FAMILY COURT
OF AUSTRALIA

FEDERAL CIRCUIT
COURT OF AUSTRALIA

VICTORIAN ROYAL COMMISSION

INTO FAMILY VIOLENCE

SUBMISSION
BY THE FAMILY COURT OF AUSTRALIA AND FEDERAL CIRCUIT COURT OF AUSTRALIA

6 August 2015

INTRODUCTION

1. The Family Court of Australia (Family Court) and Federal Circuit Court of Australia (Federal Circuit Court) ("the courts") are grateful for the opportunity to contribute to this important Commission into family violence. Although the Commission will report to the Parliament of Victoria and these courts are created by legislation enacted by the Commonwealth Parliament, the issue of family violence is an Australia wide issue which does not recognise state boundaries. Hence it is appropriate that with the consent of the Commonwealth Attorney General, our courts assist the Commission in its work. However, the Commission's Terms of Reference are broad and extend further than matters upon which the courts could appropriately comment. This submission will thus focus on the second of the Commission's Terms of Reference; being on the interaction of federal family law and state laws in relation to family violence. Information will also be provided about various organisational initiatives designed to make the registries safe and to equip staff to recognise, understand and deal with family violence.

2. It should be observed at the outset that although the Commission is required to adopt the definition of "family violence" contained in s 5 of the *Family Violence Protection Act 2008* (Vic) for its work, in this submission the term "family violence" applies the definition of family violence set out in s 4AB of the *Family Law Act 1975* (Cth) ("Family Law Act")[1].

COURTS EXERCISING FAMILY LAW ACT JURISDICTION

3. Australia operates according to a system of co-operative federalism, whereby governmental powers are allocated between Commonwealth and state governments. The Commonwealth has specific powers under the Australian Constitution and the states and territories exercise residual powers. Constitutional responsibility for parental rights and the custody and guardianship of children is vested in the Commonwealth. Responsibility for public intervention by the state in care and protection issues and the criminal law lies with the states and territories. As a consequence state intervention in children's lives is dealt with by state courts and private family law disputes are dealt with by courts exercising federal jurisdiction, in particular, the Family Court and Federal Circuit Court.

4. When the Family Court was established it took over the matrimonial causes jurisdiction exercised by state and territory Supreme Courts, but only in relation to divorce and ancillary relief. In the following years, state and territory parliaments referred to the Commonwealth powers which were invested in the states and territories, including in relation to de jure and de facto couples.

Jurisdiction continued to grow and the Family Court now has jurisdiction in relation to all private family law disputes, relevantly including all children other than those under the care of a person under a child welfare law (s 69ZK). Allied to this is the power to accrue additional jurisdiction required to determine, in one court, a single justiciable issue. The weight of authority is against the Family Court having power to accrue jurisdiction to bind a state child protection agency unless that agency has submitted to the court's jurisdiction (*Secretary, Department of Health and Human Services v Ray and Ors* (2012) 45 Fam LR 1).

5. The Family Court operates in all states and territories other than Western Australia. Western Australia elected to maintain a state based court structure upon which federal jurisdiction is conferred.

6. The Federal Circuit Court was created by the enactment of the *Federal Magistrates Court Act 1999* (Cth) and commenced operation in 2000. The Federal Circuit Court exercises jurisdiction in general federal law matters throughout Australia and in family law matters, in all states and territories other than Western Australia. Although the Federal Circuit Court's jurisdiction was initially quite limited, it has continued to grow and, in family law matters, it is invested with almost concurrent jurisdiction to that of the Family Court. The differences in jurisdiction have no bearing on the Commission's work. The Federal Circuit Court determines the greatest volume of family law cases of any court in Australia.

7. Appeals from judges of the general division of the Family Court and judges of the Federal Circuit Court exercising family law jurisdiction lie to the Appeals Division of the Family Court. Appeals are by way of rehearing but subject to the establishment of an error of law. The role of the Appeals Division is to correct error as well as to elucidate the law and set precedents.

8. The division of casework between the Family Court and the Federal Circuit Court is underpinned by a protocol which the Chief Justice and the Chief Judge published for the guidance of the legal profession and parties to enable matters to be directed to the court appropriate to hear them. Under the protocol, the Federal Circuit Court judges undertake the bulk of family law cases, whilst the more complex cases and appeals are dealt with by the Family Court. The effect of the protocol is that the types of matters listed below are determined in the Family Court:

    - International child abduction;
    - International relocation;
    - Disputes about whether a case should be heard in Australia;

- Special medical procedures (such as gender reassignment and sterilisation);
- Contravention and related applications in parenting cases concerned with orders made by judicial determination by a judge of the Family Court in the preceding 12 months;
- Serious allegations of sexual abuse of a child warranting transfer to the Magellan or similar list and serious allegations of physical abuse of a child or serious controlling family violence warranting the attention of a superior court;
- Complex questions of jurisdictional law; and
- If the matter proceeds to a final hearing, the hearing is likely to take in excess of four days.

9. Cases which do not come within these categories are determined in the Federal Circuit Court. The effect of the protocol is that the Family Court deals with the most complex and intractable parenting disputes which require substantial court time. Although there are occasions when cases that the protocol would otherwise have determined by one court are determined in the other court, the protocol provides a useful guide to the nature of the work undertaken by each court.

10. Reference must also be made to arrangements by the Commonwealth with the states and territories which enable magistrates of state and territorial courts to exercise family law jurisdiction (ss 39(2) and (7)). The effect of this is that state and territory magistrates exercise limited original jurisdiction in family law subject to an appeal de novo to the Family Court. Although they perform an important role in the Australian family law system and are the point at which many people involved in the breakdown of a marriage or relationship first come into contact with a court, it is not appropriate that we make submissions in relation to the operations of those courts.

