victims who often think that it is not possible to obtain a protection order unless the abuse is physical or there is damage to property.

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

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

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

The conduct alleged to form the basis of the making of a protection order, should be contained in a sworn document or statement to police.

If the application is being brought in person, then it is essential that assistance to make the application be available, and readily accessible. The relevance of this question diminishes in those jurisdictions where the application is made by the police.

It is noted that women are often required to give a statement when in a highly emotive state at the scene of the incident. The opportunity to provide affidavit evidence at a later date can give the victim the ability to provide further and more detailed information which may be necessary to the application.

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?

NLA supports victims being able to provide the court with written evidence when seeking a protection order.

Advantages of written evidence include:

1. that it can reduce the potential for further/re-traumatisation of the victim by reason of having to re-tell their story in a public forum. If absolutely necessary, the victim can be called upon to attend court to give further oral evidence;
2. particularly if written evidence is prepared by someone with knowledge of the legal system and an understanding of family violence, it can help to ensure that the conduct on which the application is based is presented as concisely as possible, thereby ensuring that the protection order is made as quickly as possible taking account of all appropriate circumstances and requiring the use of less court resources.

In relation to a standard form of affidavit there are some reservations depending on the content of a standard affidavit form as, depending on the detail, it may have the capacity to confuse the applicant and confuse and possibly provoke the respondent when the application form is served.

It is suggested that where this is not already the case that funding should be made available as a matter of priority to ensure appropriate support services for the preparation of necessary legal materials to support the application, including at the court.

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?

See response to Question 10-5.

Section 69ZX(3) of the *Family Law Act 1975* specifically enables a practitioner to apply for the transcript which is prima facie admissible. Aadmitting the transcript into evidence reduces the possibility and extent of trauma for the victim who would otherwise be required to repeat evidence in its entirety.

The timely provision of transcripts of evidence would help. Currently it is not always the case that transcripts can be obtained in a reasonable time frame. This may be a resources issue.

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?

See response to Question 10-8 below.

Question 10–8 How is the requirement in s 81 of the *Domestic and Family Violence Protection Act 1989* (Qld), that a court hearing an application for a protection order should not generally be open to the public, working in practice?

All applications for protection orders are heard in closed court. This works well and is appropriate. There is room for amendments to be made to the *Evidence Act 1977 (Qld) to* allow for evidence by the alleged victim and witnesses to be given by way of video-link or closed circuit television.

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.

NLA supports this proposal. However if the proposal were to be accepted, substantial resources to Legal Aid Commissions would need to be provided.

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

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

It is essential that judicial officers are provided with family violence training to ensure there is no confusion between a vexatious litigant and a victim exhibiting behaviour which is the consequence of violence, for example the type of vacillation that commonly occurs in persons who have been subjected to long term / repeated abuse. Persons suffering Post Traumatic Stress Disorder may appear inconsistent, may fail to follow through, may also 'change their mind'. They are not being deliberately vexatious. Some women make many attempts before they can actually follow an application through to the end.

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.

NLA supports this proposal.

It is considered that too often mutual protection orders are offered as a resolution to the matter at court to appease the defendant without considering the merit of their application. Defendants often rely on cross-applications to further harass and threaten the victim and pressure them into withdrawing the initial application.

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.

NLA supports this proposal.

Where an application is originally a police application, police would need to be informed of any application to vary or revoke the order whether it is by the defendant or the applicant. Currently there is no mechanism within the NSW local courts to ensure police are notified about these applications. There is a mechanism in Tasmania for police to be informed of applications to vary or revoke orders, but only where police were involved in the original application.

Section 25(3) of the *Intervention Order (Protection of Abuse) Act* 2009 (SA) requires the defendant to seek leave of the court and permission is only to be granted if the court is satisfied there has been a substantial change in the relevant circumstances since the order was issued or last varied.

Question 10–10 In practice, are records of proceedings under the *Family Law Act 1975* (Cth) accessible—in a timely fashion—to persons seeking access for the purpose of protection order proceedings under state and territory family violence legislation? If not, are any amendments to the *Family Law Act* or the *Family Law Rules 2004* (Cth) necessary or desirable—for example, to impose an obligation on federal family courts to provide details of injunctions or orders to a state or territory court hearing proceedings under family violence legislation involving one or more of the parties to the family law proceedings?

NLA supports mechanisms for sharing information in these circumstances. NLA notes the facilitation of this process by the MOU in WA, and is of the view that similar protocols would be valuable in other jurisdictions.

Question 10–11 In practice, does the prohibition on publication set out in s 121 of the *Family Law Act 1975* (Cth) unduly restrict communication about family law proceedings to persons involved in protection order proceedings under state and territory family violence legislation, including police who enforce such orders? If so, are any amendments to s 121 necessary or desirable?

No. Please refer to s. 121 (9) (a).

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

NLA suggests that this proposal requires very careful and detailed consideration by, and consultation with, service providers.

Family Dispute Resolution (FDR) encourages and allows parties to raise matters on a confidential basis and to discuss options for settlement on a without prejudice basis outside court processes. There are real concerns that any dilution of the confidentiality and inadmissibility provisions as drafted will make FDR less effective and attractive.

While FDR is allowing many families to resolve matters out of court, it is still the case that many clients with complex issues are resolving their matters through the family law courts. While all parts of the family law system wish to minimise the re-interviewing of victims of family violence, the provision of more detailed information by a Family Dispute Resolution Practitioner (FDRP) may bring a wide range of risks both to the confidentiality of the process and more specifically to victims of family violence. It also does not remove the need for ongoing screening.

Adequate resources need to be provided to the family law courts for screening and assessment (as recommended in the Chisholm Review) and for timely and appropriate determination of these matters, rather than diluting the current confidentiality of the FDR process. Screening and assessment should be carried out in the court context because of the requirement for transparency of the court process and the opportunity to test and review the evidence. This cannot be replaced by the use of the untested screening and risk assessments of FDRP's and Counsellors.

It is understood that there is some concern that family law courts may not be taking into account the different categories of certificates that issue from FDR. Any such concern could be addressed by ensuring appropriate education of registry staff, family consultants, and judicial officers to facilitate their consideration of the need for screening and risk assessment in circumstances where a (b) or (e) certificate has been issued. This may also be appropriate in some circumstances where an (a) certificate has been issued. For example, it is possible that an "a" certificate could issue where the other party did not attend dispute resolution because of a history of family violence, and may/not have disclosed this to the dispute resolution organisation. An option that it might be appropriate to consider is that of amendment to categories (b) and (e) so that the "not appropriate" certificates could include an optional alternative clause such as "I recommend that the court conduct screening and risk assessment in this matter" which would draw the Court's attention to the existence of issues such as family violence as a factor for consideration in their case management process.

Recommendation 8.1 in the Family Law Council "*Improving Responses to Family Violence in the Family Law System*" Report, December 2009 was that an options paper be prepared to consider the advantages and disadvantages of FRCs and FDRPs having some responsibility to provide to the federal family courts any information about family violence or any other related issue disclosed during an intervention. NLA supports further detailed consideration of all the legal and social implications of the provision of such information.

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

Please refer to the response to Proposal 10-7 above.

If Proposal 10-7 were to be implemented then the information should only be used for screening, and risk assessment.

The screening and risk assessment requirements for appropriate case management is an issue for the court and will depend on the issues raised by the parties in the proceedings.

Screening for family violence must be an ongoing process through all stages of the proceedings. It is not sufficient to rely on assessments made by FDRPs and the information placed on certificates as a result of their assessment.

Question 10–13 Are the confidentiality provisions in ss 10D and 10H of the *Family Law Act 1975 Act* (Cth) inappropriately restricting family counsellors and family dispute resolution practitioners from releasing information relating to the risks of family violence to:

(a) courts exercising family law jurisdiction; and

(b) state and territory courts exercising jurisdiction under family violence legislation?

It is suggested that the current circumstances in which certificates (b) and (e) are issued potentially flag risk issues for parties and the court of violence and child abuse. NLA currently inclines to the view that the existing provisions are adequate, however we note Recommendation 2.5 and the discussion in relation to that recommendation in the Family Courts Violence Review.[17]. Please also refer to our response to Proposal 10-7.

[17] Ibid ppp. 76-80

The issues associated with provision of information from family counselling and FDR, including what should be accessed and the purpose for which it should be used are complex. They should be explored in joint consultation with relevant stakeholders to ensure that the extent of the existing powers are understood, and so that all issues and appropriate solutions are identified so as to ensure that the court is well placed to make appropriate decisions at an early stage.

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

NLA supports this proposal.

Counsellors and FDRPs should ensure appropriate/immediate warm referrals to other services including police, crisis support services, and legal assistance.

Proposal 10–9 Sections 10D(4)(c) and 10H(4)(c) of the *Family Law Act 1975* (Cth) should permit family counsellors and family dispute resolution practitioners to disclose communications where they reasonably believe that disclosure is necessary to report conduct that they reasonably believe constitutes grounds for a protection order under state and territory family violence legislation.

In relation to family dispute resolution, this should only apply where the conduct constituting grounds for a protection order arises during the family dispute resolution, i.e. not to communications about past instances of conduct constituting grounds for a protection order. See also comments above regarding these sections.

Question 10–14 Should there be any other amendments to ss 10D and 10H of the *Family Law Act 1975* (Cth) enabling the release of any other types of information obtained by family counsellors or family dispute resolution

practitioners? For example, should the legislation permit release where it would prevent or lessen a serious threat to a child's welfare?

