

Your Ref:

Quote in reply: Family Law Committee:21000340/42

25 June 2010

The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

Dear Executive Director

FAMILY VIOLENCE: IMPROVING LEGAL FRAMEWORKS CONSULTATION PAPER: QUEENSLAND LAW SOCIETY RESPONSE

Thank you for the opportunity to provide a submission to the Family Violence Inquiry. For the purposes of this submission, I have adopted the numbering contained in ALRC Consultation Paper Summary 1 Family Violence. The focus of The Queensland Law Society's response has been as to the interaction of domestic violence laws and the Family Law Act.

Response to 4.1 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.

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?

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'.

The Queensland Law Society agrees that:

"Drafting a uniform definition acceptable to all states and territories would be a significant task, especially given that jurisdictions adopt differing terminology to describe family violence ..."

In particular, The Queensland Law Society is firmly of the view, as identified by you in the report, that:

“The protection of victims of violence should not, however, be compromised by achieving a consistent definition, if consistency represents the lowest common denominator”.

The key features about laws preventing domestic violence must be that:

1. They adequately identify what is domestic violence;
2. By the process of obtaining civil protection orders they prevent further acts of violence;
3. They adequately punish perpetrators of domestic violence; and
4. So far as possible they put in place systems to prevent further acts of domestic violence.

It is the view of The Queensland Law Society that, in general terms, the Domestic and Family Violence Protection Act 1989 Qld (“the Qld Act”) adequately meets these tasks.

However, there is currently a review being undertaken by the Queensland Government into that Act, although the outcome of that review is likely to hinge on the outcome of the New South Wales and Australian Law Reform Commissions’ review. It is the desire of the Queensland Law Society that, as far as possible, the outcomes of the two inquiries are consistent.

In the interests of reaching some uniformity though in relation to definitions, The Queensland Law Society acknowledges that the definition of family violence contained in the Family Violence Protection Act 2008 (Vic) is comprehensive.

The Queensland Law Society, agrees though, to quote your words, that:

“While definitions of family violence across state and territory family violence legislation need not be drafted in precisely the same terms, there should be shared understanding of the types of conduct that constitute family violence, covering both physical and non-physical violence.”

Family violence laws in Australia came into effect just over 20 years ago. Queensland did so after a comprehensive report “*Beyond these walls*” (1988). The nature of the laws and the topic that they attempt to tackle has been very much a moving feast, reflection of recognition of the level of violence and nature of violence in society, administrative challenges posed by that violence and research into that violence.

Domestic and family violence is a topic that governments will keep wishing to legislate in response to. But it is a healthy part of the Australian Federation that different states and territories are able to respond to domestic and family violence in an experimental way to see what works and what does not work, with the benefit that states and territories are able to learn from each other and improve legislation to ensure that this violence is adequately tackled.

This process of innovation should not be removed by adopting a uniform definition.

It is important that legislation responding to domestic and family violence recognises that:

- (a) It is to be seen in a human rights context;
- (b) Without trivialising or minimising other forms of violence, including violence by women to men, by men to other men, by women to other women, and violence occurring in same sex relationships; the overwhelming nature of domestic and family violence is of a gendered nature by men towards women.

For the reasons set out in this submission, The Queensland Law Society does not support a test in legislation requiring fear. The Queensland Law Society is generally supportive of the test contained under the Qld Act as to the basis for obtaining protection orders.

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.

Whilst the ALRC's Consultation Paper expresses a view that the Queensland definition of "family violence" in referring to "indecent behaviour without consent" may need to be amended to catch sexual offences against children where consent is not a defence, this is not necessarily supported by The Queensland Law Society.

Magistrates in Queensland are well aware that those under 16 (or 18 in respect of anal sex) are not, as a matter of law, able to consent so that consent is not an issue when dealing with sexual offences against children in domestic violence proceedings.

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.

There appears to be the assumption by the Commissions that economic abuse is not recognised in the Qld Act. This is illustrated by the example on page 191. This assumption is inaccurate.

It is possible now to obtain protection orders based on economic abuse as the behaviour which would constitute that abuse would, to use the definitions that are currently contained in that Act, constitute either or both "harassment" or "intimidation" depending on the facts of the case. A number of our members have obtained protection orders on behalf of clients on the basis of economic abuse.

It is the view of The Queensland Law Society, however, that in the reference to "harassment" and "intimidation" in section 11 of that Act that it would be useful to have an example which includes economic abuse so that it highlights specifically for police and magistrates that economic abuse is and can be an example of harassment or intimidation.

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.

There is no question in Queensland law that the current definition of “harassment” and “intimidation” includes emotional or psychological harm/abuse. Neither of the words “harassment” nor “intimidation” is defined within the legislation. Magistrates and District Court judges have relied upon dictionary or common garden definitions of what constitutes harassment and intimidation. District Court judges have commonly indicated that intimidation requires fear. There have been a number of differing approaches. In some cases there has been a reference to the fear of the aggrieved not being that of an unduly sensitive person. In other cases this has not been a requirement.

Harassment has commonly been seen by its dictionary definition which includes to vex or annoy, particularly by repeated acts. Ever since the coming into force of the legislation almost 20 years ago, magistrates have on a daily basis included emotional or psychological harm/abuse within that of harassment.

For example, a husband who quoted scripture at his wife for 5 hours straight about the superiority of men over women was held by a magistrate to have engaged in harassment.

Similarly, men who have kept their wives or partners as prisoners in their home, depriving the women of their liberty in various ways such as:

- Parking their car in;
- Removing the telephone;
- Monitoring telephone calls;
- Locking them in the house;
- Checking on them regularly by telephone,

have been held to have engaged in harassment and, in certain cases, intimidation.

Section 11 of the Qld Act is the Queensland section defining what constitutes domestic violence. It is widely recognised that the definition of “domestic violence” includes many other types of behaviours in addition to those seen in the examples.

Appropriate use of emotional or psychological abuse category

The risk in including specific examples of emotional and psychological abuse in the legislation is that it will be used as defining “violence” and as a criteria to be proved before protection in the form of an Order is awarded.

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?

It has not come to the attention of the Queensland Law Society that examples included in legislation are being used as anything other than as examples.

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 should not be necessary for a survivor of violence to prove emotional abuse to obtain a protection order. If the survivor is unable to prove this on a balance of probabilities, the application for the protection order would fail.

All that should be necessary is that, on the balance of probabilities, a survivor of violence (or police on behalf of that survivor) is able to prove that *an* act or a number of acts of domestic violence have occurred (by judging the past conduct) and that the prediction, in viewing that past conduct, is that further acts are likely.

The Queensland Law Society agrees that:

“Requiring a person to prove emotional or psychological harm as a result of sexual assault adds a further evidentiary burden.”

Similarly, for a person deprived of his or her liberty to have to prove emotional or psychological harm would appear to be burdensome, unnecessary, and might deter those from seeking protection when they might otherwise be entitled to it.

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.

The Queensland Law Society is of the view that, whilst not referring specifically to kidnapping or deprivation of liberty, this conduct would none the less clearly constitute harassment or intimidation, under Qld definition of domestic violence.

However the Queensland Law Society would support the Commissions’ view that the definition of “domestic violence” in the Qld Act should specifically refer to kidnapping and deprivation of liberty.

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.

The Queensland Law Society supports the view that family violence legislation in the definition of “domestic or family violence” should include a reference to the damage to property.

That recognition has been in the Queensland legislation since its inception. It is a recognition of the use of violence towards property in relationships where one party might, for example:

- Punch or kick a hole in the wall;
- Throw a phone smashing it, preventing the other party from telephoning the police for safety;
- Hitting a car;
- Poisoning plants;
- Smashing a windscreen;
- Kicking the family pet.

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.*

The Society agrees with this proposal.

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 Queensland Law Society supports the preliminary view of the Commissions “that family violence legislation ought to acknowledge the detrimental impact of family violence on children”.

The Commissions rightly state that “Exposure of children to family violence encompasses more than just witnessing family violence”. As long ago as 1994 Justice Chisholm (as he then was) in JG and BG (1994) recognised that family violence did not need to occur in the presence or hearing of the children to impact on the children. Chisholm J recognised the impact of power and control in domestic violence matters.

The current test to ensure that children are able to be protected in their parents’ domestic violence hearing is a consideration of whether the child has either been subject to or is likely to be subject to domestic violence. Regrettably, some magistrates have been reluctant to include children on protection orders even when, for example, the father punched the mother in the face whilst she was holding the baby.

Children are the most vulnerable members of society and there ought to be the most stringent measures put in place to ensure their protection.

There are 2 views though as to whether provisions that require the Magistrate, where it has been found that there has been family violence and a protection order is to be made, to automatically include a standard order requiring the perpetrator of violence not to commit acts of domestic violence to the children and to be of good behaviour towards them, would achieve these ends or whether there would be even greater resistance to the making of violence orders in the first place. There does appear to be a need to better educate Magistrates and Family Law Court Judicial Officers as to how violence within the household impacts of children and why orders might contain some better safeguards for children.

Having said that though there is a view that the applicant should still prove that the children had been the subjects of violent behaviour. There may be situations in which the violence occurred at times when the children were not exposed to it.

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.*

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.

The Qld Law Society does not propose to comment on these proposals

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.

The Queensland Law Society supports this proposal.

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.

The Queensland Law Society does not respond to this proposal.

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

The Queensland Law Society is not aware of any other examples

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).**

There is no interaction in practice between “common assault” and “wilful injury”. The question that should be asked, with respect, is does the more restrictive definition of “wilful injury” therefore make it more difficult to obtain a protection order than if the definition adopted for that of common assault were to be used for the purposes of the Domestic and Family Violence Protection Act 1989 Qld? The answer is simple: no, it does not.

The reason for this is two-fold:

- (a) All that is ultimately required to obtain a protection order is that **an** act of domestic violence has occurred and a further act is likely. The other reason is that there is such a wide variety of conduct contained in section 11 that certain acts could constitute different forms of domestic violence within the definition. Example: the wife is having a shower. The husband, against her wishes, removes the wife from the shower and, despite her struggles, forces her outside the house, facing towards the street whilst naked and then locks her out. The husband's conduct would constitute harassment, intimidation and an indecent act without consent. If she were bruised in addition it would constitute wilful injury.
- (b) Of more concern to the Queensland Law Society is that it was recognised 22 years ago that whilst the Criminal Code allowed police to prosecute for all types of offences, in those matters involving domestic incidents, all too often police did not prosecute.

There have been numerous reports that all too often police rely upon the provisions of the Domestic and Family Violence Protection Act 1989 Qld and do not prosecute. Research undertaken by Queensland academic Heather Douglas has highlighted the large difference between the obtaining of protection orders and prosecution rates. It would appear from that research that there is no substantial impediment to the obtaining of protection orders under the Queensland legislation but there is still a considerable way to go for police to engage in adequately prosecuting for crimes that have occurred in a domestic context.

The Queensland Law Society does not agree, for the reasons stated above, that there needs to be a review of the definition of "domestic violence" referring to "wilful injury" and "indecent behaviour without consent".

It is a mistake to assume that "indecent behaviour without consent" is merely sexual assault. The definition is much wider, for example, a partner who took photographs of his partner while she was naked in the shower, without her consent, would have committed this act of domestic violence as well as constituting "harassment".

If the husband then placed that photograph on a website, again without her consent, then that would constitute indecent behaviour without consent, and harassment and, in the appropriate context, may constitute intimidation. If there were evidence of a threat to place it on further websites or to take further action if the wife did not agree to the photograph being posted on the website, then that threat in itself would constitute an act of domestic violence.

The Queensland Law Society considers that the concepts of harassment and intimidation are sufficiently broad to include, together with wilful injury, virtually any kind of assault (other than sexual assault).

The Queensland Law Society considers that the concept of indecent behaviour without consent includes sexual assault, and that alteration to the Queensland legislation is not necessary.

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 Qld Law Society does not propose to respond to this Proposal

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?*

The Queensland Law Society agrees with the family violence strategy of the Family Court of Australia that the definition of “family violence” in the Family Law Act is too narrow to meet the objectives of the strategy.

The Queensland Law Society supports the comprehensive definition of the elements of family violence adopted by the Family Court’s family violence committee.

It is not the Queensland experience that the Family and Federal Magistrates Courts are required to consider a conceptualisation of family violence on a state level that is broader than that envisaged under the Family Law Act. In cases where a person appearing before the Family or Federal Magistrates Court has a pre-existing final or contested protection order the differences in definition between the Queensland and Federal schemes have little effect.

