

**WOMEN’S LEGAL CENTRE  
(ACT & REGION) INC.**

**25 June 2010**

**Submission to the**

**Australian Law Reform Commission**

**Family Violence Review**

Australian Law Reform Commission

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The Women's Legal Centre ACT & Region (WLC) would like to thank the Australian Law Reform Commission for the opportunity to make a submission on the Family Violence Review.

The Women's Legal Centre (ACT and Region) Inc (the Centre), is a Community Legal Centre accredited by the National Association of Community Legal Centres. The Centre has been operating successfully in Canberra since 1996. Its objectives are to:

- provide accessible, timely and accurate information, advice and assistance on legal and related matters to women in the ACT and region;
- raise awareness in the community about the law and the legal system as it affects women; and
- identify and challenge barriers to women's access to justice.

It is unacceptable that in 2010 family violence statistics are so appalling. It is vital that changes be implemented across all areas including legislation, the courts and most importantly in the prevention of family violence.

The Australian government has the opportunity with this review to implement changes to assist victims of family violence and the prevention of family violence. When changes are being introduced it is vital to keep a focus on victim's safety. Ensuring fairness to perpetrators should not be a priority and in fact a much harder line should be taken against perpetrators if Australia is to ever see a reduction in the appalling figures placed before us.

The WLC believes that if we are to ever see a reduction in the family violence statistics it will be because of a change in community attitudes. To bring about this change in attitudes the legal system must send a clear strong message that family violence is not acceptable.

The WLC is hopeful that this review will bring about much needed reform and we will watch with great interest as this reform unfolds before us.

Yours faithfully,



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Coordinator

## General Comments

1. Although the WLC recognises that the scope of the Family Violence Inquiry was broad, we wish to comment on the impact of such a long inquiry paper and summary paper. As the ALRC may be aware, community groups in particular have limited resources and constantly juggle client needs with an aim to be involved in processes that may lead to systemic reform. The length of this inquiry and the time frame in which to respond have made it a challenge to engage in the process as we would have liked which is the reason why we have only been able to supply a response to part of the paper.
2. The WLC has run an Indigenous Women's Program from 2006. It is our experience that domestic and family violence is the biggest single issue for Indigenous women and crosses all areas of their lives. It is a feature of many of the presenting legal problems. The Program at the WLC looks at ways of delivering legal advice, information and referral in appropriate and Indigenous-specific ways to take into account the unique needs of Indigenous women. With this experience, we wish to comment upon the way in which Indigenous Family violence was dealt with in the inquiry. There is only one question (Question 5-8) and 3 proposals (4-5, 4-20 and 4-22) that specifically mention Indigenous people. There are other references to Indigenous people scattered throughout the consultation paper.

Given the well-recognised view that family violence is a central factor in Indigenous families across all of the areas of the inquiry, we are disappointed that this issue wasn't dealt with in a more holistic way for Indigenous people and instead treated as almost a sub-category or side issue in the other areas of discussion.

It may be that the "solutions" for Indigenous families are different to recommendations and solutions for other people and it would have been useful, in our view, to deal with Indigenous family violence in a different way.

## Chapter 4: Family Violence: A Common Interpretative Framework?

**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?

The Women’s Legal Centre ACT & Region (WLC) believes that there should be a standard definition of family violence in all State, Territory and federal legislation.

The WLC believes the definition in the Victorian family violence legislation should be used as the standard in all legislation across all jurisdictions.

A standard definition would ensure consistency and remove confusion which would result in better outcomes for victims. While the WLC recognises that it will not be a simple process to introduce a standard definition across all jurisdictions it is critical to remember the priority of any family violence reforms should result in better outcomes for victims and ultimately eliminating family violence to the greatest extent possible.

Australian jurisdictions have come a long way in improving family violence definitions in their respective family violence legislation. Improvements have seen expanded definitions of violence, a greater emphasis on victim safety and the effect on children and their need for safety included. While acknowledging these improvements we read from the information in the ALRC report and the Domestic Violence Laws in Australia Report <sup>1</sup> that there are some important omissions in state and territory legislation.

A standard definition would eliminate the problem of omissions and ensure that important provisions such as sexual assault, economic abuse, emotional or psychological abuse, deprivation of liberty, damage to property, injury to animals and exposure to children is included across the board.