Please refer to our responses to Proposal 10-7, Question 10-13.

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

NLA has reservations about this Proposal and considers that joint consultations of relevant stakeholders is required on this issue, as indicated in our response to Question 10-13 above. NLA also notes Recommendation 8.2.1 of the Family Law Council - Family Violence Committee's report *An advice on the Intersection of Family Violence and Family Law Issues*[18] that s 10E(2) be amended to enable the admission into evidence of disclosures made by an adult or child that a child has been exposed to family violence. It may be that consideration should be given to whether disclosures made by children should be treated differently to disclosures made by adults particularly having regard to the increasing number of organisations running child-inclusive mediations.

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

Please refer to the response to Proposal 10-10

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

[18] Ibid p14.

Please refer to the response to Proposal 10-10. In principle any amendments to the confidentiality/admissibility provisions should also apply to state and territory courts when they are are not exercising federal jurisdiction.

Question 10–17 In practice, do prohibitions on publication in state and territory family violence legislation unduly restrict communication about protection order proceedings which may be relevant to proceedings in federal family courts?

Not in our experience.

Question 10–18 Should prohibitions on publication of identifying information about adults involved in protection order proceedings under state and territory family violence legislation be modified in one or more of the following ways to

(a) require the prohibition on disclosure to be activated by a court order;

(b) impose a requirement that the disclosure of identifying information must be reasonably likely to expose a person to risk of harm as a precondition for a court to issue an order prohibiting publication; and/or

(c) include an exception to prohibitions on publication for disclosure of pleadings, transcripts of evidence or other documents to police or other persons concerned in any court proceedings, for use in connection with those proceedings—for example, the exception set out in s 82(3)(a) of the *Domestic and Family Violence Protection Act 1989* (Qld)?

NLA's view is that there should be general prohibition in relation to publication of identifying information about adults involved in protection order proceedings under state and territory family violence legislation, with specific exceptions about use in related court proceedings, enforcement and implementation of orders. There could also be general provision to make application to court for publication in the interests of justice.

The prohibition should not prevent victims or victims' supports from explaining why assistance or special consideration is being requested (eg at schools, hospitals etc where the principals/staff often assist in ensuring safety in those contexts, and need to have a copy of any orders and an understanding of what

is said to have occurred) or proper approaches to witnesses and explanations of the reasons for seeking something (a possible example being asking for copies of documentation from a real estate agent who evicted a couple after complaints of noise, because the noise in question was the offender yelling at and verbally abusing the victim, evidence which could assist in proving the existence of family violence).

Question 10–19 Are there any situations in which state and territory family violence legislation should require courts to provide details of protection order proceedings or orders to federal family courts?

State and territory family violence legislation should require courts to provide details of protection order proceedings or orders to federal family courts in circumstances where there are existing parenting orders in place, pending parenting order proceedings or it is apparent that the making of the protection order will have implications for the care arrangements of a child of the relationship between the applicant and the respondent to the order.

Information sharing protocols should be utilised (see also response to Proposal 8-3).

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

(a) protection order proceedings under state and territory family violence legislation; and/or

(b) family law proceedings in federal family courts?

Please refer to our answers to Questions 10-17 and 10-18.

It is unclear whether impediments to information sharing are based on mis/interpretation of the legislation or policy considerations or a combination of both. A particular area of concern is information sharing between the state and territory child protection authorities and the federal family courts in some places.

Relevant information to the issues in dispute should be available through information sharing protocols, memoranda of understanding and subpoenas.

In some places concern has been expressed in relation to access to information held by child protection authorities. It appears that if the information held does not meet the child protection authority's thresh-holds for a child protection concern then that information is considered confidential by the child protection authority, and the consequence of that is that relevant information about a child's welfare is not available to the federal family courts. It is suggested that this is an issue that requires immediate attention in the jurisdictions concerned. It is also noted that a requirement for Independent Children's Lawyers to issue and serve subpoenas, rather than using protocols and MOUs, has an adverse impact on the financial resources of Legal Aid Commissions. The funding which it is currently necessary to expend to get this information could otherwise be used to assist more people.

Proposal 10–11 Legislative privacy principles applying to the use and disclosure of personal information by Australian Government and state and territory government agencies should permit use or disclosure where an agency reasonably believes it is necessary to lessen or prevent a serious threat to an individual's life, health or safety, as recommended by the ALRC in the report *For Your Information: Australian Privacy Law and Practice* (ALRC 108).

NLA supports this proposal.

Proposal 10–12 State and territory family violence legislation should authorise agencies in that state or territory to use or disclose personal information for the purpose of ensuring the safety of a victim of family violence or the wellbeing of an affected child.

Please refer to the response to Proposal 10-13 below.

Proposal 10–13 Information-sharing provisions introduced pursuant to Proposal 10–12 should permit disclosure to, at least, relevant government officers in other jurisdictions and federal, state and territory court officers.

In principle, NLA supports proposals 10-12 and 10-13. Care will however need to be taken in relation to this approach. For example, the Legal Aid Commission of Tasmania is an agency involved in the family violence response, but the client's legal privileges are important in this context. The privileges are not entirely unqualified, and there is the proper exception if an offender makes threats to harm someone. There may be other bodies involved in a systems response to family violence to which information should be released in certain circumstances.

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

NLA supports this proposal subject to proper agreements about identifying what information and identifying the requirement of the other party/body to have access to it.

The case study below illustrates the need for appropriate information sharing arrangements.

Case Study

The father and the mother had been living in a de facto relationship and had two children, a pre-schooler and a baby that was still breast fed. The mother was from overseas, with no family in Western Australia. Her ability to speak English is good.

There was a history of domestic violence (physical, psychological, emotional and financial) by the father towards the mother, and both the police and DCP (Crisis Care) had records of contact with this family.

The mother left the family home whilst the father was at work and moved into a refuge with the children. The father made contact with her on the mobile phone and persuaded her to meet him, with the children, and to return home.

Before meeting the mother and the children, the father went to the Perth Magistrates Court and obtained an ex parte protection order protecting him and the children from the mother. There is no information available as to what the father alleged to obtain the order.

The mother's evidence is that the father collected the mother and the children and drove them at speed to a remote location. The mother and the children were very frightened by his behaviour. He told the Mother that he had obtained the VRO and that he was going to drive her to the police station. The Mother tried to call the refuge from her mobile phone to let them know what was happening. The father pulled off the freeway into the emergency lane and assaulted the mother, took the mobile phone and destroyed it. The children were crying in the back of the car. The father would not let the mother touch them or feed the baby. The assault, documented by a hospital, caused bruising to the mother's cheek and one side of her body.

The father drove the car to the home of his mother and called the police. The police served the protection order on the mother, refused to allow her to feed the baby and drove her to an accommodation service. Her attempts to explain what had happened had no influence on the officers, despite the obvious bruising to her face and her distress.

The mother made her own way to the hospital where she was treated for her injuries and received support from the Migrant Advocacy Service to return to the Refuge and to seek legal advice. She consulted the Legal Aid WA Domestic Violence Legal Unit and was referred to the duty lawyer service at the Family Court of WA to apply for an ex parte recovery order for the children. She was very distressed and explained that the police had refused to do a welfare check on the children for her as the protection order indicated that she was the perpetrator of the violence.

The mother was successful in obtaining an ex parte recovery order including a provision to the effect that the orders made in the Family Court were to apply to the extent of any inconsistency with the VRO. The DCP check (using the MOU) confirmed the history of family violence by the father.

The mother took the recovery order and copies of her Family Court documents to the local police station and asked them to recover the children. The police refused because of the existence of the protection order.

The mother then went to the police station closest to the refuge and provided them with copies of the recovery order and the other Family Court documents and explained what had happened. The police explained to the local police that they had no option but to execute the order. The mother returned to the local police and after some reluctance and a telephone call to DCP (who confirmed that executing the order was appropriate) the police executed the recovery order.

Proposal 10–15 A national protection order database should be established as a component of the Australian Government's commitment to the implementation of a national registration system for protection orders. At a minimum, information on the database should:

(a) include protection orders made under state and territory family violence legislation as well as orders and injunctions made under the *Family Law Act 1975* (Cth); and

(b) be available to federal, state and territory police officers, federal family courts, and state and territory courts that hear protection order proceedings.

NLA supports this proposal.

Question 10–21 Is there any other information which should be included on, or are there any other persons who should have access to, the national protection order database, over and above those set out in Proposal 10–15?

No.

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?

Please refer to our response to Proposal 10-7.

Legislation may assist, but is not enough on its own. Training about the dynamics of family violence and the necessity for victims to access legal advice and assistance should be part of continuing and, where applicable, ongoing accreditation requirements for all relevant professionals and workers in the family law system.

NLA supports the comments made by ALRC in paragraph 4 on page 143 of the Consultation Paper Summary regarding further inter-disciplinary training for family lawyers. Training should be ongoing for all participants in the family law system, including those working in Family Relationship Centres and other mediation services to improve their understanding of the need to identify the victims of family violence and arrange warm referrals for legal advice and assistance, and in appropriate cases for legally assisted family dispute resolution.

Case Study

Prior to seeking legal advice, a mother who was a victim of family violence with very young children went to mediation with an accredited service. There was a Police Family Violence Order in place, which was disclosed to the service. A Parenting Plan was signed after mediation to the effect that the father would spend time with the children in the mother's residence three times per week. The mother alleges that the father used that time to check whether she had anyone else at the house. During a visit he assaulted her, resulting in injury, damage to property and criminal charges. The children were present.