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?*

The Queensland Law Society is of the view that “definitional issues do not have great significance in practice”. In practice, if a survivor of violence asserts in Family Law Act proceedings that he or she has been the subject of violence, then in properly prepared material he or she will not merely rely upon the existence of a protection order but will set out what violence has occurred so that it can be properly taken to account as evidence before the Federal Magistrates or Family Court.

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.*

The Queensland Law Society supports this proposal to expand the definition of domestic violence in the Family Law Act.

The Queensland Law Society is of the view that “definitional issues do not have great significance in practice”. In practice, if a survivor of violence asserts in Family Law Act proceedings that he or she has been the subject of violence, then in properly prepared material he or she will not merely rely upon the

existence of a protection order but will set out what violence has occurred so that it can be properly taken to account as evidence before the Federal Magistrates or Family Court.

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

The Queensland Law Society supports this proposal.

The Queensland Law Society supports this proposal, and notes that this concept has been part of the Qld Act since 2003.

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?

The Migration Regulations should categorise certain types of conduct rather than the effect of conduct on the victim.

Furthermore, the Migration Regulations can have a pernicious effect on the survivors of violence. There has been anecdotal evidence that women who have been the subject of violence in their relationships have been left vulnerable and in refuges for very long periods of time without access to proper services whilst they wait for considerable delays for the processing of their claims through the Department of Immigration and Citizenship.

It is imperative that if Australia as a civilised society is to provide a helping hand to those who have come to Australia in good faith and then being subjected to family violence in Australia, that their applications for permanent residence are processed with priority. It would be helpful for the Migration Regulations to reflect this.

In 2005 the Howard government ensured that the Migration Regulations were amended such that in certain circumstances a person would be required to attend upon a Centrelink social worker to determine whether or not family violence had been committed.

Regulation 1.23(2) of the Migration Regulations requires that an injunction is granted under paragraph 114(1) of the Family Law Act. Section 114(1) sets out examples of the types of injunctions that can be made by the court including in this case injunction for the personal protection of a party, restraining a party to the marriage from going to the other party’s home or work. An injunction relating to the use or occupancy of the matrimonial home, if so expressed, falls within section 114(1)(f) and is not therefore worthy of consideration under Regulation 1.23(2). An undertaking, which is commonly given in the Family Court if given instead of an injunction, is not covered by this sub-regulation.

The changes introduced by the Howard government are covered under sub-regulations 8 to 14 of Regulation 1.23 covering “non-judicially determined claim of family violence”.

The immediate effect of the changes were reports that officers of the Department of Immigration and Citizenship were of the view that protection orders obtained on a without admissions or a default basis were “non-judicially determined”.

A member lobbying the Howard Government was informed by that Government that the Government

was of the view that when orders were obtained by default or on a without admissions basis then, because the respondent had the opportunity to be heard and to oppose the orders, and because magistrates had to be satisfied that domestic violence had occurred even when making consent orders, then those orders were judicially determined, and that Brisbane staff would be instructed accordingly.

The internal procedures of the Department as of last year did not include these categories.

If the regulations and their method of application were taken to their logical conclusion, victims of violence would have to insist that the proceedings continue until trial. Of course this not a desirable outcome if it can be avoided. The survivor of violence may not be in a position to ensure that the matter proceeds to trial, in any event.

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 Qld Law Society does not propose to respond to this Proposal.

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.

The Queensland Law Society supports these proposals.

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?

The Qld Act has since 2002 included relationships with informal carers. The retention of those relationships in that Act is supported by The Queensland Law Society.

The most significant limitation of the Qld Act is that for those people who are not covered by that Act, because their relationship is not of the right kind, then reliance must be had on the Peace and Good Behaviour Act 1982, legislation which was criticised as being inadequate as long ago as 1988.

The Peace and Good Behaviour Act 1982 requires threats to property or to personal injury of the complainant or someone in the complainant's care and the person fears that the respondent will carry out the threat (or has a fear of damage to property).

Relief under that Act is extremely limited:

- (a) Mediation;
- (b) A summons, and if successful an order; or
- (c) A warrant.

It has long been considered that orders are particularly ineffective as they need to be enforced by the aggrieved, not by police.

The Queensland Law Society does not have a view one way or the other as to whether relationships with paid carers are included as relationships under the Qld Act.

The Queensland Law Society is of the view, however, that those who have relationships with paid carers who are then subject to what would otherwise be described as domestic or family violence ought to have effective legal relief of a similar kind to the obtaining of a protection order.

There needs to be comprehensive legislation allowing those who are subject to violence to be able to obtain relief. In Queensland, for example (except possibly in Indigenous relationships):

- the second partner of a woman cannot obtain a protection order against the first partner; and
- a grandmother cannot obtain a protection order against her daughter-in-law's boyfriend;
- a minor cannot obtain an order against his or her parents;
- conversely a parent cannot obtain an order against his or her minor child; and
- a person can obtain an order against an informal but not a formal carer.

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.

The Queensland Law Society supports state and territory family violence legislation containing guiding principles including express reference to a human rights framework. In particular, The Queensland Law Society supports the Qld Act containing such an express reference including reference to the stated conventions. Whilst most Queensland magistrates are aware of Teoh¹, it is imperative that for the purposes of administration of the legislation, which necessarily involves the consideration of legislative principles by:

- (a) Magistrates and judges;
- (b) Police;
- (c) Lawyers;
- (d) Domestic violence advocates,

it is essential that the human rights framework is made plain in the legislation.

The human rights framework has been clearly stated by overseas courts such as those in Maryland² in which there was express reference to the amount of domestic violence and the effect of domestic violence on women, resulting in the legislative response, a view which has not been reflected yet in Queensland.

¹ Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh ("Teoh 's case") [1995] HCA 20; (1995) 128 ALR 353; (1995) 69 ALJR 423; (1995) EOC 92-696 (extract); (1995) 183 CLR 273 (7 April 1995)

² Coburn v Coburn (1996) Maryland

The Queensland Law Society supports this proposal. Without trivialising or minimising other forms of domestic and family violence, the majority of domestic and family violence occurring in Queensland and in Australia is by men to women. Some of the worst forms of domestic and family violence occurring on a daily basis in Queensland, occur in some Indigenous townships.

A key feature of domestic and family violence, of all kinds, including that by men to women, women to men, and those occurring in same sex relationships is that it is extremely common and under reported.

The preamble should be written in an inclusive way so that those who have been subject to domestic and family violence are not discouraged from seeking protection. The desire to provide justice should not blind judges and others that domestic violence occurs in ways that does not always accord with theory – for example by drug dependent adult children to their mothers, or by abusive women to their male partners.

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.

The Qld Law Society does not oppose this proposal.

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.

The Queensland Law Society supports these proposals.

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.***

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.***

Response to Proposal 4-25 and 4-26

The Queensland Law Society agrees with these 2 proposals and submits:

1. A core purpose of the legislation should be that children are able to be adequately protected.
2. A core purpose should be to protect victims of domestic violence and prevent further acts of violence against them.
3. A core purpose should be to ensure that adequate use is made of perpetrator programs to prevent both further acts of domestic violence and the transmission of domestic violence from one generation to the next.

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?

See answer to Proposals 4-25 and 4-26.

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

This is certainly the ideal. However the Queensland Law Society supports the notion that if there is a test that applies in the local jurisdiction with a proven history of achieving its goals and which provides adequate safe guards and balances for those wrongfully accused then that test ought to be retained.

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 Society does not support this proposal or the introduction of a test, even as an alternative test, that focuses on the impact of the violence on the person seeking protection. Our reasons are best explained by reference to the examples given in the Consultation Paper.

Victim B resides in Queensland. She also was physically assaulted by her partner. She applies for a protection order and has to prove that her partner assaulted her and that he is likely to do so again. She has photographic evidence of the injuries sustained in the assault, as well as the corroborating evidence of a friend.

She gives evidence that her partner is likely to assault her again, based on her knowledge that when he is under considerable stress at work he 'takes it out on her'. She leads evidence that similar types of assault occurred two years before, when her partner was also under considerable financial and work stress. Her partner contests the application expressing remorse and providing evidence that he has enrolled in an anger management course. The court does not grant the application. Victim B is also involved in family law proceedings seeking custody of her child. Unlike the case of Victim A, there is no protection order to which the Family Court must pay regard.

What is clear about the example, and appears clear from the tests in the other states, is that there has been a clear time lag between the commission of the acts of domestic violence and the need to obtain an order, which would appear based on the various tests to make it somewhat difficult for the applicant to obtain an order without more.

If the applicant were to lead a comprehensive case in which intimidation and harassment were also alleged, it is likely that she would have been successful.

The test requiring reasonable apprehension of fear would have the same difficulties as the Queensland test in the example given.

It should be noted that if the case were decided as cited it shows a possible ignorance of the dynamics of domestic violence on the part of the judicial officer:

- expressions of remorse need to be carefully weighed in domestic violence cases, given that they are also a part of the cycle of violence; and
- anger management courses do not deal with perpetrator issues, merely anger.

As the Commissions note, the test that is contained in Queensland requires likelihood. This is contained in three different ways:

- (a) In respect of domestic violence (other than threats) – that further acts of domestic violence are likely;
- (b) In respect of threats to commit acts of domestic violence, that the acts are likely to be carried out; or
- (c) In respect of associated domestic violence towards a named person, that that person has been the subject of associated domestic violence or is likely to be the subject of associated domestic violence in the future.

The Society's view is that the current test in Queensland is the appropriate one and ought not to be altered. It would appear from reading the paper that there is a less than adequate understanding of the test in Queensland and how that works in practice.

One District Court judge described the legislation as in effect looking at the events in the past to be able

to predict the future. The case example is a clear example of that, and should have resulted in the making of a protection order, if the example is accurate.

The reality about the obtaining of any type of protection order is that it is in effect a statutory form of injunction. The usual test for obtaining an injunction is the balance of convenience, i.e. is it more convenient than not for the order to be made? In considering that balance of convenience in the obtaining of civil injunctions, judges must look at the events of the past to be able to predict the future. If by the events of the past there is no need for an order, then it ought not be made.

The test of “likely” is not an onerous test. It is not a test requiring that further acts of domestic violence are going to occur in the future either on the criminal standard of beyond reasonable doubt or on the civil standard of balance of probabilities. The test is even lower than the civil standard. It is whether there is a real or serious risk of further acts of domestic violence. If there is not a real risk, then an order ought not be made.

If the “fear” test proposed by the Commissions were to be adopted in Queensland, then it is likely that orders which are currently not capable of being made in Queensland due to the safeguard of the “likely” test will be made resulting in more orders being made in cross applications brought by violent husbands. A significant proportion of those applications do not currently get made when the test of likelihood of further violence is considered.

Below are some examples of how the word “likely” works in practice:

Example 1 – The wife sought an application for a protection order against the husband. The wife alleged that the husband had grabbed and tackled her, pushed her over, flushed her head in the toilet, thrown objects at her including hitting her and damaging the objects and walls, and chasing her around the yard with a tomahawk, threatening to kill her. The husband denied these acts. At the trial the wife admitted that she had been hospitalised for long periods in a psychiatric unit. She also admitted that as a result of her medications and condition she had difficulties with her memory. Nevertheless, she maintained her story of being subject to violence and abuse by the husband. It was clear that the wife was afraid of her husband.

The husband asserted that he had been the one subjected to violence by the wife, of the kind described by the wife. He asserted that on several occasions, however, he had restrained her (which had not caused her any injuries) to prevent her from hitting him.

The magistrate found that the husband had, in those acts of restraint, committed acts of domestic violence, but that further acts of domestic violence were unlikely to occur in the future.

If there were express reference in the legislation to predominant aggressor then it is also unlikely that an order would have been made against the husband.

If the test were altered to that of subjective fear, then the wife’s fear was genuine, albeit misplaced due to her psychiatric condition, in which case the order would have been made against the husband.

Example 2 – A magistrate declined to make a protection order against a wife because the magistrate considered who the predominant aggressor was. The magistrate found that the predominant aggressor was the husband. The magistrate therefore held the view that although acts of domestic violence had

been committed by the wife, further acts of domestic violence by her towards the husband were not likely.

If the test were changed to that of fear then a protection order might have been made in favour of the husband.

