

## FRACTURED FAMILIES, FRAGMENTED RESPONSIBILITIES – RESPONDING TO FAMILY VIOLENCE IN A FEDERAL SYSTEM

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### I INTRODUCTION

Family law has transformed over the past 200 years from an essentially private space to a public one. Once it was the province of the ecclesiastical jurisdiction with respect to relations between husbands and wives, and the province of the common law and equity for questions of title and legitimacy of children with respect to real estate.

Professor Stephen Parker remarked that:

The idea that we should distinguish between public and private spheres of life has been a central one in liberal political philosophy since the seventeenth century, although the roots of the idea can be traced back to Aristotle. In classical liberalism, the notion of a private sphere was a crucial part of the belief in limited government. There were certain parts of civil society in which the state had no business. And at the epicentre of the private sphere was the family; more specifically, the patriarchal family.<sup>1</sup>

The idea that the family is a ‘private’ space has been a continuing theme in law – and especially family law.<sup>2</sup> One of the effects of the family as a private space outside the province of law was to conceal violence, to create resistance to taking violence into account in legislation.<sup>3</sup>

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1 Stephen Parker, ‘Rights and Utility in Anglo-Australian Family Law’ (1992) 55 *Modern Law Review* 311, 325–326.

2 See, eg, Tom Altobelli, *Family Law in Australia: Principles and Practice* (LexisNexis Butterworths, 2003) 50; Margaret Thornton, ‘The Cartography of Public and Private’ in Margaret Thornton (ed) *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995) 2; Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2<sup>nd</sup> ed, 2002) ch 2 and references cited throughout.

3 Elizabeth M Schneider, ‘The Violence of Privacy’ in M A Fineman and R Mykitiuk, *The Public Nature of Private Violence: The Discovery of Domestic Abuse* (Routledge, 1994) 36.

Contemporary discussion about the family reflects both the importance of the family as a ‘fundamental unit’ in society,<sup>4</sup> but also the increasing recognition of the public impact of, and responsibility for, family violence. Moreover, international conventions play an increasing role in terms of the characterisation of matters as ‘public’ or ‘private’, particularly in the area of violence against women. A great deal of effort has been applied to ensure that governments accept responsibility for preventing and dealing with violence as a serious infringement of women’s rights, and to move the issue of violence from the area of private action to that of public responsibility.<sup>5</sup>

As violence has been brought increasingly into the public arena, the dimensions of the problem have become apparent. Recent attention to violence in the Australian context has highlighted the extent of the problem. In March 2009, the National Council to Reduce Violence against Women and their Children (‘the National Council’) released the report, *Time for Action*,<sup>6</sup> which focused on the problem of violence against women in the Australian community – and its extent. It reported the estimate that ‘[a]bout one in three Australian women experience physical violence and almost one in five women experience sexual violence over their lifetime’;<sup>7</sup> and that while violence ‘knows no geographical, socio-economic, age, ability, cultural or religious boundaries’,<sup>8</sup> the experience of violence is not evenly spread. It has an impact on some groups, such as Indigenous women, more than on others.<sup>9</sup>

The cost of violence is very significant indeed, and makes incontrovertible the argument that violence is a public issue. In January 2009, KPMG prepared a forward projection of costs to 2021–22 and concluded that an estimated 750 000 Australian women ‘will experience and report violence in 2021–22, costing the Australian economy an estimated \$15.6 billion’.<sup>10</sup>

The National Council recommended that the Australian Law Reform Commission (‘ALRC’) should undertake an inquiry into the laws addressing family violence in Australia.<sup>11</sup> In April 2009 the Standing Committee of Attorneys-General agreed that the law reform commissions should work together to consider these issues. The terms of reference for the Family Violence Inquiry (‘Inquiry’) emerged from *Time for Action*. They were:

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4 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into 23 March 1976) art 23.

5 Elizabeth Evatt, ‘Eliminating Discrimination Against Women: The Impact of the UN Convention’ (1991) 18 Melbourne University Law Review 435, 437.

6 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009) (‘*Time for Action*’).

7 *Ibid* 9.

8 *Time for Action*, above n 6, 16.

9 *Ibid* 17.

10 *Ibid* 43; KPMG, *The Cost of Violence against Women and their Children* (2009), prepared for the National Council.

11 *Time for Action*, above n 6, 120.

- 1) the interaction in practice of State and Territory family/domestic violence and child protection laws with the Family Law Act and relevant Commonwealth, State and Territory criminal laws; and
- 2) the impact of inconsistent interpretation or application of laws in cases of sexual assault occurring in a family/domestic violence context, including rules of evidence, on victims of such violence.

In relation to both these issues the Commissions were asked to consider, ‘what, if any, improvements could be made to relevant legal frameworks to protect the safety of women and their children’.<sup>12</sup>

The Inquiry has focused in large measure on the interaction of laws within Australia. This article discusses one of the critical issues underpinning the analysis of problems and the development of reform recommendations in relation to family violence within the terms of reference – namely the problems of the constitutional division of jurisdiction between the Commonwealth and the states and territories – and draws upon aspects of the discussion in the ALRC and New South Wales Law Reform Commission (‘NSWLRC’) Consultation Paper.

