



Mind(ing) the gap

Law reform recommendations responding to child protection in a federal system

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It may well be an appropriate time for policy-makers to reconsider how the “gap” between the child protection system and the federal family law system could be addressed in a more comprehensive manner. (Higgins & Kaspiew, 2008, p. 258)

Daryl Higgins and Rae Kaspiew concluded their article, “Mind the Gap ...’: Protecting Children in Family Law Cases”, with this statement. An initiative in reconsidering the gap was the referral to the Australian Law Reform Commission (ALRC) and New South Wales Law Reform Commission (NSWLRC) of an inquiry into family violence that specifically included the interaction between child protection laws and the *Family Law Act 1975* (Cth) (the Family Violence Inquiry). A crucial part of the 187 policy recommendations put forward by the law reform commissions in their report released in November 2010, *Family Violence: A National Legal Response* (the Family Violence Report; ALRC & NSWLRC, 2010), revolved around “mind(ing) the gap”, in identifying strategies to address the problem of victims of

family violence (including child abuse) falling into the gaps in and between systems.

This article explores the consideration of child protection issues in the Family Violence Report, with a focus on state and territory children’s courts exercising jurisdiction under child protection laws, and federal family courts exercising jurisdiction under the *Family Law Act*. It examines the jurisdictional limits that lead to gaps in protection, and considers achievable solutions to improve the safety of children at risk of family violence (including child abuse). This discussion necessarily takes place in the context of the Australian Constitution—the framework underpinning jurisdictional limits and the range of potential reforms.

The scope of the Family Violence Inquiry

While the scope of the problem of family violence is extensive, the Family Violence Inquiry was necessarily constrained—first, by the limits of law and, secondly, by its terms

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of reference. The commissions acknowledged that their report could only address a narrow slice of the vast range of issues raised by family violence; that is, when women and children¹ encounter the legal system in its various manifestations. It could only touch the tip of a very big iceberg.² As remarked by one stakeholder in the inquiry:

Law alone is not a satisfactory response to family violence. The law must be augmented by consistent, comprehensive and co-operative agencies, organisations and individuals. Existing law and range of approaches to family violence serve as a baseline from which people concerned about that violence and its effects can reach out to establish better laws and approaches reflecting victims' needs and respecting their fundamental rights. (Commissioner for Victims' Rights, South Australia, 2010)

Further, the terms of reference, by defining the scope of the commissions' brief, necessarily limited it. Crucially, the legal frameworks within the reference were not to be considered "at large". Instead, they required consideration of the interactive spaces between the specified laws. An examination of individual pieces of legislation, such as the *Family Law Act*, was therefore beyond the reference, except where the Act interacted in practice with state and territory child protection laws and family violence laws.

Nonetheless, in some respects the canvas was very large, given the range of laws specified in the terms of reference (encompassing at least 26 legislative regimes), and the complexity of the issues (due to the focus on interaction and inconsistencies).

The constitutional framework

Many of the challenges of the Family Violence Inquiry were triggered by the constitutional framework and, in particular, the federal system of government in Australia that divides legislative power between the Commonwealth and the states and territories. Most relevantly for this inquiry, under the Constitution the Commonwealth Parliament may make laws with respect to: "marriage" (s51(xxi)); and "divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants" (s51(xxii)). 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 to the extent of the inconsistency (s109).³ The states had their own divorce laws, for example, until the Commonwealth Parliament entered the family law field with 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. In the 1970s, the *Family Law Act* and the creation of the Family Court of Australia established the principal framework of federal family law. The introduction of the Federal Magistrates Court in 1999 added another tier to the court structure, so there are now two federal family courts.

While the *Family Law Act* enabled the family courts to deal with parenting issues concerning children of marriages, children of unmarried parents ("ex-nuptial children") were not initially included in the federal family courts' jurisdictions. And then when federal power was expanded to enable ex-nuptial children to be considered, unmarried parents still had to seek the resolution of other issues arising from the breakdown of their relationship—such as property—in the state system. Clearly, some solution was needed. The first attempt failed; the second was more successful.

Cross-vesting

One of the most creative methods of addressing some of the unsatisfactory issues arising out of the constitutional limitations of power between the Commonwealth and the states was the short-lived "cross-vesting" scheme (Altobelli, 2003). The scheme was introduced in 1987 by uniform legislation enacted by the Commonwealth together with all the states and territories.⁴ The purpose of the uniform scheme—"as ingenious as it was simple" (Young & Monahan, 2009, para. 3.96)—was 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".⁵ 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 to 1999, the scheme "overcame constitutional deadlocks that used to bedevil the Family Court's jurisdiction" (Young & Monahan, 2009, para. 3.96).