The mother then sought legal advice and said that:

- as far as she was aware, no screening or risk assessment was done prior to the mediation;
- she was not given any support or options about how to address the issues of imbalance of power. To the best of her recollection, she was not given the option of separate rooms, nor was it recommended that she seek legal or child-focused information before the conference;
- it was her impression that the mediator was also intimidated by the father, and appeared to be trying to appease him;
- the mediator did not provide equal opportunities to speak for each of them, and when the father became aggressive (expression, anger, glaring, sulking, fidgeting, agitation, loud tone, etc) the mediator did not intervene;
- the mediator drew up an agreement that the father come to the home despite the mother's objection. She said that she signed the parenting plan at the end of the conference feeling that she had no choice. She says she felt 'intimidated and hopeless';
- the mother says that the children were present during the mediation.

The mother provided instructions to write to the service and raise these issues. The mediation service responded in a letter which only acknowledged that some comment on their service had been received. If any of the issues she raised are an accurate reflection of what occurred, this is a matter of concern. The mother is now worried that she will have to explain why the agreement was reached.

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.

NLA supports this proposal. There is also a need for such training and support beyond the legal sector. The recent tender by the Attorney-General's Department for the development of a multi-disciplinary training package in relation to family violence is noted.

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.

NLA supports this proposal in principle.

Many family dispute resolution service providers already adopt well–developed screening and risk assessment frameworks and tools.

It is understood that the Attorney-General's Department may release a tender for the development of a common screening and risk assessment tool.

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.

NLA supports this proposal.

Collaboration, cooperation and training should be ongoing for all participants in the family law system.

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.

NLA supports this proposal subject to the matters raised in response to Question 11-3.

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

No, but the definition of family violence in s 4 of the *Family Law Act 1975* should be amended to be consistent with the model definition. See also comments at Proposal 4-23.

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

Legal Aid Commission Family Dispute Resolution conferencing programs use intake and screening processes which identify whether protection orders exist or have been sought, and these are taken into account when assessing the suitability of the matter for mediation, the management of the mediation, and resulting agreements.

Courts and magistrates, in making both interim and final protection orders, should make clear whether they have turned their mind to the appropriateness of parties attending family dispute resolution, not merely either including or excluding the exception clause permitting parties to attend family dispute resolution. Where the clause is not included, courts should make clear that they have considered the nature of the dispute and have made an order excluding family dispute resolution. Family law courts would still be able to refer such matters back out to family dispute resolution where appropriate after conducting risk assessment and making any urgent, interim orders.

NLA supports an election option in this regard but ultimately the court or Magistrate should consider this aspect regardless of the election being exercised.

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.

Please refer to the response to question 11-3.

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?

The use of alternative dispute resolution mechanisms in protection order proceedings should be approached with caution.

In Tasmania, State Courts hearing protection order proceedings can and do order that matters go to mediation with that court's dispute resolution service. As that dispute resolution service commonly deals with the general run of civil issues (although it also operates dispute resolution in child protection proceedings, which has considerable overlap of issues with family violence matters), the level of family violence expertise varies greatly across the Court-provided chairpersons of those meetings. Not all participants are legally assisted. There is also a varying degree of recognition amongst judicial officers of the issues of imbalance of power and therefore sensitivity to appropriateness or otherwise of mediation.

In WA, there is no provision under the WA legislation for ADR to occur in protection order proceedings. Anecdotally, it may have occurred in one or two regional courts at the initiative of the Magistrate. There is insufficient data or evaluation to comment on its success or appropriateness.

If mediation processes are to be used there must be appropriate screening and assessment processes to ensure that referrals are appropriate. The mediators would need to be trained to understand the dynamics of family violence and to manage the mediation in this context.

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

It is suggested that State/Territory and Commonwealth government funding for appropriate pilot programs to be trialled and evaluated is required.

For example, state funding has been provided to Legal Aid WA to conduct a pilot Signs of Safety child dispute resolution program during 2010 in conjunction with the Perth Children's Court, the Department for Child Protection (WA) and King Edward Memorial Hospital for Women. This pilot involves 100 lawyer assisted meetings and includes a combination of pre-court application meetings for pregnant women in the care of the Department or who already have a child or children in the care of the Department, together with matters referred to post-court application pre-hearing conferences.

Communication and collaboration between the key stakeholders involved has improved immeasurably since the pilot commenced at the end of 2009.

A similar program is underway in Victoria in collaboration between Victoria Legal Aid, Department of Human Services (Vic), Department of Justice (Vic) and the Children's Court (Vic) following the report of the Victorian Task Force into Child Protection, following the Victorian Ombudsman's Report into Child Protection dated 27 November 2009.

The Legal Aid Commission of Tasmania notes that for alternative dispute resolution to work well, and in particular to have an impact on communication and collaboration in child protection matters:

- parents need to have legal assistance, as victims of family violence have often been threatened with what will happen at court, and are untrusting of systems. This is an acute funding issue at present for the Legal Aid Commission of Tasmania;
- the workers for the Department who are present need to have the authority to reach agreements at the conference, rather than needing to go back to the Department for sign-off;
- the presence of other support services and professionals, eg psychologists working with the family is likely to assist (whether for all or only part of the mediation);

- the issues and steps that would need to be taken by the parents to address the risk issues need to be clearly defined, and consistent messages given to parents by the Departmental workers about acceptable and unacceptable behaviour;
- where there are issues of family violence, facilities such as separate rooms and other ways of allowing both parties to participate in the mediation without causing the victim fear/trauma need to be made available;
- follow-up, whether by correspondence or in a further conference needs to occur (the availability of resources for additional conferences can be an issue);
- departmental workers and chairpersons should have education and training in relation to issues of family violence, including the impact of the conduct on victims and children, as it can be very difficult to work with people who have suffered considerable damage. Where that damage is 'historical', the ongoing effects are often not recognised, and the victim's often over-compliant or exceedingly angry responses can result in problematic assumptions or outcomes.

Efforts are necessary to try to address the issue of the 'disappearing perpetrator' - frequently, the perpetrator is not present at or involved in the child protection process, or engaged in services at all.

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

Yes.

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?

NLA can see the potential for restorative justice practices in appropriate cases, but great care would need to be taken in identifying these. It is suggested that this is a matter which might best be considered further at a future point in time, and after there is a wider understanding of the dynamics of family violence.

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?

NLA considers that offences against children for abuse and neglect should be contained in general criminal laws.

Our experience is that prosecutions are not often brought under the child protection legislation.

Child protection authorities should have collaborative working arrangements with the police to ensure that offenders are prosecuted in appropriate circumstances.

Question 13–2 In practice, what issues, if any, arise from the way in which the offence provisions are currently drafted?

See the response to Question 13-1 above. No issues are raised.

Question 13–3 In those jurisdictions where the same conduct may give rise to an offence under both child protection or criminal legislation, what factors are taken into account in practice when determining whether to bring an action against an alleged offender under child protection or criminal legislation?

In our experience prosecutions are not usually brought under the child protection legislation.

Question 13–4 What range of penalties should be available to courts for offences under child protection legislation?

Please see the response to Q. 13-1.

Depending on the nature of the offence the full range of penalties (including diversion to relevant programs to address associated issues, such as family violence, drug and alcohol abuse) up to and including imprisonment should be available.

Question 13–5 In practice, what range of penalties are most regularly imposed, and if conditional, what are the most usual conditions imposed by the court?

Please see the response to Q. 13-1 above.

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

It is appropriate for the police to make a notification if a child is present in the household or is observed to be exposed to violence or the aftermath.

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.

Proposal 13–2 State and territory child protection legislation should also provide that the exemption in Proposal 13–1 does not apply unless a senior officer of the law enforcement agency to which the disclosure is made has certified in writing beforehand that:

(a) obtaining the reporter's consent would prejudice the investigation of the serious offence concerned; or

(b) it is impractical to obtain the consent.

Proposal 13–3 State and territory child protection legislation should define law enforcement agency to be the police force of the relevant state, the Australian Federal Police and the police force of any other state and territory.

Proposal 13–4 State and territory child protection legislation should provide that the person or body that discloses the identity of a reporter—or the information in a report from which the reporter's identity can be deduced—should notify the reporter of the disclosure unless it is impractical to do so, or would prejudice the investigation of the serious offence concerned.

Proposals 13-1 to 13-4

To the extent that this is not provided for in individual jurisdictions (and we believe that generally it is), NLA supports this proposal. There is a need to provide appropriate training to the relevant agency staff. In addition to factors of impracticality, and prejudicing investigations, the safety of the person disclosing the information about identity must also taken into account.

Question 13–7 In practice, are the inter-agency protocols and memorandums of understanding between key agencies involved in child protection—such as the police and child protection agencies—effective to ensure that professionals in each part of the system understand the consequences of their actions for other parts of the system?

Commissions have Memoranda of Understanding or informal agreements about exchange of certain information with child protection agencies and Independent

Children's Lawyers (representing the interests of children in proceedings under the Family Law Act).

A Memorandum of Understanding is in place between the Family Court of WA, the Department for Child Protection and Legal Aid WA (to the extent necessary to make decisions in relation to grants of aid and to facilitate the work of Independent Children's Lawyers / Child Representatives) to facilitate information sharing in the best interests of the children, the subject of family law and child protection proceedings and their families.

This MOU is working very effectively notwithstanding current serious Family Court funding and resourcing issues and could be a model for the development of similar protocols in other jurisdictions.