## II FRAGMENTED RESPONSIBILITIES – THE EFFECT ON FAMILIES

The Family Law Council advised the Australian Government Attorney-General in December 2009 that:

The reality for a separating family experiencing contentious issues in respect of parenting capacity is that there is no single judicial forum that can provide them with a comprehensive response to address their disputes, particularly where there are underlying issues of family violence and/or child abuse.<sup>13</sup>

The Council was referring to the fact that those who are seeking legal protections and orders in relation to family violence may need to use magistrates courts – and in some cases criminal courts at higher levels; children’s courts; and family courts to deal with the violence. Those who work in this fragmented system have become used to it and have accepted the divisions it creates. In consultations for this Inquiry it became apparent to the Commissions that the various parts of what might be called ‘the family violence system’ contain people who are dedicated to making their part of the system work as well as it possibly can. When users of the system reach the boundaries of each jurisdiction they are referred to a different court, or a different service agency which, in its turn, strives to provide the best possible service it can. The divisions between the different parts of the system are accepted or are seen as immutable by most of

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12 The Terms of Reference for this Inquiry are set out at the front of the Consultation Paper: ALRC and NSWLRC, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper No 1, NSWLRC Consultation Paper No 9 (2010) <<http://www.alrc.gov.au/inquiries/family-violence/terms-reference>>.

13 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009) [7.2].

those who work within them. One academic in the United Kingdom ('UK') has gone so far as to describe these differences as different 'planets'.<sup>14</sup>

### A Falling between the Cracks in the System

Despite the apparent acceptance of the family law system by practitioners, the experience of those who seek legal protection and orders in situations of violence is of a system that is complex and confusing and which may be too hard to navigate. An example will provide some context for the discussion. Let us imagine the all too common situation of a woman and her children who have left a relationship involving severe, ongoing, controlling violence. An application is likely to be made to a magistrates court for protection orders. In the same court, a criminal prosecution for the violence may also be brought. A child protection agency may have become involved with the family, perhaps alerted by calls from family members, neighbours or the police. Concerned about the impact of the violence on the children, the agency may decide to investigate and to pursue care proceedings in relation to those children in the relevant children's court. Contemporaneously, the father may make an application in a federal family court for parenting orders. Thus, this one family may be involved in legal proceedings in three courts in relation to (at least) four different types of proceedings.

This example underplays the complexity of the system for some families. In 1999, Justice Linda Dessau of the Family Court of Australia looked at cases involving allegations of child sexual abuse and calculated that a victim could be the focus of court proceedings in eight different ways and would have contact with at least ten different professionals.<sup>15</sup>

As Dessau J pointed out, those who are the targets of violence need assistance not only from law, but also from service agencies. In the example above, in addition to legal proceedings in three courts, the mother and children may also be negotiating their needs – and being required to tell their story – in order to access numerous services. They may be involved in discussions with services associated with courts (such as police, victim support services, counselling services and family dispute resolution practitioners) and beyond the courts, for example in housing, child support, and health care.

It is apparent, therefore, that the system is complex and may be hard to navigate for families who may be in crisis, or at least dealing with very difficult transitions in their lives. This point has been made repeatedly by judges, academics, service providers and others over the years. The system has been referred to as 'a maze' in which families can get lost.<sup>16</sup> The 1997 report of the ALRC and the Human Rights and Equal Opportunity Commission on children in the legal process pointed out that the lack of co-ordination between proceedings

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14 Marianne Hester, 'Commentary on "Mothers, Domestic Violence and Child Protection" by H Douglas and T Walsh' (2010) 16 *Violence Against Women* 516.

15 Linda Dessau, 'Children and the Court System' (Paper presented at the Australian Institute of Criminology *Children and Crime: Victims and Offenders Conference*, Brisbane, 17 June 1999) 6–7.

16 Thea Brown and Renata Alexander, *Child Abuse and Family Law: Understanding the Issues Facing Human Service and Legal Professionals* (Allen & Unwin, 2007), 138.

involving children may result in duplication, delays, the possibility that a child would be interviewed repeatedly about the same distressing issues, and the creation of uncertainty about her or his future may be damaging to a child.<sup>17</sup>

Empirical research has provided evidence of the problems created by this complex and fragmented system.<sup>18</sup> One such problem is that families can fall through the gaps in the system. For example Kelly and Fehlberg, in 2002, showed that cases are often shifted from the child protection system to the family law system. For example, a family may come to the attention of child protection services who may investigate and may work with the family to ensure that the children are safe. In many such cases a viable and protective carer is identified for a child. At that point child protection agencies are likely to withdraw and invite the carer to go to the family courts to get a parenting order. Most succeed in getting such an order, but some do not. They may fail to apply, fail to pursue an application, or the court may make an order that does not provide for the children to live with the person identified as a viable carer.