Example 3 – A man and a woman were in an intimate personal relationship. The woman was both the paid and unpaid carer of the man. The man ended the relationship to the great chagrin of the woman. The woman then sent a barrage of emails, text messages and phone calls to the man demanding to know why he had broken up the relationship. Ultimately the woman discontinued the barrage, sending an email saying that as she had heard nothing further from him she would not be contacting him ever again.

Two days later the man then brought an application for a protection order. He relied on the communications to obtain a temporary protection order.

The woman defended the application on the basis that further acts were not likely, given her unilateral communication that there would be no further communication, and her compliance with that for over a fortnight before any temporary protection order was made.

Ultimately the matter was settled without an order being made as the man recognised that it was unlikely that further acts of domestic violence would occur.

The temptation for the woman in that circumstance would have been to agree to an order on a “without admissions” basis and thereby avoid the costs and grief of contesting the matter.

The woman, however, decided to contest the matter in part because of her obvious defence but also in part because she wanted to be a foster parent and she believed that having a protection order made against her may well prejudice her ability to become a foster parent.

There are at times unexpected impacts that arise from the making of a protection order. Those who are respondents to protection orders ought to have the ability to have checks and balances in place so that protection orders are made to protect those who need them, and not those who necessarily say they need them.

Too often respondents to protection orders make cross applications. These are often made by violent men. By having the checks and balances in place so that these applications are properly scrutinised and particularly by whether further acts of domestic violence are likely, should minimise spurious and oppressive cross applications being made.

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

- (a) ***a person has reasonable grounds to fear, and, except in certain cases, in fact fears family violence, along the lines of the Crimes (Domestic and Personal Violence) Act 2007 (NSW);***
- (b) ***a person has reasonable grounds to fear family violence;***
- (c) ***there are reasonable grounds to suspect that further family violence will occur and the Court is satisfied that making an order is appropriate in all the circumstances, along the lines of the Intervention Orders (Prevention of Abuse) Act 2009 (SA); or***

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

The Qld Law Society supports the retention of the grounds as set out in the Qld Act as it has a proven track history of providing an appropriate balance between protection of the victims of violence and protection of those erroneously alleged to have committed acts of domestic violence.

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 Queensland Law Society is unable to comment as to whether state and territory prosecutors seek the consent of the Commonwealth Director of Public Prosecutions and inform it of the outcomes of any such prosecutions.

The federal offences that come up most frequently in the family violence context are:

- (a) Improper use of mail; and
(b) Use of a carriageway to make a threat.

In respect of the former, any prosecutions (which appear to be rare) are undertaken by the Australian Federal Police.

In respect of the latter, prosecutions are ordinarily undertaken by Queensland Police.

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?

It is certainly The Queensland Law Society's experience that conduct which would constitute an offence against federal criminal law has on a daily basis formed part of the basis for obtaining a protection order in Queensland.

The type of conduct includes making threats:

- (a) By post (although rare these days);
(b) By email;
(c) SMS; or

(d) By telephone.

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.

It is the view of the Queensland Law Society, in light of the daily experience of police and the courts, that the current legislation in Queensland adequately captures relevant federal offences in the family violence context.

So far as sexual servitude is concerned, the greatest difficulty under the Queensland legislation, as identified above, is that if the violence and abuse is not within the right type of relationship, then there is little legal relief. In a case of sexual servitude, the notorious cases involve women brought from third world countries to Australia by strangers. Whilst there would be various criminal charges that would apply, and if the defendants were granted bail, there would no doubt be conditions of bail attached and whilst there is the ability in Queensland law for restraining orders to be made at the conclusion of the matter, there is not the basis (except for a warrant under the Peace and Good Behaviour Act) to obtain relief in Queensland to be adequately protected from such a person.

The example of the offence of sexual servitude illustrates again why in Queensland there ought to be legislation that enables civil protection orders to be given to those who are not within the relatively narrow compass of relationships as covered under the Qld Act, by replacement of the Peace and Good Behaviour Act 1982.

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.***

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.***

The Queensland Law Society would support such a centralised database of statistics.

Furthermore, The Queensland Law Society has identified that one of the clear weaknesses in the Qld Act is that there is not a specific mandate given to a particular public servant or statutory official requiring statistics to be kept under that Act. Currently statistics under that Act are kept separately by:

- (a) Commissioner of Police – as to call outs by police in domestic violence incidents and prosecutions;
- (b) Department of Justice and Attorney-General – as to statistics held by the courts; and
- (c) The Department of Communities – as to the number of applications and orders that are made.

There is not one clear transparent process of keeping statistics nor a standard for keeping those statistics. This makes it difficult for those practising in the field or for researchers and public commentators to be fully aware as to the level of domestic and family violence in Queensland and the government's response to it. The Qld Act ought to be amended to provide for one public official to collate and publish annually those statistics so that parliament and the public are clearly aware of the level of and nature of domestic and family violence as responded to under that Act.

Obviously any register to be maintained would need such adequate administrative support to enable it to work.

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?

Yes. It is best achieved by being offered as part of the CPD requirements of lawyers, particularly solicitors practising in family and criminal law.

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

In the 20 years since the Qld Act came into effect, there has been a remarkable change of attitude by police. Police will say, with undoubted pride, as to the number of domestic violence prosecutions that they undertake and will also say as to the number of domestic violence call outs that police attend upon. Nevertheless, it is a sad reality, as researchers such as Heather Douglas have demonstrated, that there is an extraordinarily wide gap between:

- (a) Police obtaining protection orders; and
- (b) Police prosecuting perpetrators of violence when the conduct would also constitute domestic and family violence.

To their credit, Queensland Police have identified domestic violence as being a core responsibility and have taken strong and positive action to counter it. For example:

- (a) The Commissioner regularly reviews statistics from various police divisions within Queensland. When it is noted that police action on domestic violence prosecutions in a district is statistically quite different from that of comparable districts, then a review is taken down the line through the Police Service as to why that might be the case. It has certainly been seen when that action has been taken that prosecution rates increase.
- (b) The state-wide coordinator of police response to domestic violence position has been upgraded from that of a senior sergeant to that of an inspector. The significance of that change has meant that in dealing with officers in charge of individual stations, the inspector is of at least the same rank as the other officer, if not a higher rank. This is a useful tool in promoting action to deal with domestic violence.
- (c) Police continue to upgrade education so that recruits are aware of domestic violence and some of the subtleties in policing it.

Nevertheless, police claim that it can be very difficult to prosecute for offences involving domestic violence because:

- (a) The victim often recants and therefore police are reluctant to commence the prosecution; and
- (b) It can be hard to prove matters beyond reasonable doubt.

Furthermore, Queensland Police in their operational police manual, a small book given to police on the beat, have their attention drawn to obtaining protection orders but not necessarily to also charging perpetrators of violence with offences arising out of the same conduct. The most typical reaction by police in attending domestic situations is to take action and if necessary apply for a protection order and if necessary remove the perpetrator from the scene, taking him or her into custody for a number of hours, but not to charge the perpetrator with any offence.

The experience overseas is that police in the United States, for example, have often given the excuse of the victim of violence recanting and therefore being reluctant to prosecute or it being somehow difficult to prosecute matters beyond reasonable doubt.

Two methods that have been adopted in the United States have had a positive impact on the reduction of domestic violence and an increase in the prosecution of domestic violence offences. Those two steps have been:

- (a) adopting a coordinated community response to domestic violence, based on the Duluth model; and
- (b) The establishment of Family Justice Centres.

The First Family Justice Centre was established in San Diego. It brought together amongst others domestic violence advocates, prosecutors, counsellors and sexual assault workers as well as specialist police to investigate domestic violence offences.

What was noticed in San Diego (and later repeated in other places where Family Justice Centres operate) was that by bunching together these disparate experts into the same place the level of

expertise of all of them was increased, so that there was more of a teamwork approach to dealing with domestic violence. There was, as a result:

- (a) A marked increase in successful prosecutions for domestic violence offences; and
- (b) A marked decrease in the amount of domestic violence.

The prosecution of offences in the United States can be particularly more difficult than in Australia as defendants are entitled, on all offences, to have a jury.

The Queensland Law Society would urge the Commissions to investigate and recommend the adoption of coordinated community responses and of family justice type centres.

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

No. It is particularly difficult to establish that there has been family domestic violence by virtue of economic or emotional abuse, particularly in the context where it is seen that the parties are also disputing in the family law arena as to property settlement and as to children's matters.

It is easier to obtain protection orders when there is evidence of physical violence and related threats. Subtle cases are hard to prove to obtain protection orders even where there are relaxed rules of evidence and for which the case need only be proved ultimately on the balance of probabilities.

More onerous requirements would be placed upon police to prosecute for these offences both because of the evidentiary rules and to meet the criminal burden of proof.

It is submitted that a much higher priority for police is to prosecute for the offences that have been committed under existing legislation.

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?

Police do not have the power in Queensland to make protection orders. In more urgent cases, police have the power to apply to a magistrate under section 54 of the Qld Act to make an order over the telephone late at night or to take a respondent into custody in a more serious case and then release them under, in effect, conditions of bail until the matter comes before the court.

In the scheme of things, section 54 applications are rarely brought in part due to the natural desire of magistrates not to be called at 2.00am in respect of an urgent matter except where absolutely necessary.

The existing power to take a person into custody directly leads to a reduction of domestic violence and ought to remain.

It is the view of the Queensland Law Society that Queensland Police should have the power to make temporary protection orders for a period of up to 72 hours so that the matter can then come quickly before a court and enable the respondent to have the opportunity to be heard.

In the absence of police issuing an on the spot order, there will be a gap between the attendance by police and the appearance before the court.

In some cases police have over the years and continue to tell survivors of violence that the survivor needs to apply for a protection order even though there appears on the face of it to have been an obvious case in which police ought to have taken action.

The making of short temporary protection orders by police should lead to a decrease in the workflow by police in dealing with domestic violence incidents. There has been far too high an administrative burden on police in this process. Police have estimated that it takes approximately 6 hours for a pair of police officers to deal with each domestic violence incident. Each such incident therefore directly impacts upon the ability of police to provide a safe environment for all of us. The obtaining of temporary protection orders in those circumstances should, if able to be properly administered, lead to a decrease in the administrative burden upon police and corresponding increase of police responsiveness to other criminal behaviour within the community.

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***

Police should be able to impose protection orders in emergency circumstances in addition to the other powers given to police under the Qld Act including the ability to make application under section 54 of that Act.

For the purposes of protection of the civil liberties of the respondent and to enable the respondent to have an opportunity to be properly heard, any temporary protection order ought to be for a short period, such as a period not greater than 72 hours.

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.***

The Queensland Law Society supports this proposal. A similar duty has always been contained in section 57 of the Qld Act. It is submitted that it would be appropriate that section 67(2)(d) of that Act be amended at the end by adding the words: “or by another Act” so that it is clearly stated to police that in addition to the stated duty under the Qld Act there are other Acts under which police have powers and responsibilities, including in appropriate cases to prosecute for offences.

There should be a requirement to make a record of the reasons not to take any action such as apply for a protection order, if police decide not to take action. Although there ought to be full accountability, there should be a recognition of ensuring in that process that the administrative burden on police is able to be minimised.

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?

The basis of a police application for a protection order is stated under section 67 of the Qld Act, namely that if after an investigation the officer reasonably believes that the person is an aggrieved and there is sufficient reason for the officer to take action then the officer may apply for a protection order. Furthermore, if police have taken a person into custody there is then a mandatory requirement by section 71 of the Qld Act to apply for a protection order.

It is submitted that the statutory balance under the Qld Act is appropriate.

The Queensland Law Society supports the continued ability of police to apply for protection orders.

What is apparent from observing statistics from different police and Magistrate Court districts of Queensland is that there can be great differences in each district as to the percentage of applications applied for by police, such that in some districts it is certainly a majority of applications but in other districts it is very much a minority.

It would appear that the main reason for those differences from anecdotal evidence has been the level of domestic violence and other crime in the particular district *and* the resources of police able to meet those demands. It would appear that in those police districts in which resources are stretched there can be relatively fewer prosecutions by percentage than those districts in which there are more available resources.

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?

This would certainly be the case in an ideal world. However, Queensland, in particular, is a greatly decentralised state. Sydney, Canberra and Melbourne are closer to Brisbane than is Cairns, let alone Saibai Island or Boigu Island. If there are to be Indigenous specific support services then these ought to be focused in areas of greatest need.