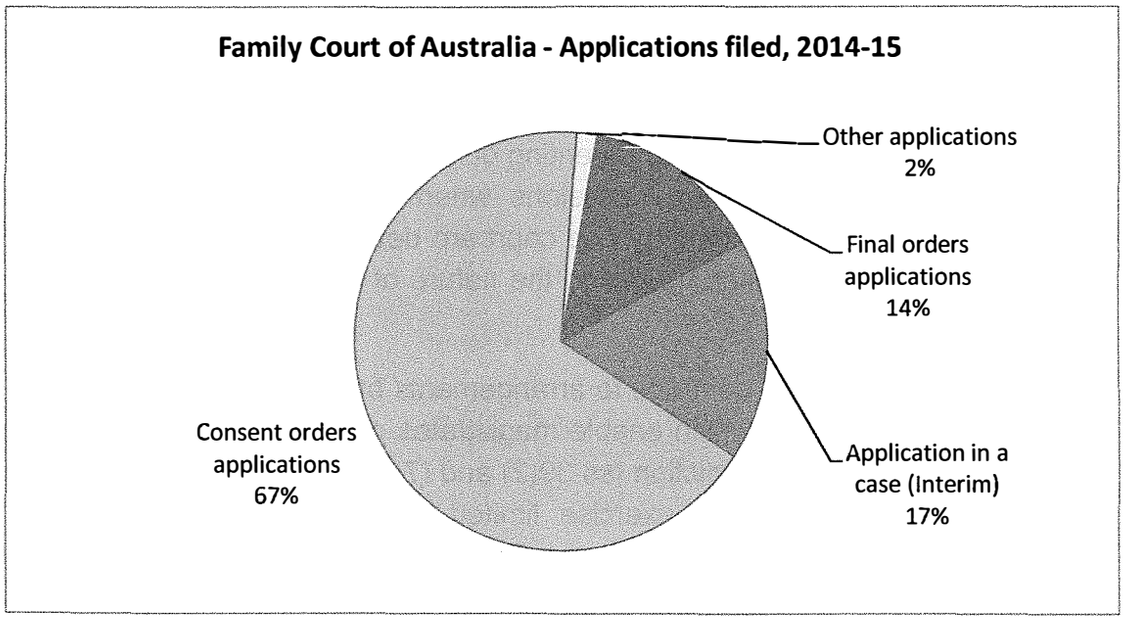
DIVISION OF WORK BETWEEN THE TWO COURTS

11. The courts share premises and administration. Since the establishment of the Federal Circuit Court there has been a progressive shift in the balance of filings between the two courts. For the last two years, the share of filings between the Family Court and Federal Circuit Court (including transfers and excluding appeals) has been stable at 85% - 87% for the Federal Circuit Court and 15% - 13% in the Family Court. The two tables which follow provide a summary of the applications for final and interim orders dealt with by the two courts for the 2014/2015 financial year:

Table 1: Family Court: period 2014-2015

Application	Filed	Finalised	Pending	% Filed
Final orders applications	2936	3028	2982	14%
Application in a case (Interim)	3476	3333	1428	17%
Consent orders applications	13,662	13,457	1012	67%
Other applications	323	290	222	2%
Total	20,397	20,108	5644	100%

Applications for Final Orders - Issues sought	
Parenting only	30%
Financial only	55%
Parenting and financial	13%
Other	2%



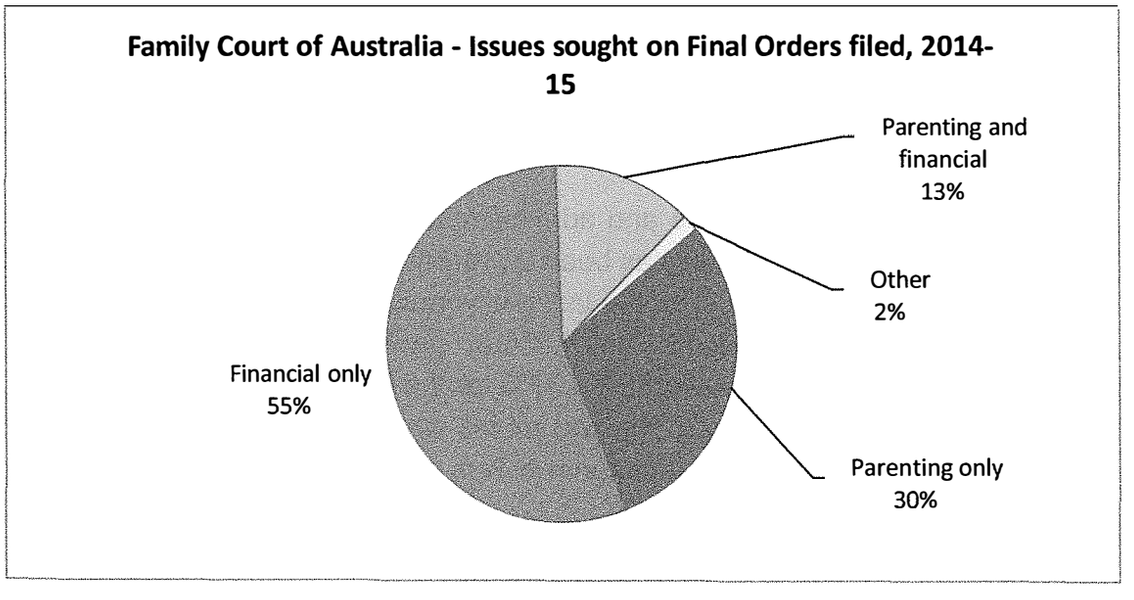
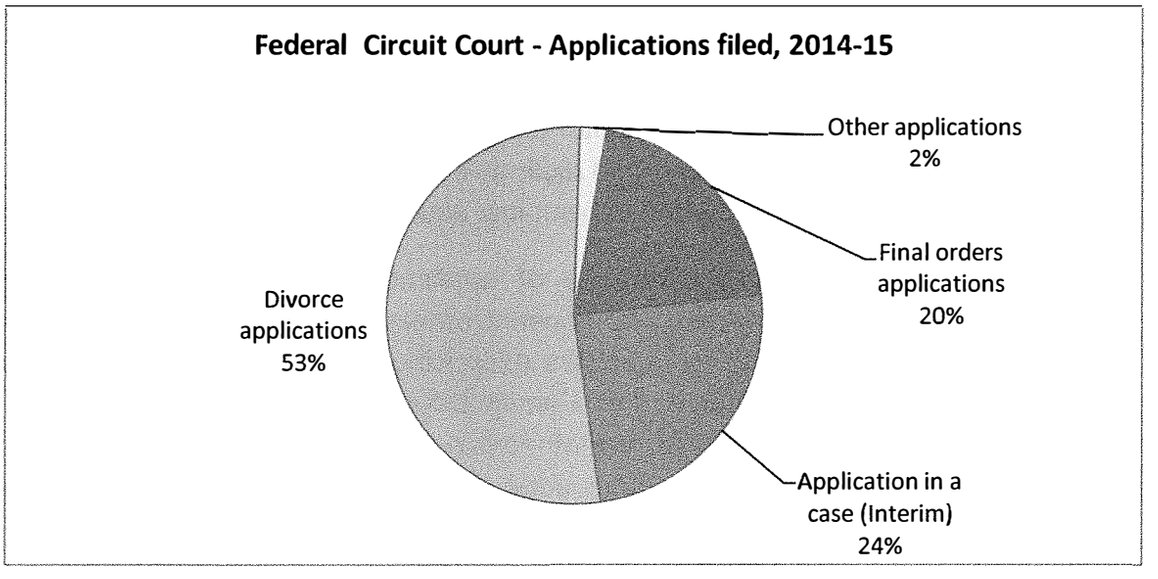
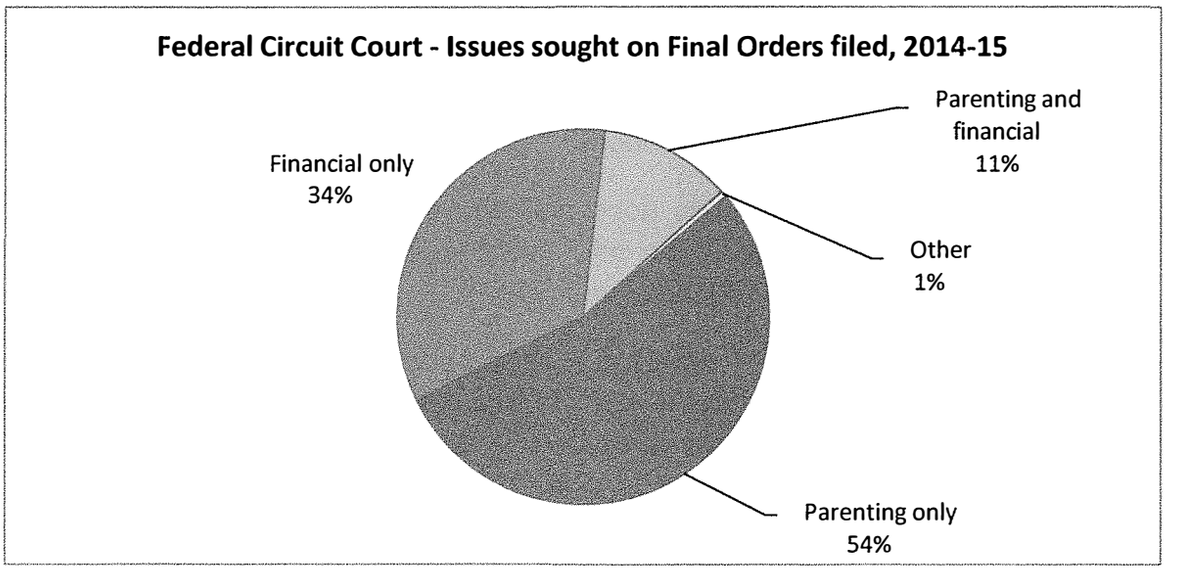