These findings were echoed in our consultations undertaken as part of the Inquiry when we were told that sometimes the identified viable carers do not go to the family courts because of financial constraints, or their inability to get legal aid. People also told the Commissions that some clients do not go to court because they find the family courts intimidating, or expensive, or they are weary and feel they have been through enough. If they drop out of the system, no court scrutinises the children's welfare or makes a considered and appropriate order about who should take care of the children or spend time with them. If the perpetrator of violence later challenges the informal arrangements no enforceable order protects the child or the carer.

The danger that families may fall into the cracks between the systems was noted by the Family Law Council in December 2009:

more than one court may be involved in a particular family breakdown. Disputes cannot be neatly divided into private and public areas of law and parties will often have to institute or be engaged in proceedings in various legal forums to have all of their issues determined. ... The overlapping jurisdictions cause significant angst for the parties involved and considerable difficulties for the courts.<sup>19</sup>

The impact on children may be especially severe, as reflected through the eyes of a nine year old child speaking of the uncertainty of ongoing family court proceedings:

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17 ALRC and Human Rights and Equal Opportunity Commission, *Seen and Heard – Priority for Children in the Legal Process*, ALRC Report No 84 (1997).

18 See, eg, Thea Brown et al, *Resolving Violence to Children, Report Number Three: An Evaluation of Project Magellan and the Pilot Program for Managing Residence and Contact Disputes in the Family Court when Child Abuse Allegations are Involved* (Family Violence and Family Court Research Project 2001), cited in Fiona Kelly and Belinda Fehlberg, 'Australia's Fragmented Family Law System: Jurisdictional Overlap in the Area of Child Protection' (2002) 16 *International Journal of Child Protection* 38.

19 Family Law Council, above n 13, [7.3.5].

I felt worried that mum was going to go back and forth and back and forth and it wasn't going to stop ... [I felt] freaked out, I couldn't get to sleep I had nightmares, I was crying a lot ... [It was just all] horrible and frightening.<sup>20</sup>

The sense of being bounced between systems was described by one contributor to this Inquiry as feeling 'like a ball on a pool table'.<sup>21</sup> The legal system has been described by some as operating in 'silos', with participants feeling bounced around from one agency to the next or alternatively falling into the gaps in the system.<sup>22</sup> One women's legal centre attributed the dropping away of complaints of family violence to such gaps:

The small numbers of women who do build the courage to report [family violence] then have to battle their way through the legal and court systems. In [our centre's] experience, these systems have inherent gaps which ultimately fail to protect women. They fall through the cracks and are left feeling vulnerable and re-traumatised; the reason so many women give up.<sup>23</sup>

The problems for some citizens may be compounded by their histories and identities.

For many Aboriginal people the intervention of child protection services is a common experience that often goes back several generations. Recently it was reported that child protection workers in Australia have begun removing the fifth generation of Aboriginal children from their parents, meaning that some Aboriginal families have an eighty year history of child protection intervention. ... Many scholars have observed that as a result of the intersecting factors of poverty, race and gender, Aboriginal women, and women who are recent immigrants, are particularly disadvantaged and discriminated against in their engagements with institutional processes.<sup>24</sup>

## B The Gravitational Pull of Different Planets

Clients with family violence problems may also experience the effects of the different perspectives that inform the activities and approaches of different parts of the system. These tensions in the system may detrimentally affect the relationships between those who work on different planets.

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20 Alison Hay, 'Child Protection and the Family Court of Western Australia: The Experiences of Children and Protective Parents' (Paper presented at Child Sexual Abuse: Justice Response or Alternative Resolution Conference, Adelaide, 1–2 May 2003) 11.

21 Confidential, Submission No 49 to Australian Law Reform Commission, *Family Violence Inquiry*, 5 May 2010.

22 Or on a 'roundabout' as described in the AIFS evaluation: Rae Kaspiew et al, 'Evaluation of the 2006 Family Law Reforms' (Australian Institute and Family Studies, 2009) 21 [4]. This separation of practice or silos was reflected, for example, in one submission in this Inquiry, where different committees of the one Law Society came to strongly divergent conclusions with respect to a number of matters raised in the Consultation Paper: Law Society of New South Wales, Submission No 205 to Australian Law Reform Commission, *Family Violence Inquiry*, 30 June 2010.

23 Hunter Women's Centre, Submission No 79 to Australian Law Reform Commission, *Family Violence Inquiry*, 1 June 2010.

24 Heather Douglas and Tamara Walsh, 'Mothers, Domestic Violence and Child Protection' (Paper presented at Key Centre for Ethics, Law, Justice and Governance Seminar, Griffith University, 22 April 2009) 20–21.