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?

The Queensland Law Society is unable to respond other than to the situation in Queensland. The Director of Public Prosecution plays no role in protection or proceedings under the Qld Act.

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 currently in Queensland regularly enter premises, search for and seize firearms or other articles and arrest and detain people under the Qld Act.

The Queensland Law Society supports police being able to attend at a domestic and be able to take direct action to ensure the safety of those present.

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.

It is a daily event that police suggest to those committing acts of domestic violence to leave the scene and remain in another specified place, instead of police detaining those people under the Qld Act.

The Queensland Law Society is opposed to any action which would diminish the responsibility by police officers under section 69 of the Qld Act (taking respondents into custody) as the effect of any such change may tempt police not to take action under section 69, which may have tragic consequences.

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?

It is considered that there are adequate means under this legislation and there is no need to alter it. The requirement under section 69 of the Qld Act currently is very wide. A police officer who has reasonable grounds for suspecting that an act of domestic violence has been committed and a person is in danger of personal injury by a respondent or their property is in danger of being damaged by the respondent may take the respondent into custody. This section is intended to deal with the initial crisis when police attend at a “domestic”. Anecdotal evidence as to police action at domestics is that police officers separate and speak to the parties separately. This is in accord with police training and procedure and is appropriate. If police believe that there is a danger of personal injury or damage to property then that is an adequate ground to take a respondent into custody.

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

The Queensland Law Society supports such amendments. It is imperative that the predominant aggressor is identified. Providing a reference to predominant aggressor in the core purposes of the legislation will focus the minds of judges, police and lawyers as to whether or not it is appropriate for an order to be made and, if so, what the conditions of that order ought to be and/or what punishment there ought to be for a breach of the order.

In addition to any other benefit, this may be of benefit in any Family Law Act proceedings between the parties.

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 relation to the release of respondents after they have been detained for a short time by police who arrived at the scene of a domestic, pursuant to section 71(3) of the Qld Act, the anecdotal evidence is that these people are much less likely to commit acts of domestic violence after having been taken into custody than those who are not taken into custody and almost certainly will not breach the conditions of their release.

The test otherwise in respect of bail is no different to that which applies generally under section 16 of the Bail Act 1980 (Qld) which is generally based on a refusal of bail if there is an unacceptable risk including endangering the safety or welfare of a person who has claimed to be a victim of the offence.

In general terms there is high compliance with bail conditions because, unlike many acts of domestic violence where there is a low chance of being prosecuted for an offence, let alone being imprisoned, a breach of a bail condition will almost certainly result in the imprisonment of the alleged offender.

The Queensland Law Society's position is there ought not to be any change as to that test.

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?

There is no statutory requirement for victims to be notified except for more serious offences. The Queensland Law Society is unable to say how often victims of family violence are informed or not informed about a decision to release the offender on bail or the conditions of release.

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.

The Queensland Law Society 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?

Not known. The anecdotal evidence is that magistrates try to ensure that bail conditions and protection orders are not inconsistent with each other.

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).

The Queensland Law Society supports this proposal. It would be unlikely that police would charge a person with committing an offence which included a domestic violence element and did not also apply for a protection order at the same time. If that were to occur, then magistrates (and for that matter Supreme and District Court judges) ought to have the power to make protection orders in addition to bail conditions.

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.

The Queensland Law Society supports the proposal. It is noted that this would entail a minor amendment to section 62 of the Qld Act which already makes plain that the proceedings do not have any effect on any proceeding for an offence against the person arising out of the same conduct.

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?

Not known.

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.

The Queensland Law Society is concerned that if this proposal were to be adopted that the civil liberties of the accused are able to be adequately protected.

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?**

Response: (a) Not known.
(b) Yes.
(c) No.

In respect of bail proceedings, the magistrate or judge would need to consider whether there is an unacceptable risk that the defendant would “endanger the safety or welfare of the person who has claimed to be the victim of the offence or anyone else’s safety or welfare”. Bail proceedings are not “for an offence” but in relation to bail relating to that offence.

Judges make reference to the existence of a protection order in the process of sentencing, but it is more in the context that, as a consequence of the behaviour which resulted in the offender being charged, a protection order was also made.

Section 62 does not apply to breach of protection order proceedings except if there are further proceedings or a protection order or variation or revocation of a protection order as a result of that further conduct: cf. Section 62(4). The key phrase is “for an offence against the person arising out of the same conduct”.

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?

The knowledge about this is very limited. It would appear that by the time the matter comes before the court the aggrieved has already obtained a temporary protection order (or police have applied).

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?**

Not known.

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?

No. If it is necessary for State intervention to ensure the safety of a victim then the ability to have a

mandatory protection order should remain.

If the victim, however, is able to meet the statutory threshold for revocation, which in broad terms is that the safety is not going to be imperilled by the revocation of the order, that further acts of domestic violence without the existence of the order are not likely, then these are matters for appropriate relief.

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?

The Queensland Law Society is unable to answer the first question. There is already the ability of all courts on a plea of guilty or finding of guilt on their own initiative to make a protection order. There should be the ability of prosecutors of the Queensland Director of Prosecutions to make applications in those cases for a court to make a 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 the early stage of the criminal proceeding – including prior to a plea or finding of guilt.

The Queensland Law Society supports this proposal.

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.

The Queensland Law Society supports this. The problem of family violence needs to be tackled in an holistic manner. Too often the victims of violence fall through the cracks due to a lack of co-ordinated response. There should be the opportunity when an offender is sentenced for the court to ensure that the protection order is adequate.

Question 6-7. In practice, the conditions which judicial officers attach to protections of the State and Territories Family Violence Legislation are sufficiently tailored to the circumstances of particular cases?

Yes. Magistrates are attuned to ensuring that a protection order provides for safety and proper conditions are tailored to the circumstances of each case.

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

This has been a condition open to Magistrates since 2003 in Queensland, under Section 25(3)(e) & (7) of the Qld Act.

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 form should be drafted to enable applicants to indicate the types or conditions that they would impose. In particular, the application form for a protection order in Western Australia should be amended in this regard.

The conditions that may be imposed under Section 25 of the Qld Act are examples only, with the court being able to make such orders as are necessary and desirable. Having said that, there is an extensive checklist of special conditions set out in the applications for protection order, which appears to work well, being able to identify to the applicant as to which special conditions might be appropriate.

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

These orders in Queensland are known as ouster orders. Section 25(5) of the Queensland Act sets out the matters that are of paramount importance:

- a) the need to protect the aggrieved to any known person;
- b) the welfare of the child of the aggrieved.

Section 25(6) says the court may also consider:

- a) the accommodation needs of all persons affected by the proceedings; and
- b) the orders effect on the child of the aggrieved; and
- c) the existing orders for guardianship or custody or access to, a child of the aggrieved.

The anecdotal evidence is that ouster orders are less cumbersome, quicker and cheaper to obtain than sole use orders under the Family Law Act, but there are at times remarkably different approaches from different magistrates. Anecdotal evidence is that some magistrates are inclined to make these orders quite readily, including on an ex parte basis, whereas other magistrates regularly decline to make them, particularly if they are concerned that they are being used as an inappropriate stalking horse for property settlement proceedings.

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?

No. The police should certainly make enquiries of the excluded person as to whether they have accommodation and give them reasonable assistance, so as to minimise further acts of domestic violence, but given the huge administrative burden placed upon police there should not be a legislated requirement for police to take such reasonable steps.

Proposal 6-9: State and Territory Family Law 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 an order has been sought.

This is supported by the Queensland Law Society. Magistrates in making or refusing to make an order in any case should provide reasons.

Question 6-9: How is the presumption the Family Violence Legislation of the Northern Territory – that where a victims, person who uses family violence and child reside together, the protection of the victim and child is best achieved by them remaining in the home – work in practice? In particular, has the application of the presumption result in the making of exclusion orders?

The Queensland Law Society is unable to respond to that question.

Question 6-10: Should State and Territory Family Violence Legislation include an express presumption that the protection of victims is best served by them remaining in the home in circumstances where they share a residence with the person who has used violence against them?

Yes, as the removal of a victim of violence from the family home may result in further victimisation of that victim. There may also need to be provisions so that there is a recognition on the part of victims that remaining in the home in certain circumstances may be more dangerous than leaving.

Proposal 6-10: State and Territory Family Violence Legislation should be amended, where necessary, to allow expressly the 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.

The Queensland Law Society supports this proposal. Australian international research has indicated, quite strongly, that properly run and resourced perpetrator programs that are run for a sufficient length time and most importantly are linked in with services that are assisting the victims of violence can be an effective tool in preventing further acts of domestic violence and inter-generational transmission of domestic violence.

It is essential that:

- (a) Perpetrator programs be available wherever possible;
- (b) Where adequate perpetrator programs are available that in the making of protection orders magistrates consider sending the perpetrator to such a program;
- (c) That where there is a breach of the protection order that it be presumed, with appropriate exceptions, that the perpetrator is required to attend such a program.

It is essential that there are adequate standards for the programs and that amongst other things the programs are run for an adequate period of time. Overseas research indicates that programs should be run for a minimum of 26 to 52 weeks, but there are programs that have been made available in Australia for only 6 to 8 weeks which in the view of researchers is inadequate to cause a fundamental change of

thinking on the part of the perpetrator to that of non-violence and respect for others.

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

The Queensland Law Society supports this proposal.

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 prevention conditions attaching to 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?

The Queensland Law Society is not aware of Magistrates generally making such orders. The Queensland Law Society is aware of magistrates on the Gold Coast making such orders from time to time. This is more often made and there have been breaches of the orders than in the making of the protection orders.

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 of rehabilitation or counselling programs and any orders to attend such programs either pre-sentencing as part of the sentencing process?

Not known.

Question 6-14: Have there been cases where there has been overlapping of conflict between place restriction or area restriction orders imposed on sentencing on protection order conditions which prohibit or restrict the same person access to certain premises?

Not known. Many Magistrates are concerned to avoid distance or area restriction orders as they can be particularly difficult to enforce.

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

- a) ***any protection order conditions to which the person has been sentenced to subject, whether it is conditions arising out of the same or substantially the same conduct giving rise to prosecution of the offence; and***
- b) ***the duration of any protection orders which the offender is subject.***

The Queensland Law Society 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.

The Queensland Law Society supports this. Anecdotally, clients have reported threats of these prosecutions have arisen in cases of no contact clauses where the victim has spoken to the perpetrator.

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 on its own motion where:-

- a) ***there is evidence of the victim to whose benefit the protection order was made go free and voluntary consent to the breach; and***
- b) ***the court is satisfied that the victim wants to vary or revoke the protection order.***

The Queensland Law Society supports this proposal subject to there being no different tests to the variation or revocation. For example, under Section 36 of the Qld Act, the court on an application to revoke must have regard to:

- a) an express wishes of the aggrieved;
- b) any current contact between the aggrieved and respondent;
- c) where there any pressure has been applied, or threat has been made to the aggrieved by the respondent or someone else for the respondent; and
- d) any other relevant matter.

Most significantly sub-section 3 provides:

“The court may only revoke the order if the court considers the safety of the aggrieved or a known person would not be compromised by the revocation”.

There is power to vary the order in a way the court considers does not compromise the safety of the aggrieved or the known person: s.36(4).

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 courts of justice – where the conduct allege to constitute such offences as essentially conduct engaged in via victim to induce to mitigate the culpability of the offender. Legislative reform in this area should be re-enforced by appropriate directions and police codes of practice, or operating procedures and prosecutorial guidelines of policy.

While the Queensland Law Society understands the rationale for the proposal, the Society is concerned as to the wide-ranging nature of the proposal and wonders what evidence there is of victims being charged with serious offences such as conspiracy or attempting to pervert the course of justice in these circumstances.

Appropriate directions and police codes of practice or operating procedures and prosecutorial guidelines or policies may be an adequate balance.

Question 6-15: In practice does:-

- a) ***a person who breached protection orders raise a consent of the victims to the breach is a mitigating factor in sentencing; and***
- b) ***a court treat consent of the victim to a breach of a protection order as a mitigating factor in sentencing?***

Not known.

Question 6-16: Should State and Territory Family Violence or sentencing legislation prohibit the court from considering the consent of a victim to breach of a protection order as a mitigating factor in sentencing?

No. The court should have a discretion to consider the victim's consent to the circumstances within which the victim's consent was obtained..