To facilitate the operation of the MOU, DCP has located a DCP worker at the Family Court. The worker represents the values, practices and concerns of DCP in problem solving and client management processes, increasing the court and DCP's knowledge and understanding of each other, their respective roles and their shared responsibility for the welfare of children.

The development of a similar MOU between the Magistrates Courts and child protection authorities would be of great benefit in ensuring the safety of victims of violence and their children, as would an MOU between the Family Courts and the Children's Courts to ensure streamlined and seamless processes for the transfer of relevant information between these Courts.

Case Study

The Mother had two older children from a previous relationship and a preschool child from her relationship with the father who were all living with her. The mother alleged that there had been a significant history of domestic violence in the relationship. The mother came to the Legal Aid duty lawyer service at the Family Court of WA on a Friday morning seeking urgent parenting orders, as she was afraid that the father would try to remove the three year old from her care.

From the history, the mother was advised that her priority should be obtaining a Violence Restraining Order (VRO) protecting herself and the children from the magistrates court. The mother made an ex parte application for a VRO protecting her and the children. The application was granted in respect of herself and the two older children, but not the preschool child of the father. The court advised her that her application in relation to that child could not be granted as the father had earlier obtained a VRO protecting him and the three year old from the mother.

The mother was very concerned, as the parties did not have family in Perth, the father had passports for him and the child and had threatened to take the child overseas to his family when they separated. She was afraid that she would be served with the VRO over the weekend, the child removed from her care and placed with the father and that the father would then leave Australia with the child.

The duty lawyer service assisted the mother to make an ex parte application for parenting orders and an order restraining the father from removing the child from her care and from the Commonwealth of Australia. The MOU with Magistrates Court (MOU between the Family Court of WA, Department of the Attorney-General, Magistrates Court, Corrective Services and Legal Aid WA in relation to the sharing of information in relation to family violence) was used to obtain the details of the VROs against the mother (as she hadn't been served) and the MOU with DCP was used to obtain information concerning the history of the contact of the family with DCP.

The DCP officer at the court confirmed the family violence history and expressed concern that the father appeared to be trying to use agencies such as DCP and other authorities (the courts) to further harass and intimidate the mother. Parenting orders and injunctions were granted on an ex parte basis in favour of the mother with the Family Court Orders to prevail to the extent of any inconsistency with the VRO.

The Western Australian MOU:

(i) articulates a shared vision for the parties - that their aim in the fulfilment of their duties, is to provide **the best possible outcomes for children** as

opposed to the narrow focus of the "protection" of children which has the potential to limit cooperation in respect of information sharing to those children that meet child protection authorities thresholds in respect of protection concerns;

(ii) commits the parties to share information and resources as far as is practicable and permissible pursuant to provisions of their legislation in individual cases where to do so would achieve this aim;

(iii) commits the parties to distributing the MOU and to ensure that information and training is provided to staff of their agencies to ensure the workability of the arrangements;

(iv) commits the parties to meeting regularly to monitor the operation of the MOU and to address any case management issues that are identified;

(v) maximises the ability of the court to make timely, informed decisions in respect of the care arrangements for children including provision for collaborative case discussions with DCP in respect of shared clients including the potential for DCP to intervene in family court proceedings when child protection concerns arise so that there is a "one court" approach to the management and determination of these matters;

(vi) minimises the resource implications associated with information sharing including:

(a) information to be shared electronically where possible and practicable, including arrangements for DCP to provide Family Courts with an email notification of the fact that they have relevant information about a family in circumstances where the authority believes that a family member is intending to commence Family Court proceedings or becomes aware that such proceedings are on foot;

(b) processes facilitating information sharing with the ICL including the opportunity to inspect the files of DCP;

(c) "pre section 69ZW Orders" which enable the ICL and/or Family Consultant to identify relevant reports/assessments which have already been prepared in respect of the family so that s 69ZW Orders can be made specifying the documents to be produced, limiting the need for a subpoena to be issued for the DCP files;

(d) subpoena to be served electronically following the use of arrangements referred to in (b) and (c) where practicable not requiring the expense of service fees or the provision of conduct money (as happens in other jurisdictions at considerable cost to Legal Aid Commissions);
(e) processes in respect of the report to be provided (or not provided) by DCP in response to Form 4 Notifications depending on the nature of the Notification;
(f) processes for ex-parte recovery order applications which enable DCP to communicate information limited to whether there is reason to be concerned about proceeding to determine such an application in the absence of the other party and/or information from DCP.

The individual case management processes available for children's matters in the Child Related Proceedings Program of the Family Court are not available to families living in regional Western Australia which limits the effectiveness of the current MOU with DCP. The current funding and resource issues of the Family Court of WA may also have implications for the operations of this program in the future. It is considered that families in regional areas of all states and territories should have access to programs which incorporate individual case management of children's cases, particularly where there are child welfare concerns.

In NSW, there is a Memorandum of Understanding between the NSW Department of Community Services and Legal Aid NSW about the provision of information to Independent Children's Lawyers (employed by LANSW) in relation to children. The MOU has assisted professionals to a limited extent to understand each other's work and its consequences, but there is room for improved cooperation.

From the perspective of the Legal Aid Commission of Tasmania the difficulty is when the interface is between state agencies i.e. police and child protection agencies, and a federal jurisdiction. Although there are protocols and

memorandums of understanding they are cumbersome. There are issues in relation to restrictions on the information that can be provided and time frame.

Question 13–8 What legal changes are required to facilitate effective relationships between agencies to ensure that evidence is obtained in a way that is appropriate not only for child protection purposes but also for family law purposes?

It is suggested that in WA, in the short term, there is the potential to utilise current jurisdictional arrangements, and the single state Family Court for family law matters to pilot and evaluate an integrated approach towards the management of children's matters (family law and child protection) in circumstances where there are child welfare concerns that involve family law (private law) and child protection (public law) issues.

Section 36(6) of the *Family Court Act 1997* provides that, where a child the subject of proceedings (between separating parents or parents and extended family members) appears to be a child in need of protection within the meaning of the *Children and Community Services Act 2004,* the court has, in relation to the child, in addition to the powers conferred by the *Family Court Act 1997* all of the powers of the Children's Court.

This pilot would assist the Commonwealth to determine the benefits of developing and implementing a unified family law/child protection court to manage all cases involving the welfare of children. It would also inform the design of associated infrastructure and court processes, with the same judicial officers able to determine both private and public family law matters. Such an initiative, utilising the same judicial officers to determine both private and public family law matters, would overcome the challenges for families that have been identified and would be consistent with the recommendations made by NLA to the FaHCSIA Discussion Paper "*Australia's Children Safe and Well" A National Framework for protecting Australia's Children.*

NLA suggests that the confidentiality provisions contained within state child protection legislation need to ensure that information is available to the federal family law courts.

Question 13–9 Should child protection legislation be amended to require police to consult with the child protection agency before deciding to investigate an alleged offence against a child where the child is suspected of being in need of care and protection?

NLA consider child protection authorities and the police have different, but complementary, roles in respect of the protection of children. Police should be able to proceed to investigate offences on the basis that they will ensure that the relevant evidence collected is available to the child protection authorities and the authorities will provide information to the police as appropriate.

In WA DCP workers are co-located with police who respond to family violence incidents. This facilitates the information and evidence sharing referred to in the response to this question.

Question 13–10 Should child protection legislation be amended to require police to consult with the child protection agency before initiating proceedings in relation to an alleged offence against a child?

See response to Question 13-9.

Proposal 13–5 States and territories should ensure that best practice features of collaborative models of child protection are adopted, including:

(a) legislative provisions that allow agencies (including federal agencies) to share relevant information about children and families to make accurate assessments of the needs of children and families and to ensure that appropriate programs relative to those needs are delivered in a timely and coordinated way;

(b) the establishment of a shared database which contains basic information about a child or family and that authorised agencies can access to see

quickly which other agencies may be dealing with a particular child or family; and

(c) the development of guidelines to assist agencies to clarify their respective roles and functions, to assist them when performing functions under the legislation, and to assist them to resolve any issues that may arise.

NLA supports this proposal. See also response to Question 13-7

Question 13–11 In care proceedings under child protection legislation, where final orders are pending, should children's courts in all states and territories be given power to make protection orders in favour of the child who is the subject of proceedings before it, where the court considers a protection order necessary to protect the child from serious harm arising from the child's exposure to family violence?

Yes. Protection orders can be used to maintain the child in the home but to remove the alleged perpetrator of violence. The court may be more inclined to allow a child to remain in the home if there is a criminal sanction available in the event of the breach. It also means that the onus will not be on the victim to seek out a protection order to protect themselves and the children in circumstances where they may not have the capacity or resilience to do so. Further, it makes the victim less likely to suffer recriminations for initiating a protection order and means that parallel proceedings will not have to be conducted in the local court and children's court, which only adds further pressure to the victim.

Question 13–12 Should a children's court be able to make protection orders in favour of siblings of the child who is the subject of care proceedings before it? If so, should it be able to make such an order of its own motion or should it be by application by a party to the proceedings or an advocate for the child?

Yes, and including by own motion.

Proposal 13–6 State and territory child protection legislation should be amended to allow a court, in the exercise of its criminal jurisdiction where a child or young person who is a defendant before it, to refer a matter to the child protection agency for investigation where it considers that there are legislative grounds for a protection application, or an application for a therapeutic treatment order, to be made.

NLA supports this proposal in relation to each of protection applications and therapeutic treatment orders. The court should provide the reasons for the referral and details of what other services have been, or will be, involved with the child as part of the juvenile justice system.