Professor Marianne Hester, describing the experience in the UK, refers to the different cultural histories of what she describes as the three ‘planets’ of domestic violence, child protection and child contact:

Domestic violence work in the UK (and many other countries) has been influenced by feminist understanding of domestic violence as gender based, and tends to see the problem as (mainly) male perpetrators impacting on (mainly) female victims or survivors. The work of child protection services in the UK has a very different history to that of domestic violence, with the family, and in particular ‘dysfunctional’ families, as central to the problem. Within this approach the focus is on the child and her or his main carer, usually the mother. These structural factors, with domestic violence and child protection work on different ‘planets’, have made it especially difficult to integrate practice, and have resulted in child protection work where there is a tendency to see mothers as failing to protect their children rather than as the victims of domestic violence, and where violent male perpetrators are often ignored. These difficulties are made even more complex where both child protection and arrangements for child visitation post separation of the parents intersect. Within the context of divorce proceedings, mothers must be perceived as proactively encouraging child contact and must not be attempting to ‘aggressively protect’ their children from the direct or indirect abuse of a violent father. The child protection and child visitation/contact planets thus create further contradictions for mothers and children: there may be an expectation that mothers should protect their children, but at the same time, formally constituted arrangements for visitation may be implemented that do not adequately take into account that in some instances mothers and/or children may experience further abuse.<sup>25</sup>

An Australian study by Dr Heather Douglas and Dr Tamara Walsh of the University of Queensland considered how community workers who work with mothers (and who thus live on the domestic violence planet) perceive the response of child protection workers (from the child protection planet) to cases where family violence is a key risk factor: similar perceptions and juxtaposed dynamics to those found by Hester were evident.<sup>26</sup>

One of the tensions identified in the Australian family violence legal system is between the family law and child protection systems. The Family Law Council has observed that despite the differences between the jurisdictions and the ‘distinct divide between private and public law’, the orders available under the state and territory family violence and child protection legislation ‘cover much of the same ground’ as the *Family Law Act 1975* (Cth) (*FLA*).<sup>27</sup> Nevertheless, the two systems arguably do not work well together.

Section 60CC(3)(c) of the *FLA* provides that courts making parenting decisions must take into account the willingness and ability of each of the child’s parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent. This provision has been called the ‘friendly parent’ provision. However, fears of being found to be an unfriendly parent appear to be motivating the targets of violence and their lawyers to conceal violence in the

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25 Hester, above n 14, 516–517.

26 Heather Douglas and Tamara Walsh, ‘Mothers, Domestic Violence and Child Protection’ (2010) 16 *Violence Against Women* 489.

27 Family Law Council, above n 13, [7.3.4].

family law system.<sup>28</sup> The gravitational pull of this provision is in a different direction to the impetus of the child protection system which may encourage a person to go to a family court to get an order excluding contact by a violent parent in order to make a child safe.

While family courts and child protection agencies both work with cases involving allegations of child abuse, they could be said to live on different planets, having different approaches to child protection which drive different responses to cases. Where a family court is notified of a case involving child abuse it will notify the relevant child protection agency and the court is likely to anticipate that the agency will investigate these allegations and be prepared to provide information and evidence for the court. However there are a number of valid reasons why a child protection agency may not take the steps the court desires. These differences were the subject of comment in the Wood Inquiry into child protection services in New South Wales ('NSW').<sup>29</sup>

First, the report of abuse may not be judged by the child protection agency to be sufficiently serious to justify intervention. Under the *FLA*, the threshold for making a notification is a suspicion, based on reasonable grounds, that the child to whom the proceedings relates has been abused or is at risk of being abused.<sup>30</sup> Under child protection legislation the standard is generally higher – for example in NSW it is risk of significant harm.<sup>31</sup> There may therefore be different legal and cultural practices and understandings about the appropriate threshold for intervention between family courts and child protection agencies.

Second, during this Inquiry the Commissions were told that child protection agencies may decline to provide information to the court or to intervene in a family court case because their involvement with the family has been limited and they have nothing of use on file. In 2009 NSW Community Services reported that 27 per cent of all children under eighteen years were known to the agency, so it is

28 Richard Chisholm, *Family Courts Violence Review* (Attorney-General's Department (Cth), November 2009).

29 James Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008) 548–9.

30 *FLA* s 67ZA(2). Section 67ZA(3) permits (but does not mandate) notification where a person suspects, on reasonable grounds, ill treatment or exposure to behaviour, which would cause psychological harm. Section 67Z requires notification where a party raises an allegation of abuse.