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<sup>1</sup> Australian Governments Solicitors, *Domestic Violence Laws in Australia*, June 2009

There are several other excellent reasons for the introduction of a standard definition not the very least that all parties involved, victims, perpetrators, courts, lawyers and other people working with the legislation have the same understanding of what constitutes family violence.

We know that many victims of family violence move interstate in an attempt to escape family violence. Currently the difference between the state and territories can create problems for victims when registering an order in a different jurisdiction. This may be where the family violence legislation may not be comprehensive enough to cover the particular family violence issue the victim has been dealing with.

Having a comprehensive definition of family violence across all jurisdictions would also act as a tool towards changing community attitudes to family violence. Including behaviours such as those in the Victorian definition, emotional and psychological abuse (including tormenting behaviour), economic abuse, sexual abuse, coercive and threatening behaviours and controlling behaviour causing fear would ensure that all members of the community recognise what constitutes family violence and therefore look at these behaviours for what they are, family violence.

The WLC assists approximately 1,000 women each year by giving them advice and information on family law including property, children and family violence.

Approximately 41% of these clients present to the WLC having experienced some form of family violence. Often the most difficult form of violence these women are dealing with is the emotional and psychological abuse. The WLC understands only too well the effect that these forms of violence has on victims: the pain, suffering, poor health and not being able to be part of 'normal' society impacts not only on the victim but of course on the children and other family members. Apart from the massive cost to the government in health care these women have had any resemblance of a normal life removed from them.

The WLC is in favour of using the definitions of family violence from the Victorian *Family Violence Protection Act 2008 (Vic)* as the model to be introduced in legislation across all jurisdictions. The Victorian definition currently provides the greatest capacity to address these varying forms of violence, in that orders relating

to violence by or against associates are available for emotional/psychological forms of violence, as well as harm to children.

**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?

The WLC does not have any examples of judicial officers and lawyers treating examples as exhaustive rather than illustrative but could see that there is a real possibility that this takes place. It is important when using examples to ensure it is clear that they are only examples and stress that other conduct could constitute family violence.

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

It is the view of the WLC that the definition of family violence in the *Family Law Act* is too narrow. The broad discretion given to the courts and the family violence strategy do not overcome the constraints posed by the narrow definition of family violence in the *Family Law Act*. As WLC stated in question 1 there needs to be a standard definition of family violence in all legislation including the *Family Law Act*.

**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?

Yes, the WLC believes it is important that the standard definition of family violence have a purpose or preamble which refers to human rights, the fact that more women are victims of family violence, the impact on children, the impact on groups such as Indigenous people, those from culturally and linguistically diverse backgrounds, people with disabilities, older people and those from the gay, lesbian, bisexual and transgender community. The WLC believes the preamble in the Victorian *Family Violence Protection Act 2008* provides a reasonable model in this regard.

## Chapter 5: Family Violence Legislation and the Criminal Law – an Introduction

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?

Clients do report the type of behaviour that may ground such charges but we are not aware of any cases that have been prosecuted.

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?

In the first instance the police and the DPP need to be on board with actively prosecuting these types of matters. If that were to be the case, it would be useful for lawyers to be aware of this potential so that their clients may ask the police about the possibility of these charges where relevant. Lawyers could be made aware of this through the usual Community Legal Education channels, in particular the Family Law Section of the Law Council of Australia.

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 Australian Capital Territory victims are left to apply for a protection order themselves. Police need to make a separate decision about charging the offender as a criminal justice response. Because of these separate tracks, there can be a lack of information for the victim about the criminal justice response: see question 5-14 below.

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

The WLC agrees with the preliminary concerns of the Commission in this regard. In circumstances where parent victims are litigating in two courts, namely the Magistrates Court for the protection order and the Federal Magistrates Court / Family Court, it may be more useful for full consideration of the economic and emotional abuse to be considered in the family law context as the Court has power to make other orders which may have a positive impact, for example, the jurisdiction to make spousal support orders or the jurisdiction to make orders for supervised contact if this were appropriate. This jurisdiction provides a potential to address the underlying issue in a way that just making a protection order doesn't. It would not be a good situation for victims if they had to give evidence about these issues, which potentially would be lengthy and controversial evidence, in more than one Court.