The scheme was "revolutionary (yet ultimately flawed)" (Young & Monahan, 2009, para. 3.87), and in 1999 the High Court held that it was unconstitutional—at least in the direction of the attempt to vest state jurisdiction in federal courts.⁶ That part of the scheme that enabled federal courts to hear state matters—such as family courts determining a claim under state-based de facto relationships legislation or family provision legislation—was invalid. State

courts could deal with federal matters where the Commonwealth Parliament gave them the power to do so under the Constitution (s77(iii)).⁷

Referral of powers

As a consequence of the failure of the cross-vesting scheme, any expansion of Commonwealth power not already covered in the heads of power in the Australian Constitution had to be achieved through the mechanism of a “referral of power” under s51(xxxvii). Referrals of power from the mid-1980s enabled the Commonwealth Parliament to make laws across a wider field of family law, such that it now has jurisdiction over marriage, divorce, parenting and family property on separation, while the states retain jurisdiction over child protection and adoption (see, e.g., Fehlberg & Behrens, 2008). Also of relevance in the family violence context is that the states have power to legislate in relation to criminal law. In these ways, the division of the laws relevant to family violence is underpinned, and determined, by Australia’s constitutional framework. A further complication, however, is the position in Western Australia.

The Western Australian approach

Western Australia took a different approach from the other states by availing itself of the opportunity provided in the *Family Law Act* for the creation of a state family court exercising both federal and state jurisdiction (*Family Court Act 1975* [WA]). In particular, it sought to provide a single court of unified jurisdiction, administering matters of family law, both federal and state (O’Neill, 1975). Then, 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. (Van de Klashorst, 1997, p. 8534)

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. It 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” (Family Law Council, 2000, p. 1).

Responding to the fragmented system

The effect of the division of power between the Commonwealth and the states and territories is a fragmented, overlapping system in relation to dealing with families (see, e.g., Altobelli, 2003; Kelly & Fehlberg, 2002). As neither the Australian Government nor the state and territory governments have exclusive legislative competence in the area, neither can provide “the complete suite of judicial solutions to address all of the legal issues” (Family Law Council, 2009, para. 7.3.2). As a result of this incompleteness, there are gaps in, as well as between, legal systems. Further, families may be involved in multiple proceedings in more than one court in order to deal with issues arising from separation and family violence. It was this state of affairs that prompted two articles by Higgins and Kaspiw: “Mind the Gap” (2008), mentioned above, and “Child Protection and Family Law ... Join the Dots” (2011). These provide instructive discussions of the “gap” problems in the context of family law and child protection.

Throughout the Family Violence Inquiry, the commissions heard how fragmented jurisdictions have adversely affected victims of family violence. In particular, multiple proceedings across jurisdictions may have compromised the safety of victims, by increasing the likelihood that they will drop out of the system without the needed protections. Repeated proceedings also impose financial costs on families, as well as personal costs, such as distress where victims are required to repeat evidence of a personal and traumatic nature in different courts. Additionally, legal

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processes that require a child's persistent and multiple engagement with the legal system may be contrary to their best interests (ALRC & Human Rights and Equal Opportunity Commission, 1997)).

To respond to such problems of fragmentation, the commissions had to be imaginative, within the framework of the constitutional division of power.

A “one-court” solution?

The commissions gave consideration to the feasibility of establishing one court, with jurisdiction to deal with the range of legal matters relating to family violence. The establishment of a unified family violence court was considered at both federal and state and territory levels, but both potential models presented particular problems. A unified federal court would require, as remarked by one Family Court judge, “major constitutional change, a Commonwealth takeover of services and more resources” (Judicial Officer Roundtable). Further, a federal family court would still rely on the states to provide family violence services, as most such services, like the police and child protection agencies, are state-based. Conversely, the creation of a unified state court would also have significant consequences, prompting the question of whether the Australian Government should vacate the field of family law. But a system where family disputes involving violence were dealt with in a state court, and family disputes not involving violence were dealt with in a

federal court, is clearly impractical and would create yet another gap in the system.

Ultimately, the commissions concluded that a single new specialist court was not a feasible solution, and considered whether its benefits could be delivered in another way. The Family Violence Report expressed the view that the most practical and achievable solution to jurisdictional fragmentation was to enhance the ability of existing courts to deal with matters outside their core jurisdiction—to develop “corresponding” jurisdictions.