31 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 30(b): a child will only be at risk of significant harm if current concerns exist for the safety, welfare or wellbeing of the child (s 23). In the ACT, emotional abuse will only constitute 'abuse' under the Act if it has caused or will cause significant harm to a child's wellbeing or development: *Children and Young People Act 2008* (ACT) s 342. In Victoria, a child is in need of protection if the child has suffered or is likely to suffer significant harm from physical or sexual abuse, or suffer significant damage to their emotional or intellectual development as a result of emotional or psychological harm: *Children, Youth and Families Act 2005* (Vic) s 162. In the Northern Territory a child is in need of care and protection if the child has suffered or is likely to suffer harm (s 20). Harm is an act, omission or circumstance causing a significant detrimental effect on a child's wellbeing: *Care and Protection of Children Act 2007* (NT) s 15. In Western Australia a child is in need of protection if the child has suffered or is likely to suffer harm as a result of abuse. Harm means a detrimental effect of a significant nature on a child's wellbeing: *Children and Community Services Act 2004* (WA) s 28.



hardly surprising that all cases are not exhaustively investigated and that the file in some cases contains very little.<sup>32</sup>

Third, a child protection agency may choose not to act because the information provided by the person who notifies the abuse may not disclose sufficient reason to believe the child is at risk of the abuse alleged. For example, while the notifier (often the other parent) may have a belief to that effect, the evidence to support that belief may be weak, insufficient or even absent.

Fourth, the reported concern may relate to events some time in the past or the child may currently be in a situation where he or she is no longer exposed to the risk disclosed in the report. Child protection legislation generally focuses on current concerns that might justify the involvement of child protection agencies. Thus historic matters, which might be relevant to family law proceedings, may not be sufficient to attract the intervention of the child protection system.

Fifth, the child protection agency may believe that the family court is the most appropriate venue to handle the matter. If there is a viable and protective carer and the child is in his or her care, from the perspective of the child protection agency the child is safe.

It seems likely that these different approaches to child protection, and the tensions between some courts and agencies, are opaque to families dealing with allegations of child abuse who may simply not understand why the child protection agency is, or is not, intervening and/or why the family courts do not have resources to investigate allegations of child abuse.

### III THE CONSTITUTIONAL BASIS OF THE FRAGMENTED SYSTEM

#### A Constitutional Law – The ‘Big Bang’ behind the Creation of the Planets?

It will be apparent from the discussion above that, from the perspective of consumers, the fragmented system of courts that handles family violence is not working well. Below we explore the reasons why the system is structured in this way.

Australia has a federal system of government in which legislative power is divided between the Commonwealth and the states and territories. In the area of family law, neither the Commonwealth nor the states and territories has exclusive legislative competence.<sup>33</sup>

The *Australian Constitution* gives the Commonwealth Government the power to make laws with respect to: (1) ‘marriage’;<sup>34</sup> and (2) ‘divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship

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32 Albert Zhou, ‘Estimate of NSW Children Involved in the Child Welfare System’ (Report, Department of Human Services NSW, Community Services, June 2010).

33 Family Law Council, ‘The Best Interests of the Child? The Interaction of Public and Private Law in Australia’ (Discussion Paper No 2, Family Law Council, October 2000) ch 2 provides a useful discussion of the constitutional context of family law in Australia.

34 *Australian Constitution* s 51(xxi).

of infants'.<sup>35</sup> It also has the power to legislate with respect to 'matters incidental to the execution of any power vested by this *Constitution* in the Parliament'.<sup>36</sup> The power of the states to legislate in relation to family law is not limited in the same way, but where a state law is inconsistent with a Commonwealth law, the Commonwealth law prevails.<sup>37</sup>

Federal Magistrate Geoff Monahan and Associate Professor Lisa Young comment, with respect to this division between the Commonwealth and the states, that 'as a general principle, private rights were regarded as more appropriately a matter for the states than for the Commonwealth'. However, questions of status – marriage and divorce – needed uniformity across Australia and hence were more appropriate for allocation to federal power.<sup>38</sup>

what was chiefly in the minds of the framers of the *Constitution* was the need to ensure the recognition of such a basic institution as marriage in the different parts of the new Commonwealth and beyond its borders, throughout what was then known as the British Empire. Legislation for marriage necessarily also implied legislation for its dissolution, since the recognition of a person's status as a divorced person was a necessary precondition to the capacity to remarry.<sup>39</sup>

While it had legislative competence to do so, the Commonwealth Parliament did not race into the field of family law. The first Commonwealth legislation was the *Matrimonial Causes Act 1959* (Cth), followed two years later by the *Marriage Act 1961* (Cth). These laws superseded the laws of the states and provided a uniform Commonwealth law on marriage and divorce. Then in the mid-1970s, the *FLA* and the establishment of the Family Court of Australia ushered in the current framework of federal family law.<sup>40</sup>

While the *FLA* enabled the family court to deal with parenting issues concerning children of marriages, there ensued a long series of cases that debated the limits of the category of children of a marriage.<sup>41</sup> Ex-nuptial children were

35 *Australian Constitution* s 51(xxii).

36 *Australian Constitution* s 51(xxxix).

37 Section 109 of the *Australian Constitution* provides that: 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'. This provision may operate in two ways: it may directly invalidate state law where it is impossible to obey both the state law and the federal law; or it may indirectly invalidate state law where the Australian Parliament's legislative intent is to 'cover the field' in relation to a particular matter.

38 Lisa Young and Geoff Monahan, *Family Law in Australia* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2009) [3.6].