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 Commission has set out the current position in the ACT. The WLC supports the approach taken in the Model Domestic Violence Laws that police should be required to investigate family violence where they have reason to believe or suspect that family violence has been, is being or likely to be committed. Police should be required, in cases where they did not take action, to record the reasons why. This approach would be more likely to lead to consistency with bail conditions and protections orders, as part of a co-ordinated approach.

There should also be provision for victims to approach the Court directly for a protection order without involving the police. This allows victims the choice of avenues to seek protection.

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?

The Women’s Legal Centre (ACT & Region) runs the Indigenous Women’s Program, providing legal assistance, advice and referral to indigenous women. It is our experience that Indigenous women are often reluctant to engage with police and, as well, require a great deal of support around applying for a protection order. (Of course, in our jurisdiction, women themselves apply for the protection orders.) In Indigenous communities, there appears to be a perception that protection orders may not be useful as a way of ensuring safety for women and children.

These issues were examined at length in the 2009 report: “*We Don’t Shoot Our Wounded ...*” (Aboriginal & Torres Strait Islander Victims of Family Violence Access to Justice and Access to Services in the ACT)

We support the proposal that there should be indigenous-specific support services in courts regardless of whether police or victims themselves are applying for the protections orders. When assessing available services, it is important to remember that the Aboriginal Legal Service often either act for perpetrators, or are perceived as acting for perpetrators, and will therefore not be accessed by Indigenous women. Alternate services for victims, such as Indigenous Women’s Programs, Aboriginal Family Violence Prevention Legal Services or other Aboriginal Women’s Legal Services need to be available.

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?

Safety for victims is the key issue, which leads the WLC to support a police power to detain perpetrators. In the ACT the Domestic Violence Crisis Service is available, through its partnership with the AFP, in this critical first response period to provide support and information for parties.

Another option worth exploring is the power to enable police to remove a perpetrator from the home for a certain period, say 7 to 10 days. If that period is to be extended the application must be made to a Court.

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

The system needs to ensure that perpetrators do not use the protection order process to further victimise the real victim. Often perpetrators of violence well-understand the system and have a better capacity to engage with police and courts to potentially apply for protection orders where in reality their own safety is not a concern.

If there was to be a determination of “primary aggressor” this would need to be approached cautiously as there is a potential to cause harm through such a determination should it be inappropriately determined without gathering all the facts. Assistance of appropriately experienced domestic violence workers would be critical. Also there may need to be included, for example, the obligation to organise an interpreter for family members who have information relevant to such an assessment.

*Case study: A young Indian wife, newly arrived in Australia suffers physical violence, intimidation and control from the time she arrives in Australia. The wife’s visa is dependent upon the husband’s sponsorship so the wife feels especially dependent upon the husband. None of this behaviour is reported. The parties have an argument one evening and the wife falls to the floor. In the course of a struggle, she kicks the wall and damages it. The husband calls the police and the wife is charged with property damage. He obtains a protection order based on this set of facts. The wife has no legal advice and goes to Court and pleads guilty to the charge. This may now affect her immigration status in Australia and the husband uses this as an ongoing threat.*

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?

We support proposal 5-7 that there should be a positive 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. We have had a recent example (in the Australian Capital Territory) where a woman was not given this information until such time as she sought legal advice from our service and then followed up with the police herself. In this case, the woman did not have a protection order and so the woman was not certain of whether her ex-partner would approach the former joint home and/or the contact that her ex-partner could have with her and their child.

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

We cannot give a quantitative response to this question. We are aware of instances arising when the bail conditions are varied before resolution of the criminal matter and the victim has in the meantime obtained a protection order.

One of the important issues is the length of time that the protections will be in place. Typically a protection order will last longer than bail conditions and the protection order is only variable with the knowledge of the victim.

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.

## Chapter 8: Family Violence Legislation and Parenting Orders

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

In the Australian Capital Territory it is not usual for children to be included on protection orders. There are two standard exceptions which can be ticked on the application:

“... prohibited from being within a particular distance from the aggrieved person ... EXCEPT in accordance with an order made pursuant to the *Family Law Act 1975*.”

“prohibited from contacting the aggrieved person ... EXCEPT in accordance with an order made pursuant to the *Family Law Act 1975*.”