Question 6-17: In practice, where a 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 of the State or Territory Criminal Law?

The practice seems to vary. Sometimes police charge only with breach of a protection order which can, at times, minimise the effect of the offender's behaviour. On other occasions, police charge the offender with the whole gamut of offences.

Question 6-18: If there is practice the 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?

The best way is to ensure that so far as possible, police have proper expertise. The issue of establishing a family justice centre was raised above which should ensure that in respect of these matters, the perpetrator is properly charged with the full range of offences.

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 context.

The Queensland Law Society would support this as part of the desire to have meaningful and open statistics, as separately raised above.

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

The Queensland Law Society does not have a position of this question.

Question 6-20: In practice, what issues of concerns arise about the sentencing actually imposed on offenders for breach of protection orders?

Too often there is no sentence actually imposed or a minimal fine. Too often offenders continue to commit acts of domestic violence including breaches of protection orders for which they are not prosecuted by police, confident in their belief that they will only receive a minimal penalty, if they are prosecuted at all.

Question 6-21: Should State and Territory of Family Violence Legislation contain provisions which direct courts to adopt a particular approach in sentencing for breach of protection orders - for example, a provision such as that in Section 14(4) of the Crimes, Domestic and Personal Violence (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?

Yes. Perpetrators of violence need to get the message loud and clear to stop committing acts of domestic violence and to start complying with orders. Victims of violence need safety.

Question 6-22: What types of non-financial sanctions are appropriate to interpose with breach of protection orders where the breach does not involve violence involving comparatively low levels of violence?

Probation may be appropriate with possible, special conditions such as attending perpetrators' course or counselling. Attendance at perpetrators' course may be a special condition including possibility of a suspended sentence. In appropriate cases, community service may be the most feasible option. Heather Douglas has raised, as noted in the paper, that police charge for technical breaches rather than the substantive underlying offence. The court may then see the offence committed as a rather trivial one, rather than more serious.

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 2-tier offence which captures both coercive conduct and physical conduct visible violence in a family violence context?

No. There is an adequate suite of laws already dealing with family violence. The real issue is the desire, ability and resources of police to prosecute and the granting of appropriate penalties by the courts in sentencing. A further offence of committing family violence is not required. A more effective response would be to ensure co-ordinated community response, and specialist police working in family justice centres occur.

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 high maximum penalty applies – if the offender is an offender relationship with the victim and defence committed forms part of a pattern of controlling, coercing 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 high maximum penalty?**

The Queensland Law Society favours the former as the Queensland Law Society considers that an aggravating factor or an assault or similar type behaviour is where the offence was committed as part of the pattern of controlling, coercive or dominating behaviour.

Question 7-3: What kind of family relationship should be included for the purposes of the offences referred to in Question 7-2?

The Queensland Law Society has no concluded view on the kind of family relationship.

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?

The Queensland Law Society believes that the same response should be adopted in the Federal sphere as is proposed under Question 7-2(a).

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?

The Queensland Law Society is not in a position to respond.

Question 7-6: In practice, are courts imposing sentencing for family violence related offences taking into account, where applicable, the fact that the offence forms 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?

The Queensland Law Society is unable to respond.

Question 7-7: In practice to what extent a guilty plea is entered to a family violence related charge accompanied by the acknowledgement that they are representative of criminology, comprising uncharged conduct as well as charged conduct?

The Queensland Law Society is unable to respond.

Proposal 7-1: The 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 charge conduct forms part of the course of conduct.

Noted.

Question 7-8: Should the sentencing legislation of States and Territories be permitted 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?

Yes.

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 relationship should this apply? Does it make a specific link between a family relationship and escalation of violence in appropriate model?

See Answers to Question 7-2, 7-3.

Proposal 7-2: State and Territories 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.

Agreed.

Proposal 7-3: The Australian Government – in conjunction with State and Territory Governments,

the National Judicial College of Australia, the Judicial Commission of New South Wales and the Judicial College of Victoria – should develop, and maintain the currency of, a model bench book on family violence, which incorporates the section of sentencing and family violence matters.

Agreed.

Question 7-10: Are current defence of domicile for victims and violence of family relationships adequate in each Australia State and Territories ?

Queensland, as noted in the paper, now has a partial defence to homicide based on serious domestic violence. It remains to be seen how this works in practice.

Proposal 7-4: State and Territory Criminal Legislation should provide defences to homicide which accommodate the experiences of family violence victims who kill, recognised in the dynamics of features of family violence.

The Queensland Law Society supports this proposal.

Proposal 7-5: State and Territory Criminal Legislation should express and 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.

The Commissions will be well aware of the recent changes to the Queensland Criminal Code in this regard.

Question 7-11: How could the criminal law best recognise family violence is relevant to a defence to homicide? For example, should family violence be expressed and accommodated within an expanded concept of self-defence or should jurisdictions introduce a separate defence of family violence? Are problems or issues arising from current models which recognise family violence is relevant to a defence to homicide?

It is too early to assess the effect of the amendments to the Criminal Code.

Proposals 8-1: State and Territory child protection laws should be amended to require a child protection agency who advises a parent to seek a protection order under State of Territory Family Violence Legislation for the purpose of protecting the child and provide written advice to this effect to ensure that a federal family court does not construe the parents' actions as a failure to . "facilitate, and encourage a close and continuing relationship between the child and the other parent" pursuant to Section 60CC(3)(c) of the Family Law Act 1975 (Cth).

The Queensland Law Society supports this. It is also the case that the production of these letters will be useful for women forced to make application for a protection, failing which the Department of Communities (Child Safety Services) has threatened to remove the child from her care, for failure to protect.

Proposal 8-2: Application forms 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 order.

The Qld Law Society supports this proposal and notes that applications in Family Law Courts require protection orders to be attached. The Qld Law Society supports a requirement for Family Law Courts to also require copies of the application, cross application order or temporary orders and orders to be annexed as well.

Proposal 8-3: State and Territory Family Violence Legislation should provide a mechanism 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 legal enforceable obligation of parties to proceedings by protection order to inform the court about any such parenting orders or proceedings;***
- b) ***requiring courts making protection orders to enquire as to any such parenting orders or proceedings;***
- c) ***both of the above.***

The Commissions noted that in Queensland there is such an obligation to inform the court. The application form in Queensland is adequate to deal with this issue.

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 on police who issue protection orders in other States and Territories?

The Queensland Law Society is unable to respond as to the position in all the States and Territories. It would be envisaged that “reasonable enquiries” would at a minimum be asking each of the parties as to the existence of any such orders.

Proposal 8-4: Application Form 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 of such orders.

The Queensland Law Society supports this proposal.

Proposal 8-5: The “additional consideration” in section 60CC(3)(k) of the Family Law Act 1975 (Cth), which directs a court to consider final or contested protection orders when determining the best interest of the child in making a protection order, should be:

- a) ***repealed, and reliance placed on a general criterion on family violence contained in Section 60CC(3)(j); OR***
- b) ***amended to provide that any family violence, including evidence of such violence given in any protection order proceedings – 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 interest of a child.***

The Queensland Law Society proposes the latter. It has been a view expressed by Family Court Judges that evidence given in family violence proceedings is not admissible in family court. This may no longer be the case given section 69ZT of the Family Law Act, but expressed clarity in section 60CC would be an improvement.

Proposal 8-6: Rule 10.15KA of the Family Law Rules 2004(Cth) should apply to allegations of family violence and additional allegations of child abuse. A substantial equivalent rule should apply to proceedings in the Federal Magistrates Court.

The Queensland Law Society supports the proposal.

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? Additional measures needed to prevent this – for example, by including a requirement in the Family Law Rules 2004(Cth) the parenting proceedings be initiated with parties propose consent orders that are inconsistent with current protection orders?

The Qld Society considers that inconsistent orders are made rarely but it supports the proposal.

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?

The most obvious measure is to enable cross-examination to occur so that the credibility of the parties is immediately observed. Another measure in respect to the Federal Magistrates Court is to remove the 5 subpoena limit and in the Family Court to allow subpoena to be issued for interim hearings with leave being required.

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 the current parenting order. This could be achieved by:

- a) prohibition to this effect of the State and Territory Family Law Violence Legislation;
- b) guidance in relevance State and Territory bench books.

Noted. It is suggested that the latter approach be adopted.

Question 8-4: Is section 68P of the Family Law Act 1975 (Cth), which requires the Family Court to specify any inconsistency between the Family Law Order and a Family Violence Protection Order, working in practice? Are any reforms necessary to improve the section's operation?

It is comparatively rare that Section 68P arises as the no contact provisions that are made in the protection orders typically have an exception for orders made under the Family Law Act to allow for contact between the respondent and his or her children. Where there is an inconsistency, judges provide reasons as to why there is the inconsistency.

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

The Queensland Law Society is unaware of whether the section has been used.

Question 8-6: Do state and territory courts exercise their power under section 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?

This power is rarely exercised.

Proposal 8-8: Family violence legislation should refer to the powers under section 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.**

The Queensland Law Society supports the South Australian model, i.e. as part of a checklist approach before a magistrate makes a temporary protection order or a protection order (including any variation). A magistrate ought to be required as part of the Qld Act to consider whether section 68R of the Family Law Act applies.

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?

No. Whilst the Queensland Law Society supports specialist family violence courts, the Queensland Law Society recognises that:

- (a) To fund these courts may require significant financial resources; and
- (b) Queensland is a very decentralised state and whilst referral to a specialist court might be appropriate in Brisbane, for much of Queensland reference to a specialist court will be inconvenient and result in a denial of access to justice.

Furthermore, the delay in referral to a specialist court may, in itself, defeat the purpose of section 68R which is, after all, for a timeframe of only 21 days and intended to apply in the most urgent circumstances.

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 for a current parenting order.

The Queensland Law Society supports the application form being altered as suggested so that applicants are clearly made aware of the effect of section 68R.

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?

1. Variation of parenting orders is ordinarily undertaken in the Family or Federal Magistrates Courts. Most state magistrates do not have the relevant expertise. Furthermore, there is limited jurisdiction under the Family Law Act such that after making interim orders state magistrates are inclined to transfer the matters to the Family Court or the Federal Magistrates Court, as they can be compelled to do so. Given time and costs constraints, and limitations on the nature of funding by Legal Aid, most such applications are therefore brought in the Family or Federal Magistrates Court.
2. Magistrates are reluctant to exercise power (where they are aware of it), under section 68R of the Family Law Act. Magistrates commonly see parenting disputes being determined in another place, not in front of them, as opposed to domestic violence disputes.
3. To prepare affidavit material in bringing a section 68R application (as sometimes magistrates require) can be a costly exercise when the time of the effect of such an order is only for 21 days.

Proposal 8-10: The jurisdiction of Courts of Summary Jurisdiction (Children) Proclamation 2006 (Cth) should be reviewed to clarify its intended application in the Magistrates Courts in Western Australia seeking to exercise their powers under Div 11 of the Family Law Act 1975 (Cth).

The Queensland Law Society does not have a response to this proposal.

Question 8-9: Should the Family Law Act 1975 (Cth) be amended to direct state and territory courts 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 conduct with both parents?

No. It appears to be a false dichotomy. State magistrates are keen to ensure that family members are protected in domestic violence proceedings. Whilst federal magistrates and family court judges may at times override protection orders, they usually do so most gingerly. The Queensland Law Society is not aware of any case in which federal magistrates or family court judges have overridden a protection order to strip away protection for a third party, such as a family member.

Question 8-10: Should section 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?

Yes. The application of section 68R is limited to the most urgent circumstances and limited to a period of 21 days. Its application in practice is extremely rare. Whilst a requirement under state family violence legislation for magistrates to take section 68R into account in the making of any temporary protection order is warranted, the Queensland Law Society expects that there will remain reluctance by magistrates to exercise the power, particularly in the making of a parenting order, except in the most urgent and obvious circumstances.

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?

To the first question: yes. Interim dates in the family or federal magistrates court may be listed between 2 weeks and 12 weeks, depending on the demand on judges' time.

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 state or territory court is awaiting hearing in a federal family court or the Family Court of Western Australia?

Yes, provided that an order has been made under section 68R.

Proposal 8-11: The Tasmanian government should undertake an evaluation on the protocol negotiated between the Magistrates Court of Tasmania and the Tasmanian Registry of the Family Court in relation to co-existing 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 co-existing orders.