39 *Ibid* [3.7]. Dickey notes that it would appear that members of the Constitutional Convention of 1897–8 were averse to repeating the United States experience where the law of divorce varies with the law of the different states: Anthony Dickey, *Family Law* (Lawbook, 5<sup>th</sup> ed, 2007) 13–14. Sir Garfield Barwick suggested another reason – Queen Victoria, who proved reluctant to assent to colonial Bills which liberalised divorce, her approval being necessary for such Bills: Garfield Barwick, 'Some Aspects of the New *Matrimonial Causes Act*' (1961) 3 *Sydney Law Review* 409, 410.

40 The new regime reflected the intention 'to exercise as plenary a power as the Constitution permitted the Commonwealth to take', and was subject to a series of constitutional challenges: Young and Monahan, above n 38, [3.30] ff discusses the various constitutional challenges.

41 There was an attempt in 1983 to extend the categories of children covered by the *FLA* but this was held to be constitutionally invalid, necessitating the referral of power, discussed below: Dickey, above n 39, 32. In *Re Cormick* (1984) 156 CLR 170 it was held that the marriage power could not extend to a child who is neither a natural child of both the husband and wife, nor a child adopted by them. Young and Monahan, above n 38, [3.30] ff discusses the various constitutional challenges.

not included in the jurisdiction of the court, and the difficulties this created for families who had to go to two different courts to acquire orders in relation to children belonging to the same family meant that a solution was needed.

## B Cross-Vesting

One of the most creative schemes for addressing some of the unsatisfactory issues arising out of the constitutional limitations of power between the Commonwealth and the states was the cross-vesting scheme.<sup>42</sup> Unfortunately it was short-lived.

The scheme was introduced in 1987 by uniform legislation enacted by the Commonwealth together with all the states and territories.<sup>43</sup> The purpose of the uniform scheme – ‘as ingenious as it was simple’<sup>44</sup> – was evident in the preamble to the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth):

WHEREAS inconvenience and expense have occasionally been caused to litigants by jurisdictional limitations in federal, State and Territory courts, and whereas it is desirable –

- (a) to establish a system of cross-vesting of jurisdiction between those courts, without detracting from the existing jurisdiction of any court;
- (b) to structure the system in such a way as to ensure as far as practicable that proceedings concerning matters which, apart from this Act and any law of a State relating to cross-vesting of jurisdiction, would be entirely or substantially within the jurisdiction (other than any accrued jurisdiction) of the Federal Court or the Family Court or the jurisdiction of a Supreme Court of a State or Territory are instituted and determined in that court, whilst providing for the determination by one court of federal and State matters in appropriate cases; and
- (c) if a proceeding is instituted in a court that is not the appropriate court, to provide a system under which the proceeding will be transferred to the appropriate court.

The Explanatory Memorandum accompanying the federal Bill articulated the hope ‘that no action will fail in a court through lack of jurisdiction, and that as far as possible no court will have to determine the boundaries between federal, state and territory jurisdiction’.<sup>45</sup> State and territory supreme courts were vested with federal jurisdiction; federal courts were vested with the full jurisdiction of state and territory supreme courts; and from 1988–99, the scheme ‘overcame constitutional deadlocks that used to bedevil the Family Court’s jurisdiction’.<sup>46</sup>

The scheme was ‘revolutionary (yet ultimately flawed)’<sup>47</sup> and did not withstand constitutional challenge – at least in the direction of the attempt to vest

42 Altobelli, above n 2, 56.

43 For a consideration of the scheme see, eg, Keith Mason and James Crawford, ‘The Cross-Vesting Scheme’ (1988) 62 *Australian Law Journal* 328; C Baker, ‘Cross-Vesting of Jurisdiction between State and Federal Courts’ (1987) 14 *University of Queensland Law Journal* 118; Richard Chisholm, ‘Cross-Vesting and Family Law: A Review of Recent Developments’ (1991) 7 *Australian Family Lawyer* 15.

44 Young and Monahan, above n 38, [3.96].

45 Explanatory Memorandum, *Jurisdiction of Courts (Cross-Vesting) Bill 1987* (Cth).

46 Young and Monahan, above n 38, [3.96].

47 *Ibid* [3.87].

state jurisdiction in federal courts. In the 1999 decision *Re Wakim; Ex parte McNally*, the High Court held that Chapter III of the *Australian Constitution* exhaustively defined the ‘matters’ that may be the subject of the judicial power of the Commonwealth – and this did not include exercising the jurisdiction of the states.<sup>48</sup> That part of the scheme that enabled federal courts to hear state matters – such as the family court determining a claim for example under state based de facto relationships legislation or family provision legislation – was unconstitutional.