Corresponding jurisdictions

The premise of the final recommendations in this area was to develop jurisdictions so that they mirrored each other, as far as possible, within the limits of the Constitution, as well as practical constraints. A crucial set of recommendations was aimed at implementing this conceptual strategy of “corresponding jurisdictions” through an expansion of the jurisdictions of each of the courts responding to family law, family violence and child protection issues.

The commissions considered that corresponding jurisdictions would provide the benefits of one court by creating a more seamless and accessible system for victims of family violence—an overarching goal of the Family Violence Report. Victims of family violence would be able to obtain a reasonably full set of responses, and the protections they need, at the point of their first engagement with the legal system. This approach goes a long way towards closing the gaps created by fragmented jurisdictions.

The next section will examine some of the gaps that lie at the specific intersection of child protection and family law, and the way in which the concept of corresponding jurisdictions has been applied to find solutions. These solutions have been flanked by other practice-directed solutions in order to address gaps and improve the safety of victims of family violence.

Intersections: Family law and child protection

State and territory child protection laws govern the resolution of public disputes between individuals and state/territory governments (represented by state and territory child protection agencies) about the care and protection of children. Proceedings are litigated in state and territory children's courts, and are almost always initiated by the child protection agency, which acts as a party to proceedings. On



the other hand, the *Family Law Act* governs the resolution of private disputes about parenting, which are generally instigated by a parent or another person concerned with the wellbeing of a child. Parenting disputes are conducted in federal family courts—the Federal Magistrates Court and the Family Court.

Family and child protection jurisdictions overlap considerably: both legal systems regulate parental responsibility, and do so in accordance with the central principle of the best interests of the child. Further, the public/private description is not a clean one, as there is “a private element to child protection disputes and a public element to Family Court disputes” (Family Law Council, 2000, p. 9). Moreover, child protection issues enter upon the jurisdiction of family courts when allegations of child abuse or neglect are made in parenting proceedings. In 2007, a study of 300 court files involving parenting disputes from the Family Court and the Federal Magistrates Court revealed that allegations of child abuse had been raised in 19–50% of all cases (Moloney et al., 2007).⁸ Conversely, parenting issues may be raised during child protection proceedings in children’s courts.

Gaps in the protection of victims of family violence may arise in the space where the jurisdictions overlap. Where child protection issues are raised in federal family courts, there may be no party to the proceedings to conduct the public element of the litigation—that is, the role that child protection agencies routinely play in children’s courts. Further, both jurisdictions are limited in relation to the legal solutions they offer, and in certain cases they lack the power to make appropriate orders.

To address these gaps, the commissions developed recommendations in relation to both jurisdictions across the space of the intersection, so that they mirrored each other to an appropriate degree under the principle of “corresponding jurisdictions”—providing victims of family violence with a full set of judicial responses, as far as possible, and closing the jurisdictional gaps.

Expanding the jurisdiction of the family courts

The Family Violence Report defined the gaps in federal family court jurisdiction as the “jurisdictional gap” and the “investigatory gap”. The jurisdictional gap arises in cases where family courts consider that none of the parties to a parenting dispute is a protective or viable carer, and consequently consider that parental responsibility of the child should be given to a child protection agency. But family courts do

not have the statutory power to make such an order—a key gap in their jurisdiction, and one that may compromise the safety of children at risk of abuse (ALRC & NSWLRC, 2010, chapter 19).⁹

The investigatory gap refers to the lack of mechanisms in family courts to conduct an independent investigation into allegations of family violence and abuse made in parenting proceedings. Family courts rely upon the parties, independent children’s lawyers, family consultants, and state and territory child protection agencies, to provide them with information to make a decision about children who are at risk. This gap may also affect the safety of children, as family courts may lack the necessary information and evidence to make appropriately protective orders.

Existing provisions address these gaps to some extent; for example, by enabling family courts to obtain information from child protection agencies, and to issue subpoenas (*Family Law Act*, s69ZW, *Family Law Rules 2004* (Cth), pt 15.3). Family courts may also request child protection agencies to intervene in the court proceedings, thus becoming a party to proceedings; and agencies may choose to intervene in cases that involve allegations of abuse. However, there is no power in the *Family Law Act* for the courts to compel a child protection agency to intervene, and agencies may decline the courts’ requests (*Family Law Act* ss91B, 92A).