The Queensland Law Society supports the proposal for the reasons as set out in the consultation paper.

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.

The Queensland Law Society supports this proposal. It is then for a state magistrate to determine as to whether or not it is appropriate.

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?

No. Magistrates typically provide for exception to ensure that contact between a parent and child is able to occur. This is so as to ensure that, so far as possible, protection orders and parenting orders are able to mesh with a minimum of conflict. In appropriate cases, magistrates will make no contact orders with no exceptions. It is then for the Family or Federal Magistrates Courts to determine whether a no contact order with no exceptions ought to be overridden.

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).

The Queensland Law Society supports this proposal.

Question 8-14: Should the provisions for resolving inconsistent orders under Part VII Division 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 Regulation 12BB of the Family Law Regulations 1984 (Cth), such as protective bail conditions?**

1. The Queensland Law Society does not consider that it is necessary to expand the list.
2. It is extremely concerning to the Queensland Law Society that a federal magistrate or family court judge might be called upon to declare an inconsistency, under the proposal, with bail conditions and therefore in effect determine the administration of criminal law. The Queensland Law Society does not support such a declaration of inconsistency.

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 section 114 of the Act? If so, what procedures would be appropriate?

Currently, reliance upon injunctions for personal protection under the Family Law Act is rare. Parties typically rely upon the Qld Act. It is far cheaper and easier to obtain a temporary protection order or indeed a final protection order than an injunction under the Family Law Act.

Most applications for injunctions under the Family Law Act are not for personal protection but relate to property settlement issues.

It is the view of the Queensland Law Society that the main focus in dealing with family violence should be upon the ability to obtain protection orders under family violence legislation.

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 sections 68B and 114 is a criminal offence, as recommended by the ALRC in *Equality before the Law (ALRC 69)*.

The Queensland Law Society supports the proposal. Currently there is the ability of police officers to arrest without warrant a person committing a breach of these injunctions. However, it is rarely exercised by police. It is incumbent upon those alleging an injunction of personal protection to make application for contravention and can be a costly and time consuming exercise. It ought to be recognised that, as with breaches of protection orders, the offence of breaching an injunction for personal protection is a crime against the State and ought to be prosecuted by the State.

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?

Rarely. More commonly, a party will have sought relief under the Qld Act and then seek other relief under the Family Law Act. Section 114AB is at times ignored and at other times has been used as an impediment to prevent orders being made to ensure safety. For example, it has been submitted that the making of a protection order in the standard conditions alone might prevent a person seeking an injunction for sole use of a former matrimonial home under the Family Law Act.

Section 114AB is not necessary. In reality it is far easier to obtain an order under the Qld Act by a self represented party in a local court, using a relatively straightforward and cheap process than an injunction under the Family Law Act. Applications under the Family Law Act are more expensive, more complex, almost always require legal representation for this type of application, Legal Aid funding may not be available and a listing for the first available date may be weeks away (as opposed to being able to be dealt with the same afternoon).

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?

Yes. When people contact their local police, Queensland Police as a general rule are completely unaware of the effect of sections 68B and 114 of the Family Law Act and will not take action to enforce those sections as they are considered to be federal matters. Queensland Police are much more aware (as it is part of their daily core business), with the provisions of the Qld Act. If a party has obtained an injunction for personal protection under the Family Law Act, they should not be precluded from obtaining a protection order. The person seeking an order is then more likely to gain the assistance of police in prosecuting breaches of a State Protection Order.

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

No, as injunctions pursuant to sections 68B and 114 of the Family Law Act are applied for much less frequently than protection orders. The conflict is that contained in section 114AB which is best met by the repeal of that section.

Section 68B and section 114 are commonly only used by those people who have, for some reason, little option but to use those sections rather than domestic violence legislation. For example, section 68B may be used by people who are unable, because they fail the relevant category of relationship, to make application for a protection order. The Queensland Law Society repeats its comments about the current inadequacies of the Peace and Good Behaviour Act 1992 and the need for a comprehensive replacement in parallel to the Qld Act, so as to enable people to obtain adequate protection from violence and harassment, no matter what their relationship to the perpetrator.

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.

The Queensland Law Society supports this proposal so as to ensure that there is consistency in order for them both under state and federal legislation.

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.

The Queensland Law Society supports the proposed abolition of this subsection. The Queensland Law Society is not aware of any case in which the subsection has been applied.

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

Yes in proceedings in which a “Kennon” claim is made. The existence of an application for a protection order and the existence of a protection order will be relevant, as will the evidence given in the protection order proceedings. A party who raises a “Kennon” claim must prove there has been violence and then how that violence impacted on their contributions on their Section 75(2) factors. All too often though these “Kennon” claims fail because the evidence is not properly presented in the Family Court proceedings or because the judicial officer looks upon the case as raising fault issues which are not relevant.

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 future needs, as recommended by the ALRC in Equality before the Law (ALRC 69).

The Queensland Law Society supports this amendment.

Proposal 9-5: The Australian government should commission an inquiry into the treatment of family violence in property proceedings under Part VIII of the Family Law Act 1975 (Cth). The inquiry should consider, amongst other issues, the manner in which family violence should be taken into account in determining a party’s contribution under Section 79(4) and future needs under section 75(2); the definition of “family violence” for the purpose of Part VIII proceedings; and interaction with other schemes – for example, victims’ compensation.

The Queensland Law Society supports such an inquiry. There has been criticism of the effect of Kennon because of its reference to “opening the floodgates” and “common coinage” when, regrettably, domestic and family violence is common. Kennon is also limiting because of the cost involved in making a Kennon claim as compared to the perceived benefits for making such claim. Kennon also requires the violence to have occurred prior to separation as part of a pattern so that serious isolated incidents, including that at separation, are not taken into account. Kennon does not directly take into account future factors under section 75(2) of the Family Law Act, but contributions only.

Question 9-6: How often are persons who have been the subject of exclusion conditions of 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)?

The Queensland Law Society is unable to comment how often this occurs.

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 to excluded person to recover 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**
 - (iii) Provide that an order to recover property should not be made where other or appropriate means are available for the issue to be addressed in a timely manner.**

The Queensland Law Society is unable to respond as to interstate practice, but is able to respond as to the practice in Queensland.

The reality in Queensland is that an order of this kind is made in which the recovery of property occurs in the presence of police. Police are typically extremely busy and the timetable of when the attendance occurs depends on the availability of police.

Police, of necessity, rarely spend greater than 15 to 20 minutes at the scene in the recovery of items.

This necessarily means that the items are only of the kind and nature identified in the Commissions' proposal. Police do not have the time to ensure that bulky furniture are removed. Similarly, police are insistent that items are available for a child (or retained for the child). Similarly police certainly do not allow the removal of items where the title is genuinely in dispute. To do otherwise, might involve police as parties to the offence of stealing or the offence of compounding a crime.

The reality is that magistrates do not make orders for the recovery of property if there are other more available and appropriate means for the issue to be addressed in a timely manner. This is a matter of judicial discretion and should remain so.

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?

Yes, that is allowed for in any case under the Queensland legislation because of the wide ambit of section 25.

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 applications for such an order.

This is supported by The Queensland Law Society. There should be as much openness as possible for those who come to court seeking orders and in the court being aware of orders so as to minimise conflict between protection orders and property settlement orders under the Family Law Act.

Proposal 9-8: Application forms for protection orders in the 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 applications for such an order.

The Queensland Law Society supports this proposal for the same reasons.

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 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.

The Qld Law Society 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.

The Queensland Law Society 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 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 that 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 presumption apply?

The Queensland Law Society is aware from anecdotal evidence only that relocation orders may be made more frequently where there is a proven history of family violence and it is assessed that it is in the best interests of the child for there to be less or no contact. Certainly there can be allegations of family violence in cases in which recovery orders are obtained.

The ability of a child to relocate to a safe distance will depend on the facts of each case. Furthermore, there is a shortage of refuge accommodation with the result that women and children who need to live in refuges may, out of necessity, be moved from one part of Queensland to another although this means that the child is well away from the ability to have contact with his or her father.

Anecdotally, it is believed that sometimes the Australian Federal Police will not execute a recovery order in circumstances where there appears to be convincing evidence to police as to a history of family violence.

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

No. The issue of family violence is clearly brought into consideration under section 60CC of the Family Law Act, which section provides a list of matters as to the best interests of children, including in any relocation matter.

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 Division 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?

There is little in practice as to such an interaction. A much more significant question is as to the risk to a child and how that is considered under the Hague Convention. There is concern that the presumption for return is so strong that the issue of domestic violence may be inadequately dealt with.

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

Yes. The Family Law Act ought to be consistent in addressing the issue of family violence.

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 orders made by consent “without admission as to criminal liability of the allegations and the application for the protection order”;**
- (b) The applicant has an opportunity to oppose an order being made by consent without admissions;**
- (c) The order gives attention to the safety of victims, and, if appropriate, requires that a written safety plan accompanies the order; and**
- (d) The parties are aware of the practical consequences of consenting to a protection order without admission of liability.**

The Qld Law Society agrees with this proposal and comments adopting the same lettering:-

- (a) Magistrates in Queensland typically write on the protection order or on the court files (and sometimes both as the practice varies) that the order is made “without admissions” or “without admission”.
- (b) This occurs in Queensland given that the form of the protection order must be consented to by both parties. Experience demonstrates that applicants almost invariably agree to protection orders being made on a “without admissions” basis if it means that a protection order is made and that there is not the need for a trial with the stress, cost and risk associated with that process.
- (c) In Queensland written safety plans are not prepared by the State Magistrates Court.
- (d) It would be useful for magistrates to explain the practical consequences to an unrepresented party or consenting to a protection order without admission of liability. Certainly magistrates and police prosecutors regularly explain the consequences of so consenting to respondents.

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 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.***

The Qld Law Society supports this proposal so long as any legislation maintains judicial discretion to refuse to accept an undertaking from a respondent. In respect of (a) and (b) it should be explained by magistrates to unrepresented parties. Some magistrates are fundamentally opposed to the use of undertakings, others are in favour of them in suitable cases.

Question 10-1: What practical reforms could be implemented in order to achieve the objectives set out in proposal 10-2?

The Qld Law Society is concerned to ensure judicial discretion to refuse to accept an undertaking and suggest that rather than formalising undertakings by having some legislative response, a reference in the judicial bench book or on the file may be an alternative.

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?

The Qld Law Society has only anecdotal evidence that they happen from time to time. Typically undertakings are given in cases involving lesser allegations of family violence.

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?

Anecdotally yes.

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 is supported by The Queensland Law Society.

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?**

Applications in Queensland are required to be executed pursuant to the Oaths Act. There is nothing to prevent applicants currently executing affidavits in support of their applications. Affidavit evidence, at least at the commencement of proceedings, should not be mandatory as it will deny access to justice to many indigent applicants and will also increase the already heavy administrative burden on police. Frequently if the application is contested and the parties are legally represented, magistrates will direct affidavits to be filed prior to a final hearing.

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

The different forms of family violence dynamics within an individual family are so wide ranging that a standard form affidavit is likely not to be of assistance. A very large number of applications (in some districts in Queensland similar to or in excess of half of all applications) are brought by police. The administrative burden upon police should not be increased.

Different magistrates courts in Queensland have different procedures. Some magistrates prefer oral evidence in a trial as they consider that that is the best way in which the evidence can be measured and tested.

In other magistrates courts there are standard practice directions requiring the filing of affidavit material.

The Queensland Law Society is opposed to unrepresented victims of violence being denied access to justice from having to be forced to file affidavit material. Those who are unrepresented find the process involved with an affidavit to be entirely intimidating.

There are procedures in Queensland law in any case when affidavits are not required to obtain the particulars of any application so that the respondent is aware of any case he or she has to meet.

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 impending, concurrent or subsequent family proceedings where family violence is alleged?

Provided that the evidence is relevant, evidence given in family violence proceedings should prima facie be able to be used in any subsequent family law proceedings between the parties, and the Family Law Act should be amended accordingly. Transcripts could be made available.

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?

Largely, yes.

Question 10-8: How is the requirement in s81 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 public, working in practice?

The Queensland Law Society generally supports the proposition that for the proper administration of justice a court should be open to the public.

Domestic violence and family law proceedings provide a challenge to that proposition. It was recognised as long ago as 1975 with the enactment of section 121 of the Family Law Act that publication by the media of salacious allegations concerning family members arising from family law proceedings was not ultimately in the public interest.