A major systems failure is the gap in proper remedial and support services for young people. It is hard for young people to get long-term treatment when they have entrenched problems outside the threshold requirements for services from Mental Health facilities (typically drug overdose issues, drug induced psychosis, suicidal or homicidal behaviour). Effectively this means young people fall between the gaps and are unable to access services, particularly residential treatment services.

Clear guidelines are required for Juvenile Justice and child protection authorities in respect of accommodation placements and family reunification options for children who are appearing before the courts and require bail. Referrals need to be the subject of assessment and management as part of the sentencing process and lawyers providing representation for children in these circumstances should be able to attend case planning meetings with or for the child as appropriate. This is particularly important in cases where children have become homeless as a consequence of parental applications for Violence Restraining Orders against them.

Resource intensive programs such as *Alta One* in Western Australia have been used for a number of young offenders, with some success. Consideration should be given to the expansion of its availability, notwithstanding the associated expense. The program demonstrates that successful and relatively

timely outcomes can be achieved if sufficient resources are provided. Unfortunately, programs of this kind are usually considered a “last resort” and not first instance strategies.

Proposal 13–7 State and territory child protection legislation should require the child protection agency to provide, within 21 days of the referral, a report to the court setting out the outcomes of its investigation into the matter, and specifying whether a care and protection order or a therapeutic treatment order is being sought, or if the investigation reveals that such an order is not warranted.

NLA supports this proposal, noting that child protection authorities would need to be adequately resourced to respond within the period specified given the challenges they already experience in complying with time frames in relation to completing tasks in the child protection jurisdiction.

Proposal 13–8 A court exercising care jurisdiction under state and territory child protection legislation should have a power to refer its concerns for the safety of other children or siblings of the child or young person the subject of care proceedings before it to the child protection agency for investigation, and to require the child protection agency to furnish it with a report of its investigation within a certain time period specified in the legislation.

NLA supports this proposal.

Question 13–13 In practice, when sentencing young offenders, how often does the court request information held by the child protection agency about the offender to be provided to it?

Information is requested by Children’s Courts and requests are made for the provision of assistance in relation to accommodation and support services for young offenders. From experience, child protection authorities are reluctant to take on a support role for young offenders not the subject of child protection orders.

There can also be problems in relation to their response to children who are the subject of child protection orders. The responsibility for offenders is regarded as being the role of juvenile justice authorities. This means such children often "fall between the gaps". In regional and remote areas, the lack of services can exacerbate the problem.

Child protection authorities are reluctant to respond to risk of harm notifications for adolescents possibly because of resourcing (accommodation etc) as well as the complexity of the issues and their non-compliance with interventions. This leaves Children's Courts in a difficult situation when they cannot release a child on bail/bond because there is no appropriate adult in their family to take charge of them.

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?

NLA considers that the Family Courts are better placed to manage and determine these issues.

Question 14–2 Should the *Family Law Act 1975* (Cth) be amended to extend the jurisdiction which state and territory courts already have under pt VII to make orders for a parent to spend time with a child?

Please refer to our responses to Questions 13-8, 14-1.

Question 14–3 When should state and territory children's courts have power to determine contact between one parent and another in matters that are before the court in child protection proceedings?

See response to Question 13-8, 14-1.

Question 14–4 What features of the Family Court of Western Australia should be replicated in other jurisdictions?

See response to Question 13-8.

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?

This is a question which could be further considered after a pilot in WA.

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?'.

This proposal is supported. The Client Information Form filed (but not sworn) in the Family Court of Western Australia gives Applicants the opportunity to provide this information.

NLA would suggest that the courts not rely on self disclosure by parents. Information sharing protocols with other courts and agencies such as child protection authorities should be in place.

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 section on the application form for family courts could also include tick boxes asking questions which would:

Indicate the nature of the violence;

(a) indicate police involvement;

(b) any past orders or protection orders (be they police-issued or court ordered);

(c) any family violence orders made against that person (particularly in favour of a child who is the subject of the proceedings) and any significant person (particularly any person identified in s 65C of the Family Law Act) with whom the child may reasonably be expected to spend time with;

(d) indicate the involvement of state child protection agencies;

(e) past applications or allegations to police and/or child protection authorities;

(f) indicate if other party has been in gaol, or is on remand, or is presently in gaol in relation to family violence.

This would be helpful to the court's assessment of risk, particularly for self-represented litigants who prepare their own documents. The courts should not rely on parties' self-disclosure in their assessment of child welfare issues.

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)?

See responses above, in particular to Question 13-7.

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

NLA supports this proposal.

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

See responses to Questions 13-7 and 13-8.

NLA would support the use of MOU arrangements such as those in place in Western Australia between the Family Court of WA, the Department for Child Protection and Legal Aid WA in respect of the approach towards information sharing (s 69ZW Orders, pre s 69ZW Orders and subpoena) with child protection authorities.

In NSW, practitioners report that only limited documents are produced by Community Services under s 69ZW orders. Accordingly the legal profession in NSW tends to seek the production of documents under subpoena. New South Wales practitioners report that they encounter different outcomes to requests for the production of documents in response to subpoena. Sometimes when the Community Service Centre receives the subpoena they phone and have a discussion with the practitioner about what is needed and what is available. It assists if practitioners are clear about what it is they are seeking in the subpoena. Legal Aid NSW appreciate the volume of subpoenas issued to Community Services makes this type of response difficult to resource but nevertheless considers it to be best practice.

In South Australia there is very good cooperation between child protection agencies and the family court pursuant to the Magellan case management model of the family court. As a result of the success of the Magellan project, federal magistrates courts are now using the provisions of s.69ZW of the Family Law Act and, provided they have the resources, child protection agencies and the state child protection authorities are providing the same assistance to the Federal Magistrates Court.

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

NLA considers that child protection authorities should make more use of their power to intervene in family court proceedings in appropriate circumstances.

Generally, there also needs to be much more co-operation in relation to information sharing between state and territory child protection agencies and federal family courts, with the focus to be on ensuring the "best possible outcomes" for children, rather than the "protection" of children to ensure that all relevant evidence is available to the court, as is the case in Western Australia. Such cooperation might remove the need for formal intervention in some proceedings (please see response to Question 13-7).

In the context of child welfare concerns raised in family law proceedings, it is suggested that all relevant information should be available to the court to ensure there is an accurate and timely assessment of the safety of the children concerned. However, in states and territories other than Western Australia, the experience is that child protection authorities often object to the release of information on their files as that information doesn't meet the authority threshold for a "protection" concern pursuant to child protection legislation. This approach may be putting vulnerable children at risk.

Munro states, in relation to assessment in child protection that[19] "It is important that practitioners are aware of the problems associated with professional judgement. These problems include a lack of recognition of known risk factors, the predominance of verbal evidence over written, a focus on the immediate present or latest episode rather than considering significant historical information, and a failure to revise initial assessments in the light of new information". She has also written "the single most important factor in minimizing error (*in child protection practice*) is to admit that you may be wrong."[20]

[19] Munro,E (1999) "*Common Errors of Reasoning in Child Protection Work*" Child Abuse and Neglect The International Journal vol 22 Issue 8, August 1999, pp 745 to 758.

[20] Munro,E (2002) "*Effective Child Protection*" Sage Publications,London.

Case Study

The child lived with the maternal grandmother in Kyogle. The Family Report recommended that the child live with the mother. The mother found the child too difficult to care for and placed the child with a male friend. The Family Court requested the NSW Department of Community Services to intervene. This request was refused.

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?

Please refer to the response to Question 14-9.

There is a concern that child protection authorities may consider that if a matter is before a family law court the children's welfare is being reviewed and there is no requirement for them to investigate or intervene. It may be necessary for family courts to have additional powers to require either an assessment from child protection authorities or their intervention in family law proceedings where it is considered necessary to ensure the safety and best interests of children.

The outcome of the appeal in the matter of *Ray and Anor and Males* and O*rs* (2009) Fam CA 219 will be informative in respect of the need for the family law courts to be provided with extra powers in relation to ensuring the appropriate intervention of child protection authorities.

Question 14–11 What are the advantages of registration of state and territory child protection orders under ss 70C and 70D of the *Family Law Act 1975*

(Cth)? What are the interactions in practice of the registration provisions and s 67ZK of the *Family Law Act*?

The priority should be co-operative management of cases involving children.

Our experience in respect of the interaction in practice is that the family law courts can only make orders in relation to children in the care of child protection authorities with the consent of the child protection authority.

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?

Please refer to the response to Questions 13-7, 14-8 and 14-10.

It may be necessary for the *Family Law Act 1975* and the *Family Court Act 1997 (WA)* to be amended to provide family law courts with additional powers to require either an assessment from child protection authorities or, in some limited circumstances because of the available evidence of risk, the Court considers their intervention in family law proceedings, is necessary to ensure the safety of children.

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.

To the extent that such MOUs/protocols do not already exist, NLA supports this proposal.

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?

See Response to Questions 13-7, 13-8 and 14-9. The focus of the protocols should be on ensuring the "best possible outcomes" for children, rather than the "protection" of children to ensure that all relevant evidence is provided to the court by the child protection authority.

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?

There is a need for courts and service providers to:

(i) articulate a shared vision to provide safety for the victims of family violence;

(ii) commit to sharing information and resources as far as is practicable and permissible pursuant to provisions of their legislation in individual cases;

(iii) commit to ensuring that information and training is provided to judicial officers and staff of their agencies to facilitate the development of a common language for communication in relation to family violence issues to ensure the workability of the arrangements;

(iv) commit to address any case management issues that are identified in a co-operative manner;

(v) maximise the ability of the courts to make timely, informed decisions in respect of family violence related issues;

(vi) ensure the efficient use of resources

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.