In some locations, the existing provisions are sufficient, and collaboration between family courts and child protection agencies works to the satisfaction of both. The Magellan case management program for cases of serious child abuse provides an example of such successful collaboration between agencies and the Family Court (although the program is not available in the Federal Magistrates Court) (see ALRC & NSWLRC, 2010, chapters 19 and 29; Brown, Sheehan, Frederico, & Hewitt, 2001; Higgins, 2007; Higgins & Kaspiew, 2008, 2011).

However, in some cases, family courts expect a response they do not get from child protection agencies, in relation to both interventions in proceedings and in the provision of information by an agency to the court. There are a number of cogent reasons why state and territory child protection agencies may decline to be involved, and these are canvassed in the Family Violence Report (paras 19.66–19.74).

In forming a solution, the commissions considered a broad referral of powers from state and territory governments to enable family courts to compel state and territory

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child protection agencies to intervene in child protection proceedings. This would address not only the jurisdictional gap but also the investigatory gaps—as a child protection agency that is party to family court proceedings provides independent evidence and information to the court. However, there are significant implications to a child protection agency of being joined as a party to proceedings against its will, including the costs of staff time, representation in hearings, and possible adverse costs orders.¹⁰ This may divert child protection agencies from their core priorities, and undermine other work. In most cases it would appear that what family courts need from child protection agencies is information and the investigation of child abuse allegations—not that they become a party to proceedings. It is only where there is no viable carer for the child that family courts may require the intervention of child protection agencies. Given the practical limitations on child protection agencies, the commissions considered that the provision of information and investigation is more appropriately provided through negotiation, collaboration and agreement.

To respond to the gaps, the Family Violence Report therefore recommended that:

- there should be a limited referral of powers from state and territory governments to enable the Australian Government to make laws allowing family courts to join a child protection agency as a party to parenting proceedings, and to confer parental rights and duties on the agency, in those cases where there is no other viable and protective carer (Recommendation 19–2);
- the Australian and state and territory governments should make arrangements for child protection agencies to provide investigatory and reporting services to family courts in cases involving children's safety, and that consideration be given to establishing specialist sections within child protection agencies to provide those services to family courts (Recommendation 19–1); and
- family courts and state and territory child protection agencies should develop protocols for dealing with requests for documents and information under the provisions of the *Family Law Act*, and for responding to subpoenas issued by the family court (Recommendation 30–5).

These recommendations aimed to develop the powers and resources of family courts, so that they mirror the jurisdiction of the children's court as far as possible, within practical and constitutional constraints. This response would

enable a full and appropriate response to child protection allegations and concerns in family courts. It would enhance not only the effectiveness of the family court in cases where child protection issues are raised, but also the seamlessness of the family law system.

Expanding the jurisdiction of children's courts

State and territory magistrates courts exercise jurisdiction under pt VII of the *Family Law Act*, through specific conferral of power allowed under the Constitution (s77(iii)), and are therefore empowered to make parenting orders where orders are made by consent, or where parties agree that the court hear and determine the matter (*Family Law Act* ss69J, 69N). However, children's courts are not always able to exercise federal family law jurisdiction under the *Family Law Act*. This limit to the jurisdiction of children's courts may be problematic; in particular, where parties to children's court proceedings have a parenting dispute, and child protection issues have been addressed or resolved. This may prompt the problem of multiple jurisdictions, as parents or other carers may have to participate in further litigation to resolve the case.

The Family Violence Report recommended that the *Family Law Act* should be amended to provide that, in child protection proceedings, children's courts should have the same powers to make decisions under the *Family Law Act* as magistrates courts (Recommendation 19–4). In addition to addressing the issue of multiple jurisdictions, this response provides the advantage that, where a case starts in a children's court but raises parenting issues, a court apprised of the child protection concerns and having evidence from a child protection agency, can decide if it is more appropriate for a decision to be made under child protection legislation, or under the *Family Law Act*. This approach integrates elements of family court jurisdiction in the jurisdiction of children's courts, and thus would implement the corresponding jurisdictions' strategies and the benefits they deliver.

Addressing the gap between systems

The discussion so far has focused on gaps that arise within jurisdictions as a result of fragmentation, and the incomplete powers and resources currently available to courts. The Family Violence Report also gave consideration to the gaps between jurisdictions that may similarly affect victims of family violence. Such a gap exists between the domains of family law and child protection, in circumstances where



cases start in the child protection context, but are later referred to family courts. A child protection agency may investigate reported abuse and, in doing so, identify a viable and protective carer for the child. The agency may then advise the carer to go to a family court for a parenting order. If proceedings in the children's court have already commenced, they may be withdrawn at that stage.