Table 2: Federal Circuit Court: period 2014-2015

Application	Filed	Finalised	Pending	% Filed
Final orders applications	17,685	16,526	16,051	20%
Application in a case (Interim)	21,112	20,279	6835	24%
Divorce applications	45,593	43,132	10,136	53%
Other applications	1990	1 806	976	2%
Total	86,380	81,743	33,998	100%

Applications for Final Orders - Issues sought	
Parenting only	54%
Financial only	34%
Parenting and financial	11%
Other	1%





12. For the last nine years, the Australian Institute of Family Studies ("AIFS") has conducted a review of trends in filings in the two courts. The most recent report (Report No. 30 published 2015) analyses the courts' data for the period between 2004-2005 and 2012-2013. The key findings concerning the complexion of work undertaken by the two courts reveal:

    - 52% of the Family Court's caseload is property settlement matters (compared with 30% in 2004-2005);
    - 14% of the Family Court's caseload (compared with 18%) comprises children and property settlement matters;
    - 34% (compared with 53%) are solely children's cases;
    - In the Federal Circuit Court, the relative distribution of property and children's matters is the reverse of that in the Family Court.

13. The data presented in the AIFS report does not speak to questions of complexity and risk. As will be discussed later, both courts deal with cases which involve family violence and risk issues. Because the courts' case management processes are different, it follows that to the extent the Commission may explore the interaction of federal and state laws and the courts, it will need to be careful to distinguish between the courts and to ensure that the discussion reflects the current law and practices.

14. The overwhelming preponderance of applications filed in either court are resolved by agreement and with consent orders. In the Family Court consent orders are mostly made by registrars exercising delegated powers. There is a simple process available in the Family Court for the making of orders by consent in cases which are not otherwise before a court. If the case has commenced before a judge, the judge will determine whether or not orders should be made as sought.

15. The case management of family law proceedings in the Federal Circuit Court utilises a pure docket system in which the docketed judge deals with the matter on its first date until finalisation. Self-evidently, in the Federal Circuit Court consent orders are made by judges.

16. The consent of the parties does not relieve the court from determining the application on the basis of the child's best interests (s 60CA) albeit the court is not obliged to apply ss 60CC(2) and (3).

17. Both courts have rules which require a party, or if represented, the party's lawyer to inform the court when making consent orders whether he or she considers a party or child has been or is at risk of family violence and, if allegations have been made, how the consent order attempts to deal with the allegations (r 10.15A FLR and r 13.04A FCCR). *T v N* (2003) 31 Fam LR 257

is an example of a case where, because of safety concerns for a child, the Family Court refused to make the proposed consent orders.

THE FAMILY LAW ACT AND PARENTING ORDERS

18. In the 40 years since its inception, the Family Law Act has been amended almost 80 times and been the subject of a number of parliamentary reviews[2]. Care arrangements for children have always been governed by Part VII and, albeit described differently, always proceeded on the basis that the best interests of the child is the paramount consideration (s 60CA). However, the criteria by which the best interests of a child is established have changed often, with that issue being initially at large[3] and now governed by an array of primary and additional considerations (s 60CC), the interpretation of which is informed by the objects (s 60B) of Part VII (*Goode v Goode* (2006) FLC 93-286; *Aldridge v Keaton* (2009) FLC 93-421; *Maldera & Orbel* [2014] FamCAFC 135). The obligation on courts to take into account any other relevant matter (s 60CC(3)(m) means that the uniquely individual aspects of a family can be addressed) (*Mulvany v Lane* (2009) Fam LR 418).

19. The most recent reforms are those introduced by the *Family Law Legislation Amendment (Family Violence & Other Measures) Act 2011* (Cth).