When the Qld Act was enacted, section 82 contained a copy of section 121 of the Family Law Act.

It was soon discovered, however, that section 82 was not sufficient as several respondents were ensuring that in domestic violence proceedings members of their family and friends would sit in the back of the court and at the least stare in an intimidating manner towards the aggrieved.

It must be remembered that domestic violence proceedings are overwhelmingly held in a local court in which it is easy for a party and friends and families to attend.

Section 81 was subsequently enacted to deal with this specific problem and it has proved effective.

The administration of section 81 varies from court to court. In some courts, for example, in dealing with a busy list, lawyers in the next matter or other matters in the list, are able to come into the court and speak to the prosecutor about that matter. In other courts, magistrates enforce section 81 rigidly, preventing any entry into the court by people not associated with the matter.

Most magistrates are keen to ensure that the proceedings are transparent and are seen to be transparent and are not overly restricted on excluding people unnecessarily from the courtroom.

Some magistrates have ensured that witnesses, after giving evidence, are entitled to sit in the courtroom to facilitate this model of transparency.

There are many domestic violence court support workers in Queensland. Generally their role is supported by the magistrates. However, there have been anecdotal examples of these court support workers being excluded from the court by virtue of section 81, which would on the face of it, appear to be inappropriate.

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.***

The Queensland Law Society supports the proposition that alleged perpetrators of violence should not have the opportunity to cross examine their accusers in person, which at times can be a humiliating and degrading experience.

The Queensland Law Society supports the Victorian model of declaration of a protected witness, adjourning the court proceedings to provide the party with a reasonable opportunity to obtain legal representation for the purpose of cross examination, and if that is unable to be obtained after a reasonable opportunity, ensuring that a Legal Aid solicitor is offered to the party concerned to provide legal representation for that purpose.

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

- (a) Make an order that a person who has made 2 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?***

The Queensland Law Society is supportive of both these propositions. Perpetrators of violence should not be allowed to continue to abuse their victims by the use of vexatious and oppressive court proceedings.

Queensland magistrates have the power to dismiss vexatious applications for protection orders before they are served (when an urgent order is sought) and sometimes do so.

It is not unusual for a Queensland magistrate to dismiss a vexatious application at a mention, rather than at a hearing where the application, on its face, is clearly an abuse of process.

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.

The Queensland Law Society supports this proposition including, where possible, that the court is able to identify the predominant aggressor.

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 a protection order.

Whilst The Queensland Law Society understands the rationale for the proposal, the Society does not support it. The Society considers that there are many occasions in which applications for revocation or variation brought by the respondents ought to be legitimately heard in court and that there ought not be barriers to the bringing of those applications.

The more appropriate mechanism is that if an application is improperly brought then, under the existing processes of the Qld Act, a costs order can be made. The Queensland Law Society's concern is that by virtue of the provisions of the Qld Act the Justices Act and the Justices Regulations, the quantum of costs that can currently be ordered is artificially low. The quantum ought to reflect a much more realistic cost schedule, in accordance with civil litigation. It ought to act as a true deterrent.

Example of a revocation application

A husband and wife are living together. One night the husband, whilst the wife was watching TV and unknown to her, went out. He returned at 2.00am, took off his jeans and slipped into bed. Shortly after lying down, his mobile phone rang. This woke the wife who, rightly suspicious that the husband had been unfaithful, became angry with him. During the course of the argument she picked up his jeans and threw them at him, suggesting that he might want to get out. Unbeknownst to her the belt was still in the jeans. The belt buckle hit the husband's forehead, causing it to bleed it profusely.

The husband telephoned police who then took the wife into custody under the Qld Act and applied for a protection order against her. The wife, who was of non-English speaking background, did not oppose the protection order against her.

Subsequently the wife applied to revoke the protection order. That application was opposed by police, including at trial. With the benefit of a social work report, the court was able to be satisfied that it was unlikely that an act of domestic violence had been committed in the first place as the injury was not wilful, there was not a pattern of dominance and control or of domestic violence and that further acts of domestic violence were unlikely to occur, there being no ongoing need for a Protection Order. The husband was strongly supportive of the revocation of the Protection Order. The existence of the Protection Order was causing great harm to the marriage.

Given the non-English speaking background of the wife and that the initial application was a police application, it is doubtful in those circumstances that the wife would have obtained leave if that had been required before filing her application.

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 the 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?

The records of proceedings under the Family Law Act are generally accessible in a timely fashion to those litigating domestic violence proceedings in Queensland. Typically, magistrates do not want to be burdened with very long affidavits filed in family law proceedings, a great proportion of which are irrelevant to an application for a protection order. Magistrates certainly do want to be aware of existing current orders, particularly those impacting on children, provided that they are relevant.

In the matters which are contested, parties ensure that these matters are properly brought to the attention of magistrates.

More significant, however, is the exchange of information from State Magistrates Courts to the Family and Federal Magistrates Courts. Typically, Applications for a Protection Order are made very soon after separation, often at separation, whereas proceedings under the Family Law Act are brought considerably later. Most commonly, by the time proceedings have commenced under the Family Law Act, protection orders, or at least temporary protection orders, have already been made.

It is not unusual for Independent Children's Lawyers in Family Law Act proceedings to seek to have copies of protection order applications and orders be made available for the Family Law Act proceedings.

Due to protocols between the courts, the Family and Federal Magistrates Courts generally will not issue a subpoena to a State Magistrates Court to produce documents. Instead there is a cumbersome procedure in which a letter to the Family Court or Federal Magistrates Court has to be written by parties seeking the information. Rather than be dealt with administratively at the registry counter (as happens with the subpoena), the letter is then taken to the chambers of the judge, duty registrar or Federal Magistrate who has to consider the request and then writes a letter in turn to the State Magistrates Court. That court then produces the documents to the Federal Magistrates or Family Court. Because the documents are not produced pursuant to a subpoena, it is not known to the parties as to when documents have been produced (if at all).

Some Registrars of State Magistrate Courts have refused production of documents by letter, insisting on subpoenas.

Whatever process is used, it ought to be, as subpoenas are, timely, cheap and transparent. The current process is not any of those.

Question 10-11: In practice, does the prohibition on publication set out in section 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 section 121 necessary or desirable?

There needs to be greater clarity in section 121 (and for that matter equivalent sections under state domestic violence legislation such as section 82 of the Qld Act, that ensure that practitioners and parties are not fearful that they are “publishing” thereby committing offences by, for example, communicating with police or officers of the state welfare departments or in communications with witnesses. There needs to be a proper examination of the scope of section 121. Some judges take a very broad view of the obligations on parties and lawyers arising from section 121, others not so broad.

Proposal 10-7: Certificates issued under section 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.

Question 10-12: If more information is included in certificates issued under section 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?

The Queensland Law Society is opposed to more information being provided arising from family dispute resolution. The parties are encouraged to be open and honest in communications in family dispute resolution, which may well be further restricted if the parties are aware that those communications may be the equivalent to open communications.

Certificates under section 60I currently form part of the court file when filed in Family Law Act proceedings and are therefore open to and read by Family Court judges and Federal Magistrates.

Perpetrators of violence may attempt to intimidate their former partners into agreeing with them in family dispute resolution by the threat of using information making it available in family law proceedings.

Parties have a legitimate expectation in undertaking family dispute resolution that, with the exception of whether the mediator comments as to whether their negotiations were genuine or not but their negotiations will be private and open and not published to the world. Those expectations should be kept.

Question 10-13: Of the confidentiality provisions in sections 10D and 10H of the Family Law Act 1975 (Cth) inappropriately restricting family counsels and family dispute resolution practitioners from releasing information relating to the risks of family violence to :

- a) **Courts exercising jurisdiction;**
- b) **State and Territory courts exercising jurisdiction under family violence legislation.**

Not known. The Queensland Law Society is concerned that given the prevalence of family violence then it might be assumed that in innumerable cases of dispute resolution and counselling that the counsellors will be obliged to now give evidence, stripping away the privilege of open and frank communication between the parties.

Proposal 10-8: Sections 10B(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, as a personal safety.

The Family Law Act already allows for the necessary disclosure to prevent or lessen a serious threat to a person's life or health. The Queensland Law Society supports "safety" being added.

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 protection order under State and Territory family violence legislation.

The Queensland Law Society questions the necessity for such a provision, particularly in the context in which the commissions propose that the definition of family violence be extended to economic and emotional abuse. The Queensland Law Society is of the view that the current restriction that to report the commission, or preventing the likely commission, of an offence involving violence or threat of violence to a person, is adequate.

To whom is it suggested that the reporting occur? To police, State Magistrates Courts or the Family Courts? All carry implications which might have the effect of ensuring a family counsellor or family dispute resolutions cease.

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

No. There is ample protection contained under those sections. For example, the disclosure of communication that the practitioner reasonably believes is necessary for the purpose of protecting a child from the risk of harm (whether physical or psychological) as contained in section 10D(4)(a) and 10H(4)(a).

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

The Queensland Law Society supports this change provided that it is subject to the current restriction e.g. contained under section 10B(2) that there is not, in the opinion of the court, sufficient evidence in the admission or disclosure available to the court from other sources.

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

Please refer to response above to proposal 10-10.

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

Yes. It should be beyond doubt that when parties attend family dispute resolution or family counsellors, they can discuss matters in confidence so far as practical, without fearing that anything they might say might be used in evidence against them.

Example: Refugees attended family counselling by an approved organisation under the Family Law Act. There was no question that what was discussed by those refugees with the family counsellors are all within section 10E of the Family Law Act and would not generally be admissible in Family Law Act proceedings.

The Department of Child Safety (as it then was) obtained a summons under the Child Protection Act 1999 and sought to enforce that summons, being of the view that proceedings under the Child Protection Act were not proceeding covered by section 10E. The refugee organisation was particularly concerned that those who had been subjected to some of life's worst behaviours and are amongst the most deprived people living in Australia, felt comfortable in the ability to talk openly often for the first time in their lives, by virtue of the counselling process, and would be further victimised by the opening up of those counselling records. Ultimately, the summons was withdrawn, but for other reasons.

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

No. However, Queensland Police Service now draws reference to section 82 of Qld Act on each occasion it is subpoenaed in which it has to produce documents relating to domestic violence proceedings. It would be useful that at the time there is a close examination of section 121 of the Family Law Act there be similar examination of section 82 and equivalent provision, so as to ensure that there is ability of information to flow in different litigation, primarily to protect parties and their children.

Question 10-18 – Should prohibitions on publication of identifying information about adults involved in protection order proceedings in state and territory family violence legislation be modified in one 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 thus be reasonably likely to expose a person to risk of harm as a precondition to a court order 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, exceptions set out in section 82(3)(a) of Qld Act.**

The Queensland Law Society is of the view that the restriction on publication should not be any more onerous than contained in section 82 of the Qld Act. If anything the restriction should be less onerous,

so as to allow, without doubt, the ability of parties to provide information to police and state welfare authorities.

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?

See response above on this issue.

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

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

Yes. There should be clear legislative guidelines enacted in the Family Law Act 1975 (Cth) and the Child Protection Act 1999 (Qld), and similar legislation, such that officers of state and territory child welfare agencies are able to openly communicate with independent children's lawyers appointed in Family Law Act or child protection proceedings.

Proposal 10-11: Legislative privacy principles provide the use and disclosure of personal information by Australian government and state and territory government agencies should permit useful 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 in practice* (ALRC 108).

The Queensland Law Society 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 to the wellbeing of an affected child.

The Queensland Law Society supports this proposal.

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.

The Queensland Law Society supports this proposition and states that it should be extended to include independent children's lawyers appointed in family law or child welfare proceedings.

Proposal 10-14: Courts that hear protection 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.

For reasons as stated above, The Queensland Law Society supports such a protocol being entered into.

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 proceedings.**

The Queensland Law Society supports the setting up of such a database. The Queensland Law Society has a concern about the extension of database to orders made under the Family Law Act which are not injunctions for the personal protection under section 68B or section 114, having regard to the wide range of orders that can be made under the Family Law Act, including as to property settlement and child support matters.

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?

Yes, subject to appropriate safeguards, independent children's lawyers who have been appointed under the Family Law Act or child welfare proceedings should have access.

Question 11-1: Should any amendments be made to the provisions relating to family dispute resolution under the Family Law Act 1975 (Cth) – and, in particular, to section 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 that legislation operates effectively?