The gap arises when orders envisaged by the child protection agency to be safe and protective are not made in the family court. There are several reasons the order may not be made. First, the "viable carer" may not commence family court proceedings. Secondly, the applicant may be unable to obtain the order due to difficulties in marshalling evidence of violence and abuse—a problem that may be aggravated by the absence of investigatory mechanism in family courts, discussed above. Thirdly, as noted by Professor Richard Chisholm (2009), certain provisions of the *Family Law Act* introduced in the 2006 reforms may impede the extent to which the court is informed about the history or risk of violence (paras 3.2, 3.4).¹¹ The consequence is that the child does not receive the protection he or she requires. In such cases, it could be said that the child falls in the gap between systems.

To address this gap, the commissions considered that child protection agencies should provide greater support for parents with child protection concerns who litigate

in family courts. The Family Violence Report recommended that, where an agency has located a viable and protective carer in a child abuse investigation, and refers that carer to a family court, the agency should provide written information to the family court about its advice and the reasons for it. Alternatively, the agency should provide reports and other appropriate evidence to the family court, or intervene in proceedings (Recommendation 19–3). The commissions considered that the support may be provided by the recommended child protection agency specialist services to the family courts, discussed above.

Complementary measures

The above solutions, which focus on child protection, are a small slice of the overall package of recommendations contained in the Family Violence Report. They are complemented by numerous others that aim to enhance the seamlessness and accessibility of the legal system, and address the gaps that arise in and between jurisdictions. Several of these complementary recommendations are outlined briefly below.

Family violence protection orders

In order to provide the benefits of one court, and a complete set of judicial solutions, it is crucial that both children's courts and family courts are empowered to make effective family violence protection orders. This issue does

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not arise at the intersection of child protection law and the *Family Law Act*, unlike those discussed above. Rather, it emerges at the intersection of both legislative schemes with state and territory family violence legislation, and the state and territory magistrates courts that exercise it. The Family Violence Report made recommendations to enhance the ability of children's courts and family courts to make family violence protection orders, thus developing corresponding jurisdictions across these intersections.

A number of state and territory family violence laws already confer jurisdiction on children's courts to make family violence protection orders. The Family Violence Report recommended that state and territory family violence legislation should confer jurisdiction on all Australian children's courts to hear and determine applications of family violence, where there are proceedings related to that child before the court. The commissions considered that children's courts should be able to make protection orders where:

- the person affected by the family violence, to be protected, or against whom the order is sought, is a child;
- the person in need of a protection order is a sibling of the child who is the subject of proceedings, or another child within the same household who is affected by the circumstances; and
- the person in need of a protection order is an adult, where the adult is affected by the circumstances (Recommendations 20–3 to 20–6).

Federal family courts have existing powers directed towards the safety of victims of family violence who come within the jurisdiction of the *Family Law Act*. These orders are known as injunctions for personal protection.¹² However, a strong message to the commissions in the Family Violence Inquiry was that these orders are inaccessible and ineffective, and therefore rarely used.

The Family Violence Report considered how to make the family courts' jurisdiction as similar as possible to that of state and territory magistrates courts—within constitutional constraints—with respect to the protection it can provide for personal safety. A key strategy was to amend the *Family Law Act* to provide that a breach of such orders is a criminal offence, so that they operate as closely as possible to the protection provisions available under state and territory legislation (Recommendation 17–4). The report also recommended that the *Family Law Act* should be amended to provide separate provisions for these orders, and suggested numerous other strategies to increase both their effectiveness and accessibility (Recommendation 17–3; paras 17.165–17.246).

These recommendations were an important part of the corresponding jurisdictions package. They address gaps in both children's courts and family courts, by developing these jurisdictions to mirror magistrates courts more closely. As noted, the underlying premise of this jurisdictional development is that victims of family violence should be able to obtain effective orders for their protection in whatever proceedings they are engaged with—whether these are in the children's court or the family court. This strategy improves the safety of victims by providing them with a more complete set of judicial solutions, and limits the requirement for multiple engagements with the legal system.

Information-sharing

Gaps in protection may reflect gaps in the flow of information; in particular, between the family law system, the family violence system and the child protection system. As noted above, important information is in many cases not shared among the courts and agencies. This has a negative impact on victims, impeding the seamlessness of the responses to family violence.