*Re Wakim* struck down the cross-vesting scheme in one direction, but not the other. While it held invalid the purported vesting in federal courts of state judicial power, cross-vesting remains valid from the Commonwealth to the states, pursuant to section 77(iii) of the *Australian Constitution*. In addition, a vesting of jurisdiction between the Commonwealth and the territories is still permissible.<sup>49</sup> Young and Monahan describe the impact of the failure of the cross-vesting scheme and its immediate effect on Australian family law:

Many family law matters now needed to be resolved in both a federal and state court. Of immediate relevance was the reality that cross-vesting had allowed de facto families to seek orders in the Family Court to resolve both parenting disputes (federal jurisdiction) and property disputes (state jurisdiction). This problem was, of course, resolved by a state reference of powers over de facto relationships that resulted in amendments to the [*Family Law Act*] (by the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth)) ... Nevertheless, many other procedural benefits that cross-vesting provided to family law litigants have now been lost.<sup>50</sup>

### C Referral of Powers

Dr Anthony Dickey has noted that the referral of powers has been ‘the practical way in which problems resulting from the division of State and Commonwealth powers have most often been overcome’.<sup>51</sup> Section 51(xxxvii) of the *Australian Constitution* gives the Commonwealth Parliament power to make laws with respect to:

matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.

A major addition to federal power was therefore the referral to the Commonwealth of the power to make laws with respect to the children of unmarried parents. Between 1986 and 1990, all states (with the exception of Western Australia) referred state powers with respect to ‘guardianship, custody, maintenance and access’ in relation to ex-nuptial children to the

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48 (1999) 198 CLR 511 (*‘Re Wakim’*).

49 Australian Constitution s 122. An example is *Falconio v Conchita* [2009] FamCA 1323, noted in ‘Court Grants First Adoption’ (2010) 6 *Family Court Bulletin*.

50 Young and Monahan, above n 38, [3.100].

51 Dickey, above n 39, 40.

Commonwealth.<sup>52</sup> The states did not, however, refer to the Commonwealth their power to legislate with respect to child protection and adoption.<sup>53</sup> These remain the province of the states.

A further referral of power led to the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth). Prior to this legislation, unmarried couples had to seek the resolution of issues arising from the breakdown of their relationship in two different courts: the state system, for property and partner maintenance disputes; the federal system for parenting disputes and child support issues.<sup>54</sup> For some time the legislation was held up by debate about whether gay and lesbian couples were included in the category of de facto relationships, but these relationships were ultimately included.

The effect of these referrals is that the federal Parliament has jurisdiction over marriage, divorce, parenting and family property on separation. However, the states retain jurisdiction over adoption and child welfare. Of particular relevance in the context of family violence is that the states have power to legislate in relation to criminal law. Thus the divide between family law, criminal law, protective legislation and child protection still exists.

#### D Western Australia

Western Australia took a different approach from the other states by availing itself of the opportunity provided in the *FLA* for the creation of a state family court exercising both federal and state jurisdiction.<sup>55</sup> The reasons for doing so were explained in the Second Reading Speech to the *Family Court Act 1975* (WA):

- (1) to provide a single court of unified jurisdiction, administering matters of family law, both federal and state;
- (2) to enable the state to continue to exercise jurisdiction in family law matters which would otherwise have been removed into the Family Court of Australia, with the opportunity of retaining complementary action with other responsibilities in the areas of welfare and counselling services;
- (3) in the public interest to keep the administration of justice as close as possible to the people it is designed to serve;
- (4) to obviate the creation of a further Commonwealth court in the state.<sup>56</sup>

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52 See *Commonwealth Powers (Family Law – Children) Act 1986* (NSW); *Commonwealth Powers (Family Law – Children) Act 1986* (Vic); *Commonwealth Powers (Family Law – Children) Act 1990* (Qld); *Commonwealth Powers (Family Law) Act 1986* (SA); *Commonwealth Powers (Family Law) Act 1987* (Tas).

53 *Commonwealth Powers (Family Law – Children) Act 1986* (NSW) s 3(2); *Commonwealth Powers (Family Law – Children) Act 1986* (Vic) s 3(2); *Commonwealth Powers (Family Law – Children) Act 1990* (Qld) s (3)(2); *Commonwealth Powers (Family Law) Act 1986* (SA) s 3(2); *Commonwealth Powers (Family Law) Act 1987* (Tas) s 3(2).

54 For a summary see Belinda Fehlberg and Juliet Behrens, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2008) 34–5.

55 *Family Court Act 1975* (WA), replaced by *Family Court Act 1997* (WA).

56 Western Australia, *Parliamentary Debates*, Legislative Assembly, 21 October 1975, 3606 (D O’Neill, Minister for Works).

When the states referred power in relation to parenting disputes involving parents who are not married to each other, Western Australia enacted similar laws at a state level, in the *Family Court Act 1997* (WA). That Act reaffirmed the separate state Family Court in Western Australia and its expanded jurisdiction on the basis that

the Western Australian Family Court allows us in Western Australia – the tyranny of distance is always a problem with legislation – to be responsive to local demands and needs for the benefit of people using the Family Court.<sup>57</sup>

The court also has power to exercise jurisdiction under the *Children and Community Services Act 2004* (WA) and so, unlike the federal family courts, it may issue care or protection orders in relation to children.