The Queensland Law Society does not believe that there ought to be alteration to section 60I insofar as it deals with victims of family violence as it believes there are adequate safeguards that can be met by appropriate training, supporting screening and assessing risks in relation to family violence.

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

The Queensland Law Society supports this proposal.

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

The Queensland Law Society supports this proposal.

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.

The Queensland Law Society supports this proposal.

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

Occasionally, family dispute resolution practitioners exclude parties from attending by virtue of concerns about family violence which does not reflect the definition of “family violence” within the meaning of the Family Law Act or “domestic violence” within the meaning of the Qld Act. This is a matter that is most appropriately dealt with by a training and accreditation process.

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?

In answer to the first question: yes, and in answer to the second question :no. The intake procedures for family relationship centres are particularly thorough in identifying the existence of, nature of, and if necessary a copy of any protection orders.

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.

This is a matter not within the responsibility of the courts but of state and territory governments. The Queensland Law Society supports such an exception. Protection orders which allow such an exception are commonly made.

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 Queensland Law Society is not aware of alternative dispute resolution mechanisms being used in relation to protection order proceedings in Queensland. The Queensland Law Society considers that alternative dispute resolution processes are inappropriate for protection order proceedings and opposes any changes to the Qld Act which would allow for such processes in such proceedings.

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

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?

The issue of domestic and family violence is a matter taken to account by officers of the Department of Communities (Child Safety Services) in child protection matters. The department uses various means of alternative dispute resolution mechanisms which are also used in proceedings before the Children’s Court before matters are listed for hearing. The Queensland Law Society supports the continued use of those processes which the Society believes adequately addresses family violence issues which are related to child protection concerns.

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?

The Queensland Law Society is opposed to restorative justice practices to be used in the family violence context. Perpetrators of violence often minimise and attempt to legitimise their behaviour and have a lack of insight as to their abusive behaviour. The use of restorative justice practices has a high risk of re-victimising victims of family violence.

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

Given the limited amount of time to respond to this inquiry, the Queensland Law Society has not had sufficient time to respond to this question.

Questions under Chapter 13, child protection and the criminal law

The Queensland Law Society is unable to respond to this chapter at this time due to the short amount of time allowed for responses and the complexity of the matters raised, particularly given the large number of questions posed by the Commissions in their inquiry.

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

The Queensland Law Society requires more time to be able to respond to these matters adequately. The key response to these questions is adequacy of resources and adequacy of training. If children's courts are to exercise power to make orders under the Family Law Act, then children's courts magistrates ought to be specialised and receive adequate training and resources.

If federal courts are to be responsible for child protection matters, they need to be adequately resourced and physically available to the parties, in a timely manner. This is particularly so in a decentralised state such as Queensland. Currently there are not enough judicial resources available to meet the current workload under the Family Law Act, let alone a federal takeover of child protection matters. The Queensland Law Society supports the proposition that judges who deal with child welfare matters and family law matters are properly resourced and have adequate training and expertise. The Queensland Law Society is opposed to any changes which would result in delays through court lists due to lack of resources and denial of access to justice due to lack of judges.

Proposal 14-1: To ensure adequate disclosure of safety concerns for children, the initiating application (Family Law) form should be amended by adding additional part "Concerns about Safety" which should include a question along the lines of "Do you have any significant fears and safety of you or your children that the court should know about?"

The Queensland Law Society supports this proposal.

Question 14-6: What other practical changes to the application forms for initiating proceedings in the Federal/Family Courts and Family Court of Western Australia would make it clear to parties

that they require to disclose current or prior child protection applications and current child protection orders?

A statement to that effect.

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)?

Not known. The current Form 4 appears largely to be adequate for notifying all family violence and child abuse. Of more concern is that the definition of “abuse” under the Family Law Act 1975 is particularly restricted to sexual abuse of children or using them as sexual objects, whereas the community and professional view of child abuse also considers neglect and physical and emotional abuse, amongst others, which are not provided for under the current definition. The key change that is suggested would be to amend the definition of “abuse”.

Proposal 14-2: Screening and risk assessments developed by the federal family courts should involve State and Territory child protection agencies.

The Queensland Law Society 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 section 69ZW of the Family Law Act 1975 (Cth)?

In general terms, the Queensland Department of Communities (Child Safety Services) complies appropriately with subpoenas and section 69ZW. The memorandum of understanding between the Family Court and the state department in Brisbane appears to work well.

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

It should be able to be the flexibility of causing the state department to be a party to proceedings under the Family Law Act when so ordered by a judge or federal magistrate, as opposed to the department merely being invited to intervene as is the current model.

Family court judges and federal magistrates should have the power (if there is not a federal takeover of child protection laws) to refer appropriate cases to state courts for child protection matters where the federal magistrate is of the view that neither of the parents can adequately protect the child from harm.

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 examples, 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 or family courts have additional powers to ensure that intervention by the child protection system occurs where necessary in the interests of the safety of children?

See answer to question 14-9.

Question 14-11: What are the advantages of registration of state and territory child protection orders under sections 70C and 70D of the Family Law Act 1975 (Cth)? What are the interactions and practice of the registration provisions and section 67ZK of the Family Law Act?

The Queensland Law Society is unaware as to whether Queensland child protection orders are registered under sections 70C and 70D of the Family Law Act. There is no section 67ZK. The Queensland Law Society presumes that this is a reference to section 69ZK. Section 69ZK does not in any case apply in Queensland. By virtue of savings provisions, the relevant section that applies in Queensland is the old section 60H, as Queensland has never adopted section 69ZK (as it was required to do if section 69ZK were to take effect in Queensland).

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?

In addition to any memorandum of understanding, a properly resourced liaison officer appointed by the Department of Communities (Child Safety Services) would assist in this process.

Proposal 14-13: All states and territories should develop a memorandum of understanding of protocol to govern the relationship between federal family courts and child protection agencies.

This is supported by The Queensland Law Society.

Question 14-13: Is the variation in the content of the protocol causing 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?

The Queensland Law Society is unable to respond to this other than The Queensland Law Society supports the contended retention of the protocol between the Department of Communities (Child Safety Services) and the Family Court and involves amongst other things regular meetings between the department and the court.

Question 14-14: How could the memorandums of understanding and protocols of exchange of information between federal family courts, child protection agencies and legal aid commissions be better known within courts, and beyond them?

At the very least, the memoranda should be published on the website of each of the courts and of the child protection agency.

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) *The dealing with requests for documents and information under section 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.***

The Queensland Law Society supports the proposal.

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

Given the resourcing issues for the Federal Magistrates Court, the Queensland Law Society supports Magellan matters remaining only in the Family Court (and being identified and transferred from the Federal Magistrates Court).

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

The ability of family court judges and federal magistrates to cause the state or territory welfare authority to be a party (as opposed to a mere invitation) and to have the power to place the child in the care of the department is essential in appropriate cases.

Question 14-17: Can the problems of 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?

Collaborative arrangements will certainly assist. Greater involvement by the state and territory welfare authorities in appropriate family law matters is essential. Closer cooperation between state and territory welfare authorities concerning children and families who move interstate is also essential.

Chapter 16 - Sexual offences

The Queensland Law Society has been provided with commentary by the Law Council's National Criminal Law Committee and supports the submissions made by that committee. However, The Queensland Law Society considers that in relation to proposal 16-1, the age of consent for all sexual offences ought to be 16 years.

Chapter 17 – Reporting, prosecution and pre-trial processes

The Queensland Law Society has been provided with commentary by the Law Council's National Criminal Law Committee and supports the submissions made by that committee

Chapter 18 – Trial processes

The focus of The Queensland Law Society's response has been as to the interaction of domestic violence laws and the Family Law Act. Consequently, The Queensland Law Society has not responded to this chapter which deals with trial processes and sexual assault matters.

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

- (a) Common policies and objectives;***
- (b) Mechanisms for inter-agency collaboration, including those to ensure information sharing;***
- (c) Provision for legal and non-legal victim support, and a key role for victim support organisations;***
- (d) Training and education programs; and***
- (e) Provision for data collection and evaluation.***

The Queensland Law Society supports this proposal. The Queensland Law Society notes its comments as to co-ordinated community response above.

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 officeholder or agency?

The Queensland Law Society believes that there should be recognition within state and territory family violence laws as to integrated responses to family violence and that there ought to be statutory officeholder responsible for coordinating integrated responses within Queensland.

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, ensure access to victim support workers at the time that police are called out to family violence incidents.

This process is occurring in many parts of Queensland, subject to resources, and the Queensland Law Society supports the proposal.

Proposal 19-3: The Australian government should ensure the court support services for victims of family violence are available nationally in federal family courts.

The Queensland Law Society supports this proposal.

Proposals 19-2 to 19-13: The Queensland Law Society has not responded to these proposals given the family law focus of The Queensland Law Society's response.

Similarly, The Queensland Law Society has not responded to question 19-2.

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?

The Queensland Law Society's response has been of a family law nature. The Queensland Law Society, however, does support the proposition that offenders do not have access to victims' compensation awards in cases of family violence.

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

The Queensland Law Society supports this proposal.

Proposal 19-15: Australian Law Societies should review continuing professional development requirements to ensure that legal issues concerning family violence are appropriately addressed.

The Queensland Law Society supports this proposal.

Proposal 19-16: The Australian government and state and territory governments should collaborate and conduct a national audit of family violence training conducted by government and non-government mentor 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.**

The Queensland Law Society supports this proposal.

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 and 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.**

The Queensland Law Society supports this proposal.

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 the primary point of contact for the government and non-government agencies involved in responding to family violence;**
- (c) Especially trained police have responsibility for supervising, monitoring or ensuring 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.**

The Queensland Law Society supports this proposal.

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

This matter has been dealt with above as to Family Justice Centres.

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 in family violence?

There are clear benefits in specialised family violence prosecutors, as identified by the Society above.

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.**

So far as is feasible, given the decentralised nature of Queensland and the need for timely access to justice, the Queensland Law Society supports there being specialist family violence courts. The Society also supports that those magistrates deal with child support and family law matters to the extent that they have jurisdiction.

Proposal 20-3: State and territory governments should establish mechanisms for referral of cases involving family violence to specialised 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.**

The Queensland Law Society supports this proposal for the reasons as outlined in the proposal.

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 victims' safety; and**
- (e) Mechanisms for collaboration with other courts, agencies and non-government organisations.**

The Queensland Law Society supports the proposal.

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

- (a) Identifying, and listing on the same day, protection order matters and criminal proceedings related to family violence, as well as related Family Law Act and child protection matters;**
- (b) Providing victim and defendant support, including legal advice, on family violence list days;**
- (c) Assigning selected and trained judicial officers to work on cases related to family violence;**
- (d) Adopting practice directions for family violence cases;**

- (e) Ensuring that facilities and practices secure victims' safety at court; and**
- (f) Establishing a forum for feedback from, and discussion with, other agencies and non-government organisations.**

The Queensland Law Society supports the proposal.

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

- (a) Recording victims' statements and complaints;**
- (b) Facilitating access to victim support workers for referrals to other services;**
- (c) Filing all claims relating to family violence victims on behalf of the victim in relevant court; and**
- (d) Acting as a central point of contact for victims for basic information about pending court proceedings relating to family violence.**

The Queensland Law Society supports this proposal. The Queensland Law Society notes its support for Family Justice Centres above.

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, state and territory jurisdiction; and establishing and maintaining national networks as judicial officers and staff specialising in family violence and family law.

The Queensland Law Society supports this proposal.

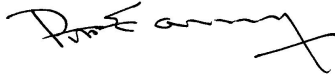
Proposal 20-8: The Australian government should create positions for family law courts liaison officers. These officers should have the following functions:

- (a) Facilitating information sharing between federal family law courts and state and territory courts;**
- (b) Developing and promoting best practice in relation to information sharing between the federal family law courts and state and territory courts; and**
- (c) Representing the federal family law courts in relevant forums for collaboration with agencies, courts and non-government organisations.**

The Queensland Law Society supports the proposal. The criticism that has been regularly made by non-government organisations that deal with domestic violence has been a lack of liaison by the courts. Without interfering with judicial independence, the more substantive the liaison, the more likely and effective will be society's response to family violence.

Thank you again for the opportunity to contribute to your inquiry.

Yours faithfully

A handwritten signature in black ink, appearing to read "Peter Eardley".

Peter Eardley
President