Thus if Orders are being made pursuant to the *Family Law Act 1975* they are not likely to be inconsistent. However, the real issues are (a) whether the violence towards the aggrieved person is disclosed in the Application for Consent Orders and, (b) if it were, the action, if any, the Court would take in response to any such disclosure. This is against the background of misperceptions about shared care and the “friendly parent” provisions.

The WLC is aware of clients who have consented to shared care of children as they are threatened and intimidated by the other parent. There is a tension between applying for Consent Orders to provide some certainty against the children being withheld from the “victim parent” as a means of intimidation and having no orders at all. Commencing parenting proceedings is seen as a high-risk strategy in terms of safety for the victim or, in other cases, the victim-parent is fearful that the children will bear the repercussions of any such action. In cases such as these there is a

reluctance to disclose the real history of violence as the Consent Orders may not be made, leaving the choices of no orders or commencing proceedings.

Of course another real consideration for parties to proceedings is the difficulty and cost of having to initiate another set of proceedings. Without guaranteed legal aid or representation from somewhere this is just putting in place another barrier or hurdle that women won't be able to get over.

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?

There are four considerations:

1.      The applicant must feel confident that the Court will appropriately consider any allegations of violence. There has been a great deal of discussion about the “friendly parent” provisions acting against this confidence in the system. The message from the family courts now seems to be that the details of family violence must be provided in an acceptable evidentiary form and they will be taken seriously by the Court.
2.      The applicant must be able to access the federal family courts quickly. For example, if there are parenting orders in place and there are subsequent issues of family violence, the victim needs to be able to access the federal family court quickly to bring these matters to the attention of the court and to seek a variation to the parenting orders.
3.      The federal family courts must have time available to fully explore the issues before interim orders are made.
4.      Any restraining orders made by the federal family courts should be enforceable by police.

Where contact orders are in place there must be increased resources for supervised contact options. NZ law has a presumption for supervision where allegations of violence are made, and contact centres are resourced to provide this.

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?

In the Australian Capital Territory the parenting order would have been obtained in the Federal Magistrates Court or the Family Court. Ideally one specialist court would deal with the protection order and the parenting order but this is not an available option. Safety must be the first concern and the protection order given priority. This may place a parent at risk of contravening family law orders. However, the WLC does not support Proposal 8-9 in the Australian Capital Territory. The inconsistent parenting order would need to go back to the Federal Magistrates Court or the Family Court for consideration.

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 ?

To the best of our knowledge the ACT courts do not make parenting orders. All applications for parenting orders are considered in the Federal Magistrates Court or the Family Court.

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

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

The ACT courts do not have the requisite experience in family law matters. In an integrated system it would be preferable for the protection order application together with any associated variation of the parenting order to be heard by a specialist family

court. The issue then becomes one of any protection order made by the family court being enforceable by the AFP; or registrable and enforceable in other jurisdictions.

Specialist courts are not an option in RRR areas, you can't assume that women in our regional area can just hop in the car and trot up to Canberra, this is yet another barrier for women dealing with family violence.

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?

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

There are practical difficulties in obtaining new orders within the 21 day period, it depends upon availability of Federal Magistrates and/or the Family Court judge. Typically each Federal Magistrate runs their own cases so a variation would go back before the judicial officer who first heard the matter. The defence proposed may be one way of addressing any unintended delay by the Court and still leave a onus on the parent seeking the variation to act quickly.

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, this issue should be one which is considered on the facts of each case, not simply routinely made. The WLC is aware of clients who do need to have arrangements for the children in place. Having the exception worded as it is mandates some formal action around arrangements for the children which can provide certainty to both parties whilst still taking into account safety of the victim. Arguably the prospect of having no arrangements for the children heightens tension and increases the safety risk for women. Simply removing this exception does not address the problem. The issue is having the appropriate parenting orders that properly reflect all safety concerns of women and children.

## Chapter 9: Family Violence Legislation and the *Family Law Act*: other *Family Law Act* Orders

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

The WLC believes that, despite the “automatic power of arrest” provisions under the *Family Law Act 1975*, personal protection orders under the Act are not a useful mechanism for addressing safety for victims. We would advise a client (1) about the difficulties with enforcement of such personal protection orders and (2) the likelihood that a protection order issued by a territory court would be more readily acted upon by police should there be a breach.