NLA supports this proposal. Please refer to responses above.

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

We note the restructure of the courts and suggest that it may be appropriate to revisit this question following implementation of the relevant legislation. We can see no reason why the principles and protocols of the Magellan project would not translate.

In some places it is considered that the Magellan project operates well. In others there are some concerns about the way in which it operates, for example, it is considered that the preparation of a report that is a summary of the state child protection authority file (in the absence of the whole file) is insufficient and that it would assist if state child protection authorities were more closely involved in the management of the case.

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?

Please refer to the responses above and in particular to the response to Questions 13-7 and 13-8.

Recent family law reforms (post 1 July 2006) and associated court requirements for compulsory diversion to family dispute resolution processes in children's matters ("private law"), with limited exceptions including family violence, child abuse and urgency, have meant that the "core child related business" of both the Family Court and Children's Court Protection jurisdiction across Australia

are families who present with multiple issues including family violence, child abuse, mental health issues and drug and alcohol abuse.

Many of the families presenting at the Family Courts also have involvement with respective child protection authorities and move between the Family Courts and the Children's Court depending on their circumstances at any particular time. Sometimes families find themselves "falling between the gaps" of both jurisdictions.

In addition, statistics reveal that grandparents and extended family members are increasingly taking on the care of children due to protection concerns with either or both parents. Often these people go to the Family Court seeking orders that children live with them, sometimes at the instigation of child protection. It is noted, that the *2003 National Census* identified that 22,500 grandparents were caring for 31,110 children under the age of 18 years; a number that would in all probability have been greater had accurate statistics for indigenous families been available. Of these grandparents 60% were over the age of 55 years and 62% relied on government pensions for their income. The challenge for these grandparents is the question of which court is appropriate. These children can be subject to either Family Court Parenting Orders or; Children's Court Protection Orders and often these families find themselves having to appear in both courts before the arrangements for the children are finally determined.

Other challenges include:

- the lack of protocols in place to facilitate timely information sharing in relation to families with child welfare issues moving between the courts;
- the difference between Family Court and Children's Court processes and the documentation that is required to be filed;
- the differences in the terminology used in the Family Court and the Children's Court eg "contact" (Children's Court) and "spend time with" (Family Court) arrangements;
- the discrepancies between Family Courts and Children's Courts in what is considered to be an appropriate amount of contact between parents and

children (particularly babies) and between siblings and, in determining the circumstances in which contact needs to be supervised by professional supervisors;

- working out which jurisdiction/court is appropriate for their families needs (eg in the case of grandparents and extended family who are prepared to care for children);
- the difference in definitions of child abuse and the thresholds for Departmental intervention in a family.

The evaluation of the less adversarial approach of the Child Related Proceedings Program of the Family Court of WA (*Sankey Report*[21]) and experience of the less adversarial trial process of the Family Court of Australia suggest that this case management strategy is better equipped to promote and protect the welfare of children and determine outcomes in their "best interests" than traditional adversarial approaches. Experience of this program, related family law reforms and family group conference research in relation to child protection matters suggest that similar processes would be in the best interests of children who are the subject of child welfare concerns on the part of state and territory welfare authorities ("public law") and that these processes should be used to avoid or limit protection and care proceedings wherever possible and appropriate.

The reports *of the Special Commission of Inquiry into Child Protection Services in NSW (November 2008),* the Victorian Ombudsman[22] and the Victorian Child Protection Proceedings Taskforce (February 2010) also specifically support the implementation of this approach, which is already being implemented and evaluated in WA in the "Signs of Safety" child protection mediation pilot.

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[21] "Evaluation of Child-related Proceedings Model Family Court of Western Australia Department of the Attorney General" Final Report December 2007 by Sankey Associates

[22] Ombudsman Victoria "Own Motion investigation into the Department of Human Services Child Protection Program (November 2009)

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

See responses to Questions 14-9, 14-10 and 14-16.

NLA is generally supportive of collaborative arrangements. Any such arrangements need to be regularly monitored and evaluated.

PART D – SEXUAL ASSAULT

16. Sexual Offences

Question 16–1 Do significant gaps or inconsistencies arise among Australian jurisdictions in relation to sexual offences against adults in terms of the:

(a) definition of sexual intercourse or penetration;
(b) recognition of aggravating factors;
(c) penalties applicable if an offence is found proven;
(d) offences relating to attempts; or
(e) definitions of indecency offences?

As a matter of principle there should be consistency in range of offences, definitions of offences, and penalties between states and territories.

Question 16–2 Do these gaps or inconsistencies have a disproportionate impact on victims of sexual assault occurring in a family violence context? If so, how?

NLA does not have access to the data that would be necessary to answer this question.

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

NLA supports this proposal.

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

Similarity of age should be a defence for children. Children have been charged with sexual offences against other children where the sexual contact was entirely consensual. For example, a 17 year old may be charged over sexual contact with his 15-year-old girlfriend and be placed on a sex offender's register for seven years.

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

Honest and reasonable mistake that a person was over a certain age should be available as a defence at any age.

Question 16–5 Has the offence of 'persistent sexual abuse' or 'maintaining a relationship' achieved its aims in assisting the prosecution of sexual offences against children in the family context, where there are frequently multiple unlawful acts? If not, what further changes are required?

Anecdotally yes. This question would benefit from further investigation by the NSW Bureau of Crime Statistics and Research or the Australian Institute of Criminology.

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

NLA supports this proposal, and notes the extent to which particular legislative provisions in all jurisdictions already provide for this.

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.

NLA supports this proposal.

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?

A long standing coercive environment is a factor relevant to consent. This factor ought to be able to be recognised as a relevant consideration when any consent issue is being considered.

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.

NLA supports this proposal.

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?

Anecdotal evidence indicates that the defence is more likely to be raised in cases where the accused and the complainant have been in a previous intimate relationship, but it is often raised in other circumstances. An objective element to the defence as in s 61HA(3)(c) of the NSW *Crimes Act* is of assistance. It is suggested that the issue is a matter for the jury to decide and should be determined in the same objective legal framework whatever the relationship between the accused and the complainant.

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.

NLA agrees that in sexual offence proceedings where consent is an issue, it is essential that clear and careful directions be given to the jury in relation to consent. However, the direction needs to be crafted to fit the circumstances of the particular case. A mandatory direction in the terms proposed runs a real risk of including issues that are not relevant to the particular case, thus having the potential to confuse the jury.

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.

NLA does not support this proposal. NLA believes that appropriate education/training should be provided to law enforcement authorities, prosecutors, lawyers, judicial officers, and other relevant service providers.

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.

See response to Proposal 16 - 6.

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?

See response to Proposal 16 - 6.

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.

NLA supports this proposal.

NLA also supports the use of specialist police squads to investigate sexual assaults. These units need to be appropriately resourced and the officers provided with ongoing training to ensure that they understand the dynamics of family violence and are equipped to use "best practice" approaches to the investigation of these offences.

Question 17–1 Have specialist police squads for sex crimes increased the policing and apprehension of sexual assault offenders, including in a family violence context?

The data required to answer this question is not readily accessible to enable NLA to respond to this question. See response to Proposal 17-1.

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?

The data required to answer this question is not readily accessible to enable NLA to respond to this question. See response to Proposal 17-1.

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?

It is considered that integrated agency responses, with active case management and mandated timelines would be very effective in reducing attrition of sexual assault matters during the police investigation phase. NLA notes the recommendations about the establishment of 'one stop shops' as recommended by the 2005 NSW Criminal Justice Sexual Offences Taskforce.

Question 17–4 What impact are specialised police units having on improving collection of admissible evidence and support for victims of sexual assault in a family violence context?

The data required to answer this question is not readily accessible to enable NLA to respond to this question. See response to Proposal 17-1.

Question 17–5 Should specialised sexual assault police units be established in jurisdictions that do not have them?

NLA supports this proposal. See response to Proposal 17-1.

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.

NLA supports this proposal.

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?

NLA supports additional measures to reduce attrition and trauma to complainants during the prosecution phase. To the extent that they do not already exist, these additional measures could include:

- court listing, call-overs with pre-trial binding directions and specialised, judge-led case management to ensure that cases progress against mandated time lines without undue delays;
- courts equipped with the appropriate technology and specialised, well trained personnel;
- access to CCTV rooms and the court via a separate entrance to accommodate and provide for complainant safety;
- specially trained and highly skilled judges;
- well trained prosecutors who continue with the matter from pre-committal to trial;
- specialist training of Crown prosecutors;
- internal DPP case management system to ensure sexual assault cases are being prepared to a high standard and prosecutorial guidelines in relation to complainants are adhered to; and
- joined up counselling, health and support services for complainants throughout the prosecution process.

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?

NLA recognises that whilst all sexual assault cases require the careful processing set out in the response to 17-6, family violence context cases are a set involving even more sensitive considerations.

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.

NLA supports the second alternative.

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.

Where there is more than one complainant, the prejudice to the accused of a joint trial is high, and the probability that the jury would disregard the evidence of the other complainant in their assessment is questionable. The fairness of a trial for the accused is thus called into question by the proposal of a presumption in favour of joint trials. It is very important that the jury determine guilt or innocence on the basis of evidence that is relevant to the charge and not otherwise.