As remarked by the Family Law Council

Western Australia is uniquely placed, as the only State Family Court in Australia with a single court for family law matters, to be the first State in Australia to develop and implement a unified Family Law/Child Protection Court to manage all cases involving the welfare of children with the same judicial officers able to determine both public [child protection] and private [parental responsibility and the care arrangements for children] family law matters.<sup>58</sup>

In consequence, any expansion of Commonwealth power not already covered in the heads of power in the *Australian Constitution* has to be achieved through the mechanism of referral of power pursuant to section 51(xxxvii). In this case the Australian Government may make laws – as federal laws – within the additional heads of power. It does not give the Australian Government, or federal courts, authority to act under state laws – this was the flaw in the cross-vesting scheme. Only Western Australia, where family law is a state matter, can provide a complete legal framework of family law.

#### IV CREATING A COHESIVE SYSTEM

Those who work within the various parts of the family violence system have worked for some time to try to find ways, short of constitutional change, to make the system more cohesive and effective. One strategy has been to find agreed ways to make different parts of the system articulate with each other. The Magellan Program at the Family Court of Australia is a good example. Magellan is a case management system designed to deal with a gap in the system caused by the fact that family cases where there are allegations of abuse generally go to federal courts, whereas investigation of child abuse is carried out by state or territory agencies.<sup>59</sup>

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57 Western Australia, Parliamentary Debates, Legislative Assembly, 25 November 1997, 8534 (J van de Klashorst, Parliamentary Secretary).

58 Family Law Council, above n 33, 1.

59 Ibid. The project was initiated by Nicholson CJ of the Family Court and Dessau J: D Higgins, Cooperation and Coordination: An Evaluation of the Family Court of Australia's Magellan Case-Management Model (Family Court of Australia, 2007) 14.

Integrated service delivery programs respond to the fact that legal solutions are only part of what is needed by families dealing with violence. They generally bring together courts, law enforcement agencies and service delivery agencies to collaborate in putting in place processes that are as seamless as possible in domestic violence cases.<sup>60</sup> For example in NSW the Joint Investigation Response Team was set up in 1997 to address the need for an integrated interagency response to child abuse. The program has three partners: the Police Service, the Department of Human Services, Community Services, and the Department of Health. The victim is interviewed once and the information is shared between the three agencies. Investigations and decisions about responses are collaborative.

Specialist courts have been created in some locations to ensure that family violence cases have an expert and consistent response. For example, in Victoria, there is the Family Violence Division of the Magistrates' Court of Victoria, which exercises jurisdiction over protection orders; summary criminal proceedings; committals for indictable offences; civil personal injury claims; compensation and restitution; and (to the extent conferred upon the Magistrates' Court) jurisdiction over family law and child support.<sup>61</sup> It can also sit as the Victims of Crime Assistance Tribunal to hear applications for statutory victims' compensation in family violence cases.<sup>62</sup>

There are also ways in which agencies collaborate by agreement, through, for example Agreements, Memorandums of Understanding ('MOU'), protocols, and Practice Notes. They are important means for information sharing between agencies and organisations to facilitate communication and a more integrated approach – based on common objectives and principles – in the family law, family violence and child protection systems. However, such arrangements, protocols and MOUs cannot stand alone and are dependent on the knowledge and involvement of officers and staff. Simply putting such arrangements in place is not sufficient. They must be given an ongoing profile among court and agency officers; they must form the basis of an ongoing and responsive relationship between the parties and must be supported and implemented in practice.

## V CONCLUSION

The problems of the division of responsibility between the Commonwealth and the states and territories are considerable. As remarked by the Family Law Council in 2002:

There is no greater problem in family law today than the problems of adequately addressing child protection concerns in proceedings under the Family Law Act. Council's research and consultations on this issue indicate that the problems in the present system are very serious indeed. Reform is urgently needed, and will

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60 ALRC and NSWLRC, above n 12, ch 19.

61 *Magistrates' Court Act 1989* (Vic) s 41.

62 Department of Justice (Vic), *Family Violence Court Division – Overview – Department of Justice* (18 October 2010) <[www.justice.vic.gov.au](http://www.justice.vic.gov.au)>.

require a commitment from governments both at State and Federal levels, to deal with the systemic problems which arise, in no small measure, from the allocation of responsibility between State and Territory authorities, and the federal government under the constitutional arrangements existing in Australia.<sup>63</sup>

To meet such problems requires enormous co-operation, trust, respect, patience and commitment. In the Family Violence Inquiry, the ALRC and the NSWLRC have undertaken consultations nationwide and received over 240 submissions from a wide range of stakeholders. The expectations of our work, although bounded by the terms of reference, are also considerable, expressed succinctly in this simple plea:

Dear Government people,

We women, we mothers, we look at you for the solutions and answers.<sup>64</sup>

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63 Family Law Council, *Family Law and Child Protection: Final Report* (Commonwealth of Australia, September 2002) 15.

64 Justice for Children, Submission No 177 to *Australian Law Reform Commission*, Family Violence Inquiry, 25 June 2010.