20. The purpose of the 2011 reforms was to amend Part VII thereby enabling the courts and the family law system generally to respond more effectively to parenting cases involving violence or allegations of violence. The most important changes instituted by the 2011 reforms were:

- Repeal of provisions which may deter disclosure of family violence.
- When considering what is in a child's best interests to give greater weight to protecting children from harm than to maintaining meaningful relationships.
- Changed the definitions of "family violence" and "abuse" of a child to reflect a contemporary understanding of what constitutes family violence.
- Refined the approach to family violence orders as part of considering a child's best interests.
- Requiring family consultants, family counsellors, family dispute resolution practitioners and legal practitioners to encourage parents to prioritise the safety of the children.
- Reporting requirements for family violence and abuse were improved to ensure that the courts have better access to evidence in this regard.

- Making it easier for state and territory child protection authorities to participate in family law proceedings (immunity from costs).

21. Since 2006, the primary considerations contained in s 60CC(2) of the Family Law Act have been:

    a) The benefit to the child of having a meaningful relationship with both of the child's parents; and

    b) The need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

22. The 2011 reforms inserted a new ss 60CC(2A), which provides:

    In applying the considerations set out in subsection (2) the court is to give greater weight to the considerations set out in paragraph (2)(b).

23. Thus the balance between the two primary best interests considerations was altered and priority is given to the safety of children over the benefit to children of having a meaningful relationship with both parents.

24. Other significant concerns emerging from various reports[4] resulted in the removal of the so-called "friendly parent" provisions (the extent to which a parent had facilitated or failed to facilitate a child's relationship with its other parent) by amending s 60CC(3)(c) and repealing ss 60CC(4) and (4A). The contentious costs section, s 117AB was also repealed. These reports suggested that this section operated as a disincentive to disclosing family violence for fear it would lead to a costs order if claims of family violence could not be substantiated.[5]

25. Under the 2011 reforms, the definition of "family violence" became:

    (1) For the purposes of this Act, ***family violence*** means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the ***family member***), or causes the family member to be fearful.

26. Section 4AB(2) contains examples of matters that may involve or constitute family violence. The definition of "abuse" was also changed and the phrase "exposed to family violence" was, for the first time, defined in the Family Law Act.

27. By s 4(1) abuse, in relation to a child, means:

    (a) an assault, including a sexual assault, of the child; or

    (b) a person (the ***first person***) involving the child in a sexual activity with the first person or another person in which the child is used, directly or

indirectly, as a sexual object by the first person or the other person, and where there is unequal power in the relationship between the child and the first person; or

(c) causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence; or

(d) serious neglect of the child.

28. The words "exposed to family violence" are defined in s 4AB(3) to mean "… if the child sees or hears family violence or otherwise experiences the effects of family violence".

29. Examples of situations that may constitute a child being exposed to family violence include, but are not limited to, the child:

(a) overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family; or

(b) seeing or hearing an assault of a member of the child's family by another member of the child's family; or

(c) comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family; or

(d) cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family; or

(e) being present when police or ambulance officers attend an incident involving the assault of a member of the child's family by another member of the child's family.

30. Although the Commission may undertake its own examination of each court's judgments[6], the following judgments constitute a useful sample of the manner in which interim hearings determined in light of the 2011 reforms are decided:

- *West & West* [2015] FCCA 336;
- *Whitby & Zeller* (No. 2) [2014] FamCAFC 239;
- *Eaby & Speelman* [2015] FamCAFC 104.

31. Those authorities make it quite clear that the court is required to address risk issues at an interim hearing. In that respect, in *Deiter & Deiter* [2011] FamCAFC 82, the Full Court said:

> The assessment of risk is one of the many burdens placed on family law decision makers. Risk assessment comprises two elements – the first requires prediction of the likelihood of the occurrence of harmful events, and the second requires consideration of the severity of the impact caused by those events. In our view, the assessment of risk in cases involving the welfare of children cannot be postponed until the last piece of evidence is given and tested, and the last submission is made... (footnotes omitted)

32. Set out below is a sample of final judgments which apply the 2011 reforms:

- *Aston & Gregory* [2015] FCCA 318;
- *Essey & Elia* [2013] FCCA 1525;
- *Vallas & Vallas* [2015] FCCA 924;
- *Wemble & Dautry (No. 2)* [2014] FCCA 2847;
- *Griffin & Trueman* [2014] FamCA 596;
- *Vance & Carlyle* [2014] FamCA 651;
- *Shivas & Darby* [2014] FamCA 1149;
- *Mabart & Haselden* [2012] FamCA 793.

THE FAMILY LAW ACT AND INJUNCTIONS

33. In addition to making a parenting order which restrains contact with a child, ss 68B and 114 give courts exercising family law jurisdiction power to grant injunctions, including restraint against approaching, entering or remaining in premises where the child, a parent of the child, and others (s 68B(1)(b)) live or spend time. Sections 68C and 114AA(1) enable the court to give police the power to arrest without warrant the person to whom the injunction is directed if the conditions in the sections are established. Although orders of this type are made frequently the powers of arrest appear to be rarely used.

34. It is obvious that the personal protection afforded by these injunctions can also be achieved by an Intervention Order made under state legislation, relevantly the *Family Violence Protection Act 2008 (Vic)*. The combined effect of s 114AB(1) and reg 19(a) of the Family Law Regulations 1984 is that ss 68B and 114 do not exclude or limit the operation of the Victorian Act. This may explain why the powers of arrest referred to are rarely used.

THE INTERACTION OF INTERVENTION ORDERS AND THE FAMILY LAW ACT

35. Section 68R of the Family Law Act empowers a state court (for example, Magistrates Court of Victoria) when making or varying an intervention order to revive, vary, discharge or suspend a parenting or other order (s 68R(1)(a)-(d)) to the extent that the family law order requires or authorises a person to spend time with a child. The power is exercisable on application by any person or on the initiative of the court but requires that the court has before it material that was not before the court that made the family law order or injunction. Thus, for example, a police prosecutor and a victim could activate s 68R.[7] Section 68T deals with interim orders and provides the suspension or variation will operate for 21 days. The intention being that within 21 days the revival, variation or suspension will be further considered by a court exercising jurisdiction under the Family Law Act. Thus, the court with the most recent evidence about the family has the power to address the effect of an elevated risk of exposure to family violence.