Question 17–8 What impact has *Phillips v The Queen* had on the prosecution of sexual assaults where there are multiple complaints against the same defendant and consent is a fact in issue?

Multiple trials have an adverse impact on the resources of the court, prosecution and defence. The question of whether multiple complaints should be the subject of separate prosecution should be determined by the court.

Question 17–9 Is there a need to introduce reforms to overturn the decision in *Phillips v The Queen*?

No.

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.

NLA supports this proposal. Training should be provided so that inadmissible material is not elicited in the pre-recordings, as resource intensive editing is required to remove it.

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.

NLA supports this proposal.

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.

NLA supports this proposal.

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?

Previous studies in various Australian jurisdictions have examined the operation of legislative provisions and have broadly found that:

- there is not enough being done to protect women from improper and offensive questioning in sexual assault matters;
- sexual experience evidence is commonly adduced without reference to the legislation or the procedure set out in the legislation;
- where the legislation is applied there is often a failure to properly apply relevant tests or a mechanical 'going through the motions' type application of the tests, which does not involve a genuine scrutiny of the proposed evidence;
- the legislation permitting limited questioning of complainants about sexual history and experience in certain circumstance has been given a much broader interpretation in courts than it was originally intended by Parliament;
- in practice, the operation of these provisions is rarely monitored so there is often no empirical evidence to assess whether the intention of Parliament in enacting these provisions is being met.

The operation of critical provisions in jurisdictions should be monitored.

Question 18–2 How best can judicial officers and legal practitioners be assisted to develop a consistent approach to the classification of evidence as being

either of ‘sexual reputation’, ‘sexual disposition’ and ‘sexual experience’ (or ‘sexual activities’)?

Appropriate ongoing education/training.

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.

Legislation should provide that leave must be obtained for any such questions.

Question 18–3 Under discretionary models, is evidence of a complainant’s prior sexual history admitted more or less often in proceedings concerning offences perpetrated in a family violence context, as compared to other sexual assault proceedings?

NLA does not have access to such data so as to be able to answer the question.

Proposal 18–2 Commonwealth, state and territory legislation should provide that complainants of sexual assault must not be cross-examined, and the court must not admit any evidence, as to the sexual activities (whether consensual or non-consensual) of the complainant other than those to which the charge relates, without the leave of the court.

There is inconsistency between states and territories concerning the extent to which cross examination on prior sexual activity is restricted. An exclusionary model with judicial discretion to allow cross-examination in certain circumstances where the evidence is relevant is the most appropriate model.

Proposal 18–3 Commonwealth, state and territory legislation should provide that the court shall not grant leave for complainants of sexual assault to be cross-examined about their sexual activities unless it is satisfied that:

(a) the evidence has significant probative value to a fact in issue; and

(b) the probative value of the evidence substantially outweighs the danger of unfair prejudice to the proper administration of justice, taking into account the matters in Proposal 18–4 below.

NLA supports this proposal but the test should be relevance.

Proposal 18–4 Commonwealth, state and territory legislation should provide that the court, in deciding whether the probative value of the evidence substantially outweighs the danger of unfair prejudice to the proper administration of justice, must have regard to:

(a) the distress, humiliation, or embarrassment which the complainant may suffer as a result of the cross-examination or the admission of the evidence, in view of the age of the complainant and the number and nature of the questions that the complainant is likely to be asked;
(b) the risk that the evidence may arouse in the jury discriminatory belief or bias, prejudice, sympathy or hostility;
(c) the need to respect the complainant's personal dignity and privacy;
(d) the right of the accused to make a full answer and defence; and
(e) any other factor which the court considers relevant.

NLA supports this proposal noting that, legislation by itself will not address the issues. Ongoing education and professional development of legal practitioners and the judiciary will help to address issues where the persist.

Question 18–4 Should Commonwealth, state and territory legislation provide that 'sexual history evidence' or sexual experience evidence is not:

(a) admissible to support an inference that the complainant is the type of person who is more likely to have consented to the sexual activity to which the charge relates; and/or
(b) to be regarded as having substantial probative value by virtue of any inference it may raise as to general disposition.

NLA supports this proposal.

Proposal 18–5 Commonwealth, state and territory legislation should provide that 'sexual history evidence' or sexual experience evidence is not to be regarded as being proper matter for cross-examination as to credit unless, because of special circumstances, it would be likely materially to impair confidence in the reliability of the evidence of the complainant.

NLA supports this proposal.

Proposal 18–6 Commonwealth, state and territory legislation should require an application for leave to admit or adduce sexual history evidence to be:

(a) made in writing; and

(b) filed with the relevant court and served on the informant or the Director Public of Prosecutions within a prescribed minimum number of days, and prescribe;

(a) the required contents of such an application;

(b) the circumstances in which leave may be granted out of time;

(c) the circumstances in which the requirement that an application for leave be made in writing may be waived; and

(d) that the application is to be determined in the absence of the jury, and if the accused requests, in the absence of the complainant.

NLA agrees that leave of the court should be required but does not support this proposal. This proposal could only work in circumstances where the need to apply for leave was known in advance of the hearing, and sometimes this is not possible.

Proposal 18–7 Commonwealth, state and territory legislation should require a court to give reasons for its decision whether or not to grant leave, and if leave is granted to question the complainant, to state the nature of the evidence which may be elicited by that questioning.

In the experience of Commissions Judges do give reasons for such decisions. The reason behind granting leave will at its core be that the evidence is relevant to the issues in the course of ensuring a fair trial.

Proposal 18–8 Commonwealth, state and territory Directors of Public Prosecution should introduce and implement a policy of writing to the defence in sexual assault matters and informing them of the procedural application requirements imposed under the relevant legislation in relation to admitting and adducing sexual experience evidence.

Defence lawyers should be aware of relevant requirements.

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 NSW the Women's Legal Service, the Office of the Director of Public Prosecutions, the NSW Bar Association and Clayton Utz, Freehills and Blake Dawson have been conducting a pilot program to give sexual assault complainants access to solicitors and barristers in order to ensure that they can assert the sexual assault communications privilege and protect their records. NLA supports this trial.

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.

Decisions about expertise, the admissibility of opinions, credibility etc should be made on a case by case basis depending on the particular circumstances of the case.

Question 18–6 Should Commonwealth, state and territory legislation provide for mandatory jury directions, containing prescribed information about children's abilities as witnesses or children's responses to sexual abuse?

No, legislation should not provide for mandatory jury directions containing such prescribed information. It may be an area of expert evidence in appropriate cases.

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.

NLA does not support this proposal. If there is a reasonable possibility of concoction, the risk of prejudice significantly outweighs the probative value of the evidence. If the possibility of concoction, collusion or suggestion cannot be excluded, the probative value of the evidence is properly diminished. This is a relevant matter for the court to take into account in determining whether the prejudicial effect of admitting the evidence would outweigh the probative value. See *AE v R* [2008] NSWCCA 52 and *Poulter v DPP* [2010] VSCA 88.

Question 18–7 To what extent does the 'striking similarities' test impede the ordering of joint trials in relation to sex offences?

NLA does not consider that the striking similarities test does impede the ordering of joint trials in relation to sex offences.

Question 18–8 Should the Western Australian reforms in relation to the cross-admissibility of evidence be adopted in other jurisdictions?

No.

Question 18–9 Should the 'no rational view of the evidence' (*Pfennig*) test be applied to determine the admissibility of relationship evidence at common law?

Yes.

Question 18–10 Should Commonwealth, state and territory legislation provide that, where complainants in sexual assault proceedings are called to give evidence, the hearsay rule does not apply to evidence of a preliminary complaint, regardless of when the preliminary complaint was made?

Allowing evidence of a disclosure to be admitted as truth of the substance of that disclosure, in circumstances where the disclosure is lacking in detail and was made when the accuracy of the complainant's recollection may already have been affected by the passage of time, would be improperly prejudicial to an accused.

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.

NLA agrees with (a) but not (b). In appropriate cases a corroboration warning may be required.

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

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

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

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

NLA supports this proposal.

Question 18–11 What issues arise in practice pursuant to s 165B of the uniform Evidence Acts? Is the s 165B(5) abrogation of the trial judge's obligation and power to give a *Longman* warning sufficiently explicit?

In April 2010 the Queensland Government released a comprehensive report from the Queensland Law Reform Commission regarding its recent review of jury directions. The Queensland Law Reform Commission looked at jury directions and trial processes and included specific analysis of issues as to whether there should be codification of directions and specific directions in sex cases. Codification was not supported. The recent and thorough nature of this review should be considered.

Question 18–12 Are warnings about the effect of delay on the credibility of complainants necessary in sexual assault proceedings?

In WA s 36BD of the *Evidence Act 1906* (WA) requires Judges to give a warning to the effect that absence or delay in complaining does not necessarily indicate that the allegation is false and that there may be good reason for such delay. Similar provisions also exist in other jurisdictions.

However, where there has been substantial delay the Judge provides the jury with a *Longman warning* advising them that recollection may be affected by substantial delay, that had the allegations been made sooner it would have been possible to explore in detail the alleged circumstances and perhaps adduce evidence throwing doubt on the complainants account or confirming the

defendant's denial. It is considered that it is appropriate that *Longman warnings* be given due to the forensic disadvantage to accused people in being able to test evidence, locate witnesses and recollect precisely what they were doing at the relevant time when there has been substantial delay.

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

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

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

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

OR

(b) the judge:

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

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

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

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

Common law judicial directions have displayed remarkable resilience. These warnings are continually revived and affirmed by appellate courts despite governments enacting legislation to limit their use.