A set of recommendations in the Family Violence Report were directed towards improving the flow of information. Several of the many recommendations relevant to



addressing gaps between child protection and family law jurisdiction are as follows:

- family court application and response forms should seek information about child protection orders, as well as a general question about safety concerns (Recommendations 30–1, 30–2);
- family courts should provide children’s courts and child protection agencies with access to the Commonwealth Courts Portal, to ensure they have access to relevant information about family court orders and proceedings (Recommendation 30–8);
- information-sharing protocols should be developed for the exchange of information between family courts and child protection agencies, where these are not in place, and regular training should be provided to ensure the effective implementation of the arrangements (Recommendation 30–16); and
- a national register should be established, and should include orders made in child protection and relevant *Family Law Act* proceedings (Recommendation 30–18).

In making recommendations about information-sharing, the commissions considered privacy issues that may arise, and made further recommendations in this regard.

Conclusion

In their “Mind the gap” article, Higgins and Kaspiew (2008) drew a distinction between bridging the gap—through practical responses such as the Magellan program—and closing the gap. As described above, the Family Violence Report sought solutions to close the gap between systems by enhancing jurisdictions at points of interaction, so that they mirror each other as much as possible within constitutional and practical constraints. However, due to the underlying fragmentation of Australia’s federal system, not all gaps can be closed completely, and bridges are required to ensure that children do not fall into them. The commissions therefore delivered a multifaceted response to the problems that arise from the interaction between family law and child protection: providing structural recommendations for closing the gaps and, to complement these, practical “bridging” solutions.

Higgins and Kaspiew (2008) argued that it appears timely for renewed scrutiny of the question of how the family law arena handles child abuse and family violence. The necessity for such scrutiny is illustrated by a 2010 judgement of the Full Court of the Family Court, in which the judges stated that continuing

attempts were needed “to harmonise in some way the administration of State and Federal laws concerned with the welfare of children”.¹³ Such a task is 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 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. (p. 15)

To meet such problems requires enormous cooperation, trust, respect, patience and commitment. And, as the Family Law Council (2002) signalled, it requires a commitment from both state and federal governments to “mind” or “mend” the gap discussed in this article, and to hear and respond sympathetically and appropriately to the weight of problems expressed succinctly in this simple plea:

Dear Government people,

We women, we mothers, we look at you for the solutions and answers. (Justice for Children Australia, 2010)

Endnotes

- 1 References to “children” in this article include “young people”, a distinction that is sometimes made, for example, in child protection legislation.
- 2 The Family Law Council (2009) remarked that the point at which family violence becomes visible in the family law system “is only the tip of the iceberg of family violence, alcoholism, drug addiction and mental illness which is apparently entrenched in Australia” (p. 7).
- 3 The *Family Law Act* defers to orders under state child protection legislation, as the Commonwealth Parliament does not have legislative competence in relation to such matters. Section 69ZK of the *Family Law Act 1975* (Cth) expressly provides that state and territory child protection laws and orders made under those laws take precedence over family court orders.
- 4 For further information about the scheme, see, for example, Baker (1987), Chisholm (1991), Mason and Crawford (1988).
- 5 Explanatory Memorandum, Jurisdiction of Courts (Cross-Vesting) Bill 1987 (Cth).
- 6 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.
- 7 In addition, a vesting of jurisdiction between the Commonwealth and the territories is permissible under Australian Constitution s122.
- 8 The variance between the figures for allegations of abuse arises because the study examined two samples—general litigants and judicial determinations—in both the Federal Magistrates Court and the Family Court of Australia. The largest

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- figure, 50%, relates to judicially determined matters in the Family Court of Australia.
- 9 See also Ray and Males Secretary of the Department of Health and Human Services and Ray and Ors [2010] FamCAFC 258. The first instance decision is reported as Ray and Anor and Males and Ors [2009] FamCA 219.
 - 10 The issue of costs orders against child protection agencies is addressed in the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011. The Bill would amend s117 of the *Family Law Act* to introduce cost immunity for child protection agencies that intervene in family court proceedings at the court's request, where they act in good faith.
 - 11 In the Family Violence Report (para. 19.109), the commissions particularly referred to ss60CC(3)(c) and 117AB. See also Family Law Council (2009, para. 8.2.3). Amendments to these sections are contained in the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (Cth).
 - 12 An injunction is a kind of order made by a court that requires a person to do, or refrain from doing, a particular act.
 - 13 Ray v Males, [96].

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