36. Anecdotally, the power contained in s 68R is not used. Perhaps this is because the application for an Intervention Order is often the first contact a family has with the court system and thus there is no order under the Family Law Act which needs consideration. Another possibility is that the volume of Intervention Order applications is so substantial that police and state courts do not have the capacity to do more than solely address the application for Intervention Orders. This means there is the potential for inconsistency between Intervention Orders and orders made pursuant to the Family Law Act which, self-evidently, may create confusion about which orders prevail and whether or not a person the subject to an Intervention Order, can approach their child and/or former partner.

37. The Commission may care to examine the extent to which Victorian courts exercise powers conferred by s 68R – and s 68T and any barriers to those powers (particularly s 68T) being used effectively.

38. If the powers conferred by ss 68R – 68T inclusive were to be extensively exercised by state courts, there are obvious resource implications for the Family Court and Federal Circuit Court. Stated simply, the federal courts do not have the capacity to readily absorb an increase in their caseload because of family law orders made by state courts, particularly in respect to work which must be dealt with urgently. An increase in this type of work would suggest that the 21 day time limit referred to in s 68T would require further consideration. It would be consistent with the time limit contained in s 67ZBB (court to take prompt action in relation to allegations of child abuse or family violence) for s 68T to be amended to eight weeks. Having said that, discussions have commenced between the Federal Circuit Court and state courts in Brisbane and

Parramatta with a view to facilitating an urgent listing in the Federal Circuit Court of any family law application necessitated by the family violence evidence given to the state court.

39. Section 68P operates somewhat similarly to s 68R. In essence, it enables a court exercising family law jurisdiction to make orders inconsistent with an existing state family violence order. The section imposes obligations on the court which are self-explanatory and relevantly requires the court to give reasons for doing so. Again, the point of the section is it enables the court with the most recent evidence about the family to make orders which governs the situation. The effect of s 68Q is that to the extent that the state order is inconsistent with the subsequent family law order, the family violence order is invalid. Anecdotally, the power contained in s 68P is not used often. The reason for this would appear to be that state orders are sensibly drafted to avoid conflict between state protection orders and orders made under the Family Law Act.

INDEPENDENT CHILDREN'S LAWYERS

40. The primary function of an independent children's lawyer is to assist the court to make a determination that is in the best interests of the children (s 68LA). This role has particular importance in proceedings where one or both of the parties is self-represented and who may not have the knowledge or skills to present appropriate evidence relevant to the determination (*Re K* (1994) 17 Fam LR 53).

41. Other important aspects of the role of the independent children's lawyer are to explain to children the nature of the proceedings and how they can be heard; garnering expert evidence, helping the parties and the court to develop a plan which enables the children to have meaningful relationships with their parents if it is safe to do so; suggesting what arrangements might be put in place to enhance the safety of children where there are elements of risk involved; and assisting the parties to find non-litigated solutions to the current dispute (s 68LA(5)) (*P & P* (1995) 19 Fam LR 1).

42. Legal Aid policy funding decisions can have a significant impact on the work of the court. This was particularly noticeable in Victoria during the years in which legal aid placed a limit on the number of independent children's lawyers it would fund. The consequence was that there were many cases in which serious allegations of risk to a child were made but an order for the appointment of an independent children's lawyer was not implemented. This meant that, at times, the court could not be confident that it had all of the relevant evidence, especially where one or more of the parties were unrepresented.

Cross-examination of victims of family violence

43. Further, lack of adequate legal aid funding may result in victims of family violence themselves having to conduct the litigation against the perpetrator of the violence and thus find themselves cross-examining the perpetrator and being cross-examined by the perpetrator. From time to time, suggestions have been made that governments fund an advocacy service similar to that which is used in certain states in criminal trials, where an advocate conducts the cross examination of the alleged victim in place of a self-represented accused.

44. In broad terms, we are not persuaded that such a suggestion recognises the significant difference between criminal and family law proceedings, even where the subject matter, violence, is the same. For example, in a criminal trial, while violence may be the sole factual and legal issue for determination, often the alleged victim is but one of the witnesses in the case. In the family law context, the victim is a party to the proceedings and the issue of family violence is only one of the issues to be determined although it may permeate the whole of the factual matrix of the case. It is difficult to see how such a system would sensibly sequester the cross-examination of an alleged perpetrator as to family violence from the cross examination on other issues in the case.

45. Further, unlike in a criminal context, where the victim is a witness and is to a considerable degree protected by the fact that the proceedings are conducted by police or by the Office of the Director of Public Prosecutions, in family law, the victim is a party and, where self-represented, will have interaction with the perpetrator throughout the case, not merely while giving evidence.

46. While ultimately a matter for government funding, a better and more effective approach to the issue would be to provide sufficient resources to enable parties to have legal representation where there is an allegation of family violence at the upper end of severity.

47. We are acutely conscious that the Commonwealth has a significant role in relation to funding legal aid bodies in relation to Commonwealth matters. And, that the demand for legal aid services notoriously outstrips the resources made available to legal aid commissions. However, there is an important policy difference between the approach taken by Victoria Legal Aid to funding independent children's lawyers at final hearings and that adopted by other legal aid commissions, for example, New South Wales. The current Victoria Legal Aid guidelines provide that the independent children's lawyer is required to appear at trial but without counsel unless one of the exceptions identified in its guidelines apply. The practical effect of the guidelines is that counsel usually appears without the independent children's lawyer or an instructing solicitor. It will be immediately apparent that counsel will not have met the child and does

not have the benefit of instructions from the independent children's lawyer throughout the hearing.

48. An alternate model which it is accepted has obvious funding ramifications is for the independent children's lawyer to be funded to instruct counsel, particularly if the case is complex. The Commission might consider the extent to which the New South Wales model might be made available in Victoria.

EVIDENCE ABOUT FAMILY VIOLENCE

49. Courts make decisions based on evidence. If material that could be relevant evidence is not placed before the court self-evidently it cannot be taken into account. The experience of both courts is that the evidence of violence in family law cases has generally not involved the perpetrator being convicted of a violence related offence or intervention by child protection agencies in the family. Of course, one of the challenges in relation to cases concerned with family violence is how to encourage or indeed compel a victim of family violence to disclose that fact and present evidence which enables the court to understand the nature and characteristics of that person's experience and thus provide an individual and nuanced response to the issue. Before that issue is discussed it needs to be understood that parenting proceedings are not conducted inter-partes (*M & M* (1988) FLC 91-979; *U & U* (2002) 211 CLR 235) as that term is generally understood and that hearings are conducted in accordance with Division 12A of the Family Law Act.