Research shows that the *Longman* direction seems to have a strong effect on trial outcomes. Research by the Judicial Commission of NSW shows that of 69 successful appeals to the CCA between 2001 and 2004 half were on the basis of a judicial misdirection. Further, of this group of successful appeals on misdirection, two thirds related specifically to the *Longman* warning and, in almost all of these matters, it was the sole error identified in the appeal.

NLA prefers Proposal (a) to proposal (b), but is firmly of the view that the jury should also be directed in terms of Croft. v. R (1996) 186 CLR 427.

Proposal 18–14 Commonwealth, state and territory legislation should:

(a) prohibit an unrepresented defendant from personally cross-examining any complainant or other witness in sexual assault proceedings; and

(b) provide that any person conducting such cross-examination is a legal practitioner representing the interests of the defendant.

NLA supports this proposal.

A mandatory prohibition already exists in NSW by way of s 294A of the *Criminal Procedure Act*. To the extent that an accused is not already legally aided (either because they have not made an application for aid or because they are ineligible by reason of means etc), Legal Aid Commissions would accept the task of providing a lawyer to do this part of the case. If this is to be done for people who do not satisfy the legal aid means test, there will need to be additional funding for the program because otherwise assistance will be diverted from people who do satisfy the means test.

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?

NLA does not consider that there are significant gaps.

Question 18–14 Should Commonwealth, state and territory legislation permit prosecutors to tender a record of the original evidence of the complainant in any re-trial ordered on appeal?

Yes, subject to the removal of any inadmissible material.

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.

NLA supports this proposal.

Legal Aid Commissions have strong working relationships with other agencies working with family violence issues and would welcome the opportunity to

participate in planning and implementation of integrated response/s that will suit the jurisdictions.

Question 19–1 Should state and territory legislation support integrated responses to family violence within their jurisdictions and, if so, what should this legislation address? For example, should responsibility for coordinating integrated responses within a jurisdiction be placed on a statutory office-holder or agency?

Yes. Legislation should address the areas and manner in which different services and Government Departments co-operate, for example, in relation to information exchange, and shared clients. This would help avoid those situations where one agency takes control of an issue without including other relevant stakeholders where it would be appropriate to do so.

It may not be appropriate for responsibility for coordinating integrated responses within a jurisdiction to be placed on a statutory office-holder or one agency. This is a complex issue and some arrangements may be more suitable than others in different jurisdictions.

Please see the responses to Questions 8-7 and 13-8. It is suggested that as the Family Court of Western Australia is a state court exercising state jurisdiction it is already well placed to take on the determination of protection order applications in circumstances where there are parenting order issues and the determination of child protection matters. This arrangement could be trialled in Western Australia with a view to informing legislative and infrastructure change in other jurisdictions. The Family Court of WA would need to be provided with the necessary resources to manage the additional workload and there may be accessibility issues for people living in regional and remote areas of the state. It is suggested that such an approach would also overcome some duplication which is currently occurring in respect of the workloads of the family court and the magistrates courts.

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.

NLA 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.

NLA supports this proposal. Priority should also be given to ensuring sufficient Family Consultants in the federal family law courts and the Family Court of Western Australia.

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).

NLA supports this proposal. All significant adverse effects the result of the family violence offences should be taken into account.

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).

NLA 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.

NLA supports this proposal which acknowledges the dynamics of family violence.

A failure to report the matter to police should be a factor that can be taken into account in determining the matter.

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.

NLA supports this proposal.

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.

NLA supports this proposal.

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.

NLA has some reservations about this proposal. Excluding claims on the basis that the offender might benefit, may assist some victims to make the decision to separate and remain separated from the perpetrator of the violence. There is also the concern that, if victims continue their relationships with perpetrators, they may suffer further violence, with the compensation being taken from them forcibly by the perpetrator and used for such purposes as the purchase of drugs and alcohol.

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).

NLA supports this proposal.

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.

NLA 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.

Data collection in respect of claims and awards of compensation made to victims of family violence under statutory victims' compensation schemes may be useful to the extent that there is consistency between the relevant provisions in relevant legislation and the capacity to provide appropriate clarification in the case of any inconsistency.

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.

NLA supports this proposal.

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

Access to relevant data to provide feedback on this question is not readily accessible. Interim payments should be accessible to victims as this may assist them to establish themselves independently of the offender.

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?

It is suggested that legislating to prevent offenders from accessing victim's compensation could be particularly complex and might actually work to the disadvantage of victims, if made particularly prescriptive.

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

NLA supports this proposal and suggests that the curriculum should also include education in other areas of social science such as child development and attachment theory to inform the practice of lawyers in relation to family violence in family law, child protection and crime in addition to the protection order jurisdiction.

The *Time for Action* Report [23] identified that education in relation to respectful relationships to break the cycle of family violence should start at pre-school level. This proposal would build on education strategies of this kind.

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.

NLA 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.

NLA suggests that such an audit would be of benefit in consultation with the sector only to the extent necessary to identify the minimum standards referred

[23] *Time for Action: The National Council's Plan to Reduce Violence against Women and their Children 2009-2021*. The National Council to Reduce Violence against Women and their Children (March 2009) Australia.

to in Proposal 19-17 (a) and to identify gaps or areas of duplication which should be addressed to make best use of available resources.

It is noted that there is already a project coordinating NSW domestic violence training. This project is called the Intersectoral Domestic & Family Violence Workforce Training Project.

It is understood that the Commonwealth Attorney-General's Department has let a tender for the development of a multi-disciplinary training package for family violence.

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.

Please refer to the response to Proposal 19-16. Consultation within the sector is important.

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.

It is important to recognise that family violence offences are, both in terms of numbers and seriousness, a major part of modern policing. Family violence is, therefore, a mainstream and core policing issue. In this sense, all police should be well-trained and have a good understanding of family violence issues. However, notwithstanding this, NLA supports as a general principle the importance of police in each state having officers with specialist expertise, training and responsibility for family violence.

There are a variety of different models for implementing this but as a minimum NLA supports having specialist family violence officers:

- in line with "(c)", as supervisors who are responsible for supervising, monitoring and quality assuring the police operational response to family violence. These supervisors should be at a rank to enable them to have sufficient authority to perform their role;
- in line with "(b)", in a central policy and strategy unit tasked with responsibility for family violence policy and strategy. Such a unit should also have responsibility for, or at least a major role in, family violence training, quality assurance of family violence supervisors and higher level networking with collaborative agencies. Again, to ensure the unit has sufficient authority and influence to perform its role, such a unit would need to be headed by a high ranking officer such as an Inspector.

In relation to "(a)", NLA supports the principle of having specialist officers for victims to report to, however this may or may not be realistic in practice due to the number of family violence incidents in some police districts. If there is not an ability to have such specialist officers for all victims, then good initial, quality assurance and complaints processes are critical.

In relation to "(b)", it is unclear whether the role described is in relation to operational/particular client issues or whether this is at a higher strategic level. Again there might be a number of different models, each of which has various strengths and shortcomings, taking into account local circumstances. It may not be necessary to be unduly prescriptive, so long as there are clear processes for responding to family violence matters and clear processes for supervision and quality assurance.

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

Issues which may arise for specialist family violence police include:

- a risk of being isolated from other areas of policing with the result that officers become "out of touch" with non-family violence operations;
- some police may consider family violence responses not to be "real police work" with the result that specialist family violence officers may feel marginalised and unappreciated;
- police may feel either marginalised professionally in the family violence area, with the result that the best quality officers are not recruited and retained or officers are recruited for motivations other than interest in the area;
- if there are not clear standards around recruitment and training for specialist officers, then they may be specialist in name only and ineffective in their role;
- a risk for officers doing only family violence policy work at arms length from operations is that they may become divorced from operational realities and current investigative processes;
- in relation to specialist family violence supervisors responsible for quality assurance, there is a potential tension if the direct general supervisors (eg sergeants in charge of stations or inspectors in charge of districts) do not

have a good awareness of family violence issues and are not supportive of the family violence supervisor's role;

- if there is not an overarching unit or person tasked with authority over the specialist officers there may be no quality control of the quality assurers. There may further be no processes for sharing information and replicating good practices from one district to another, which could result in inconsistent responses.

Leadership of the police force has to be committed to properly training and resourcing police officers to respond appropriately to family violence. The importance of the work should be emphasized. Career progression of officers working in this area might need to be addressed in some places.

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?

Specialist family violence prosecutors would ensure that prosecutors understand the complex nature of domestic violence and seek appropriate conditions on a protection order. These prosecutors would understand the intersection with family law issues, including s.68R of the Family Law Act. This would facilitate a consistent approach to the work involved at court and preparation for hearing of defended matters. It is considered that family violence guidelines would not be as effective as specialised family violence prosecutors.

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.

NLA supports specialisation within courts in relation to violence. NLA does not support proposal (b) except to the extent referred to elsewhere in this submission.

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.

Please refer to our responses above. NLA supports courts having specialisation in family violence. It is essential that people in rural, regional and remote places, have access to appropriate services.

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.

Please refer to our responses to Proposals 20-2 and 20-3.

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.

NLA supports this proposal to the extent that it is consistent with our answers above.

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.

NLA suggests that a better alternative would be to endorse, support and provide necessary resources to enable existing services to better integrate their service delivery and information sharing arrangements.

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.

NLA suggests that rather than establishing and networking specialist family violence courts, such networks should be established and supported for all of the courts currently working with family violence issues.

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.

The intention of this proposal is supported.

End.