We endorse any moves towards a process whereby an enforceable personal protection order could be speedily issued in the family courts jurisdiction. This may avoid a victim having to give evidence in two different courts. As part of the enforcement it is essential that any breach of an injunction for a personal protection order is a criminal offence.

From a practical point of view we foresee difficulties in the federal magistrates courts (as they now operate) being able to offer a speedy process for the issue of orders, noting that the territory courts are usually able to deal with applications for interim orders on the day that they are filed as well as offering Registrar run conferences on return dates.

We endorse proposal 9-1 as any new provisions should be easily understood by victims, lawyers, courts and police.

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?

In our experience, women who are concerned about their safety would obtain an order under the state or territory legislation. Generally this occurs before the family court proceedings are commenced. A typical matter is one where the act occasioning the need for an order is the act that ends the relationship; so there have not been any family law matters on foot. The quickest response is to obtain the protection order from the territory court.

Certainly if there are any concerns about physical safety or threats of harm – the more serious end of domestic violence behaviour – we would always advise the woman to seek an order under the state or territory legislation. The reason for this advice is that there is more certainty that the police can and will act on any breach of this order. Injunctions under the *Family Law Act 1975* are often sought in proceedings which are occurring after the state or territory orders are in place with the advantage that the *Family Law Act* orders continue indefinitely.

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, both options will need to be available until such time as there is a national scheme with model domestic violence laws that includes the federal jurisdiction. In the present scheme the state and territory legislation is able to offer a better safety option for victims. A person's reasons for seeking an injunction under the *Family Law Act 1975* may be different from seeking a protection order under the state or territory family violence legislation.

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

The WLC has not seen this as a pressing issue. As stated above, the state or territory order is, in our experience, usually issued first. It is a matter then of the family courts being aware of the existence of the order. In the ACT it is usual for the exception relating to orders made under the *Family Law Act* to be included in protection orders issued by the territory courts.

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

In our experience evidence of violence is not being considered in the context of property proceedings. Property proceedings tend to be viewed in a clinical way, focussing on the numbers. The threshold in *Kennon* is too high and it is almost impossible to present evidence that can link family violence directly to contributions or future factors unless, for example, there is a clear physical injury which has impeded or will impede a capacity for employment.

*Case study: A woman married for 25 years was sexually assaulted by her husband post-separation. The assault took place in the former matrimonial home where the woman was living on her own. There had been a history of alcohol-related violence during the relationship. The woman was severely traumatised by the sexual assault and sought counselling. She suffers from psychological conditions arising from the assault and it has been difficult for her to continue living in the former matrimonial home, leading her to seek sale of the home in property proceedings. Both parties are retired with health issues so there is no section 75(2) argument that can be made*

*to ground an adjustment in the wife's favour. The wife's quality of life has been affected but there will be no redress for her through the property settlement proceedings.*

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

We support Proposal 9-6. However, in our experience it is often the victim who is forced to leave the former matrimonial property and so the issue is one of the victim obtaining property. We would propose some mirror provision in the state and territory protection order legislation which would allow the victim to attend in the presence of police and collect her property, as a minimum being property set out in Proposal 9-6 (a) with an option to seek orders for property needed by the child or children.

The following is a typical case that we see at WLC.

*Case study: A woman of a non-English speaking background is married with a young child. She was living in a home which is solely rented in the husband's name. There was a history of violence and, following concerns involving the husband's treatment of the child, the woman leaves the relationship urgently with the child and lives in a refuge. There are orders for the time that the husband spends with the child to be supervised. The woman has nothing except a few personal belongings. She is denied access to the house and, in any case, would be too fearful to return there. The husband will not agree to provide any household items, including the children's belongings. The husband has retained all of the wife's personal papers,*

*except her passport which he returned. The wife proposed that a friend would attend at the house to collect household items and personal items if the husband left them outside. The husband refused. The husband has kept some of the wife's jewellery which were given to her prior to the relationship by her mother (who resides overseas). The wife is not eligible for legal aid because the property pool is too small to justify spending public funds. Unless the wife acts for herself in property proceedings, in circumstances where it would be difficult to enforce orders even if they were made, she has no means of having her personal items and documents returned and no avenue to fairly split the jointly acquired matrimonial property.*

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

It is our experience that courts do not like make determinations about items of property and so there needs to be a practical approach, possibly similar to that set out in Proposal 9-6. However, as set out in our response to Question 9-6, there needs to be consideration to given to the situation where the victim has had to leave with the child and needs access to her personal belongings and some of the children's belongings.