50. Division 12A legislates for active case management of child related proceedings and operates so that many of the more restrictive rules of evidence do not apply and for the court to admit evidence subject to weight (s 69ZT) (*Maluka v Maluka* (2001) 45 Fam LR 129). The changes are based on principles derived from the Children's Cases Program undertaken by the Family Court, which tested various case management practices so as to diminish the adversarial nature of proceedings and increase child focus. One of the five principles in Division 12A requires that the proceedings are conducted in a way that safeguards the child from or exposure to abuse, neglect or family violence, and the parties to the proceedings from family violence (s 69ZT(5)).

Family Consultants

51. Both courts use the specialist services of family consultants, in the case of the Family Court primarily those employed by the court (s 11A) and for the Federal Circuit Court a combination of s 11A and external consultants appointed pursuant to s 11B. Family consultants are registered psychologists or social workers with tertiary qualifications and no less than five years related experience. Reports provided by family consultants accord with the Australian

Standards of Practice for Family Assessment and Reporting published this year by the two courts and the Family Court of Western Australia.

52. Family consultants are involved in both pre-trial and trial processes in various ways. Their functions are described in s 11A and include family violence screening. All communications are reportable and short memoranda or oral evidence may be given in interim hearings to assist the court to identify the issues in dispute, risks and concerns and what expert evidence may be of assistance. If a matter is to proceed to a final hearing they may be required to provide a family report pursuant to s 62G.

53. The family consultants are presently testing the use of a behaviourally based family violence screening questionnaire. It is an adaption of the Mediators' Assessment of Safety Issues and Concerns, Practitioner Version 2 (MASIC – 2P; Beck, Hotlzworth-Munroe and Applegate 2012) (MASIC).[8] This is a questionnaire submitted by each party prior to an interview with the family consultant. Trials of the questionnaire were commenced in April 2015 by the courts at Melbourne and Brisbane. An evaluation will be completed by late 2015.

Prescribed Notices

54. Notwithstanding this initiative, screening for family violence by family consultants is less available in the Federal Circuit Court than it is in the Family Court. Because victims of family violence often struggle to disclose that fact, the Commonwealth Parliament, courts[9] and the legal profession[10] have taken steps to ensure as far as possible, evidence of that type is placed before the court.[11] Sections 67Z and 67ZBA collectively require a party or interested person to file a notice in the prescribed form of allegations of child abuse, family violence or risk of family violence. The filing of a prescribed notice triggers s 67ZBB which requires the court to take prompt action in relation to allegations of child abuse or family violence. The section requires the court to consider what interim or procedural orders should be made to:

    (a) gather evidence about the allegation as expeditiously as possible; and

    (b) protect the child or any parties to proceedings.

55. As has already been mentioned, the section nominates an eight week timeframe if it is possible.

56. It is the experience of both courts that prior to the 2011 reforms there was widespread non-compliance by parties with the existing obligation to file the prescribed form and a consequential under-reporting of matters which should have been referred to a child protection authority. Hence the 2011 reforms

strengthened the obligations on parties and interested persons. The Family Court uses the prescribed notice in accordance with the Act.

57. However, the volume of cases dealt with by the Federal Circuit Court presents particular challenges in identifying cases where a party alleges there is a risk of family violence and/or child abuse. It is for this reason that in January 2015 the Federal Circuit Court introduced a new notice of risk which must be filed by every party to an application for parenting orders. The compulsory nature of the form is designed to operate as a broad based risk screening device in relation to all issues which may present a risk to a party or a child. It is the experience of the Federal Circuit Court that by imposing an obligation on all parties to answer questions about risk issues has resulted in disclosures that might not have been given in their affidavits.

58. Any notice of risk which alleges abuse of child is sent by the Federal Circuit Court to the relevant child protection authority. The obligation to file the notice in every parenting case has seen a substantial escalation in the number of notices sent by that court to child protection authorities. The Federal Circuit Court considers that the increase reflects the previous under-reporting of family violence and child abuse.

59. Set out below are two tables which identify the number of prescribed notices filed in each court in recent years. For both courts, the statistics reveal a significant increase in filings triggered by the 2011 reforms.

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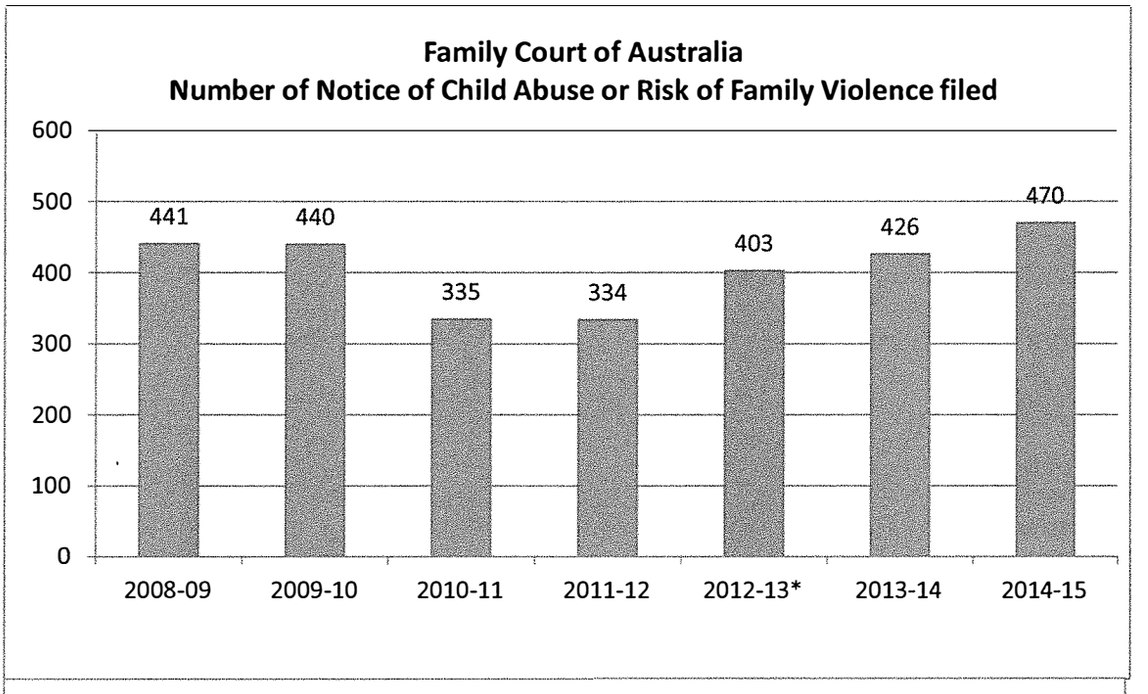
Table 3: Family Court of Australia

Notice of Child Abuse or Risk of Family Violence lodged

Filings - Family Violence Notices filed							
	2008-09	2009-10	2010-11	2011-12	2012-13*	2013-14	*2014-15*
Notice of Child Abuse or Risk of Family Violence	441	440	335	334	403	426	470
% of Cases (Final orders)	11.5%	11.9%	10.3%	10.2%	14.4%	14.6%	16.0%

*On 1 July 2012, new definitions and rules on Family Violence were enacted.



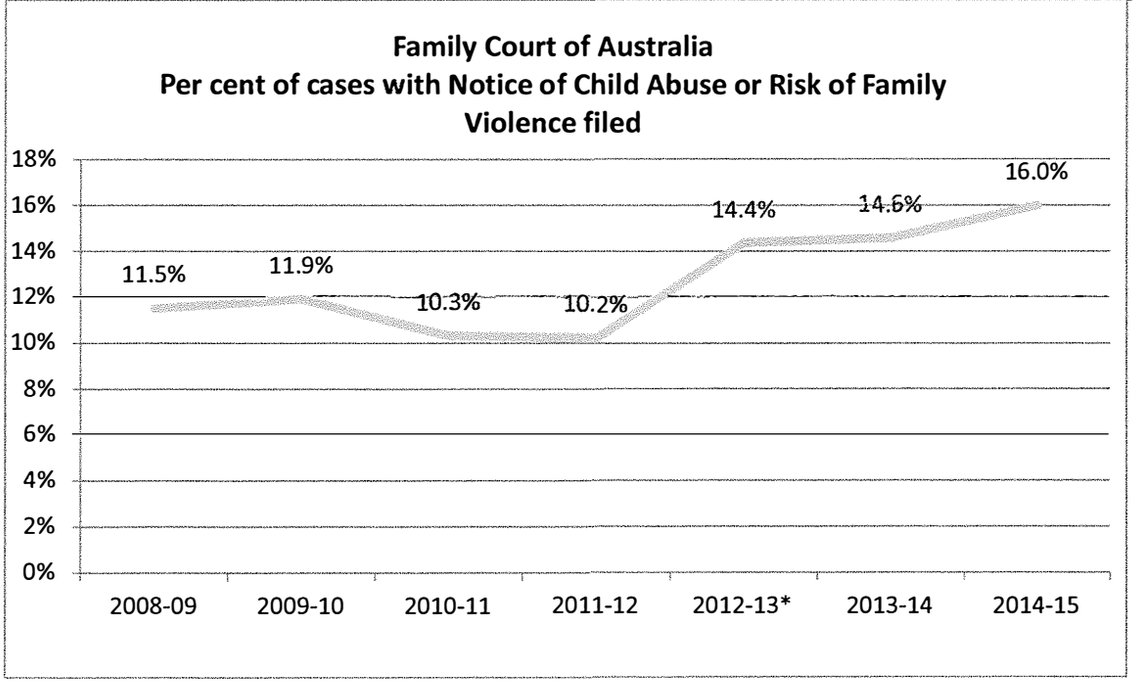
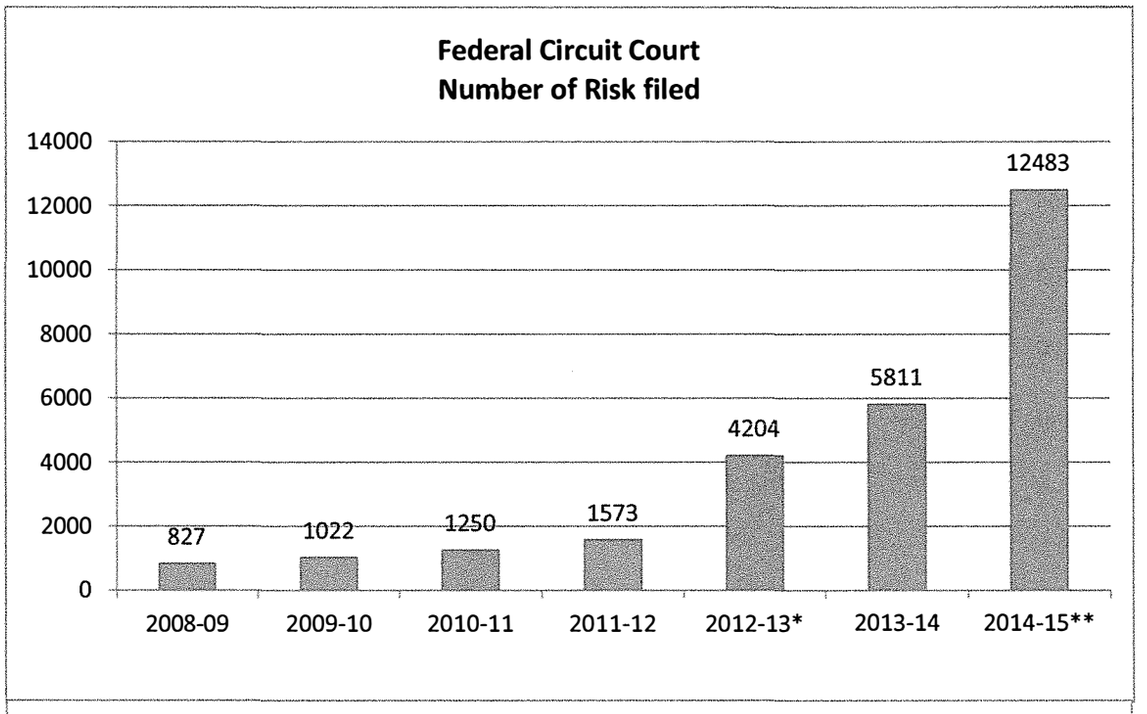
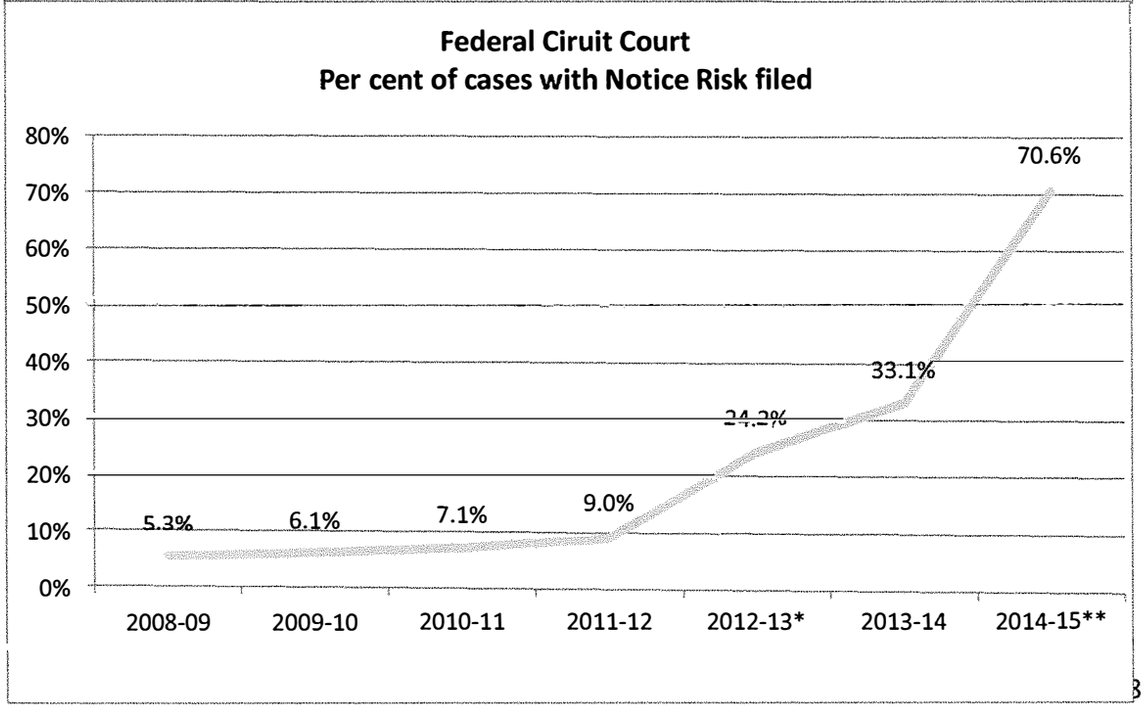