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

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

This Question raises the important need for the family courts to consider expert opinion about family violence when making relocation decisions. There are difficulties with presenting expert evidence about the impact of family violence other than in a very case specific way. Some of the relevant general factors are:

- (a) Many women are isolated from their families as a part of the cycle of domestic violence. After separation, many of the applications for relocation are to relocate to be closer to the mother's family and supports. Not giving sufficient weight to this factor leaves women in the position of being without support, caring for the children, feeling trapped by their situation and subject to control by their ex-partner as he is effectively the reason why she cannot take some control over her life and begin to re-establish herself post-separation.
- (b) In cities like Canberra the cost of living can be prohibitive for a separated parent, particularly a parent who has full-time care of the children. This is not a separate factor which can be taken into account when in reality it may be the factor of primary importance when considering relocation to an area with either a lower cost of living or assistance with, for example, childcare, which can improve the financial situation of the applicant. This is tied to family violence in, for example, situations where the woman has been restricted by her ex-partner in her capacity to work during the relationship and/or has had little control over the finances of the relationship both pre- and post-

separation. There is typically a resistance by the ex-partner to contribute towards the cost of remaining in Canberra.

- (c) Because of the “friendly parent” provisions it has been a risky strategy to run the argument that puts forward the primary reason for relocation as being the wish to get away from the violent parent. Any amendments to the legislation which provided an avenue for more direct consideration of family violence as a reason for relocation would, in our view, be useful for the courts.

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

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

There is a concern that a parent who has fled with the children to escape family violence will potentially have the children removed from her care upon her return and placed with the perpetrator.

Similarly to the comments in relation to relocation, there should be a direct consideration of the impact of family violence on the reason for leaving the jurisdiction and the safety implications of any decision about ordering the fleeing parent back to the jurisdiction.

## Chapter 11: Alternative Processes

Question 11-1 Should any amendments be made to the provisions relating to family dispute resolution in the *Family Law Act 1975* (Cth)—and, in particular, to s 60I of that Act—to ensure that victims of family violence are not inappropriately attempting or participating in family dispute resolution? What other reforms may be necessary to ensure the legislation operates effectively?

The attitude of the Courts in granting exemptions based upon family violence allegations needs to be clearer for practitioners. We have heard anecdotally of Registries which simply do not allow exemptions and thus lawyers need to send their client to an FDR practitioner to obtain a certificate when it was obvious from initial instructions that FDR was not suitable.

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

In our experience, difficulties may arise where there are issues of power and control in a relationship which are outside the definition of family violence. These issues may impact on a woman's capacity to negotiate but not be sufficient to ground an exemption should the application be made directly to the Court. The capacity of family dispute resolution processes to address these issues often depends upon the skill of the particular family dispute resolution practitioner in the case. We are aware of cases where women felt intimidated by the FDR process and/or reported not feeling listened to or feeling bullied.

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

In the ACT there is a conferencing process as part of an application for a protection order in the territory courts. This is not called ADR but is conducted by a Registrar in a shuttle model. Often parties are unrepresented. It is important that parties are well informed about this process and have the opportunity to seek legal advice about their specific situation.

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

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 ?

In the ACT there is a conferencing process run by a Registrar through certain stages of child protection matters. It is important that parents are legally represented as the child and the Department are legally represented. The power that the Department holds creates a situation of imbalance which needs to be carefully managed in any adr process. This is part of a broader issue about accountability of child protection authorities. One of the difficulties that we see is the lack of support by the child protection authorities of women trying to escape domestic violence. The onus is placed upon them to remove themselves from the situation of domestic violence and, if they are not able to do this, there is a threat that the child or children will be removed. If the mandate of the child protection authority encompasses providing support for the parent escaping domestic violence, this may be a more useful strategy.

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?

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?

The view of the WLC is that it is inappropriate to use restorative justice practices in the family violence context and to be used for sexual assault offences or offenders. We agree that the dynamics of power in relationships where sexual offences have been committed mitigate against any such process.

It is important to name and address perpetrator behaviour both individually and systemically.