Table 4: Federal Circuit Court
Notice of Risk lodged (Child Abuse and/or Family Violence)

Filings - Family Violence Notices filed							
	2008-09	2009-10	2010-11	2011-12	2012-13*	2013-14	*2014-15***
Notice of Child Abuse or Risk of Family Violence	827	1022	1250	1573	4204	5811	12483
% of Cases (Final orders)	5.3%	6.1%	7.1%	9.0%	24.2%	33.1%	70.6%

*On 1 July 2012, new definitions and rules on Family Violence were enacted.
** - Following a pilot in SA, on 1 January FCC introduced a Notice of Risk that is to be filed on every child matter.





60. For 2012-13 the Family Court transmitted 305 prescribed notices to child welfare agencies and in the following year 383. For the Federal Circuit Court, 2,952 prescribed notices were referred in 2012-13 and 4,217 in 2013-14. The compulsory obligation introduced in January 2015 should result in a significant increase over the preceding year.

61. Initially some authorities treated each notice of risk as a notification requiring investigation. However, the threshold for action to be taken by the child protection authority is usually higher than the matters which come within the definition of family violence and child abuse in the Family Law Act. A number of the state child protection authorities now triage the notice of risk to assess whether or not the allegations fall within the agency's statutory requirements for intervention.

62. The Federal Circuit Court has engaged with state and territory child protection authorities with a view to developing methods of ameliorating the resources ramifications on authorities of the increase in prescribed notices sent to them. In some locations, such as Parramatta, the court and child protection authority has developed a means by which the authority provides streamlined information to the court at an early stage. This has reduced the frequency of s 69ZW requests and subpoenas for the production of documents.

63. Effective communication of information between the courts and child protection agencies also means that the courts can avoid unproductive s 91B requests that a child protection agency intervene in family law proceedings. Collaboration between the courts and the Victorian Department of Human Services has led to innovations such as the co-location of a Departmental Officer at the Melbourne and Dandenong registries. This has dramatically improved the ability of the courts to receive and exchange information in relation to family violence and child abuse.

64. The Commission may care to consider the manner in which state child protection agencies receive and provide information about family violence to courts exercising jurisdiction under the Act.

EDUCATION AND TRAINING

65. At its inception, the Federal Circuit Court allocated judicial work on the basis that the judges would undertake all of the work of the court. As time passed, informal divisions developed. Essentially, as family law comprised the majority of the work of the Federal Circuit Court, judicial appointments reflected that and the majority of judges hear cases of a type in which he or she specialised in practice. Although a number of judges preside across all jurisdictions, the majority sit in the field of specialisation they chose in practice.

66. It follows that in both courts family law work is overwhelmingly undertaken by

specialist judges[12].

67. The National Judicial College of Australia provides courses for judges and an orientation course for newly appointed judges. The Australian Institute of Judicial Administration conducts education for judges, including in relation to family violence. Judges of both courts participate in training by these agencies and Justice May is President of the AIJA. The AIJA has secured Commonwealth funding to prepare a Family Violence Benchbook for use in all courts.

68. The Family Court has provided specialist education in family violence, inter alia, since 1995. Judges in both courts attend an annual conference which includes judicial education, and are encouraged to attend conferences in which these kinds of issues are discussed. Family Court judges are required to invest in five days of judicial education annually.

69. In addition, the child disputes services provide monthly seminars which are available electronically nationally on topics relevant to parenting cases, including issues of family violence. Examples of seminar topics include:

- Borderline Personality Disorder implications for parenting capacity - Dr Peter Krabman;
- Recent research findings on the impact of separated families including implications of exposure to family violence on the social ,and emotional development of children -Dr Rae Kaspiew (AIFS);
- Mens Behavioural Programs- Do they work and should we refer?- Professor Thea Brown;
- Forensic examination of violence in a family law context - Dr Chris Lennings;
- Child Emotional Abuse - the difficulty of assessing non - physical maltreatment - Dr Dana Glaser;
- The immediate, medium and long term implications of childhood trauma- overview of the impact of brain development, behaviour, attachment relationships and mental health - Susan Adams (CDS).

70. This seminar series is provided for family consultants and judges of both courts.

Administrative and Organisational Focus on Family Violence

71. The courts have made significant investments of financial resources and staff time to ensure staff have the training they need to provide sensitive client services, help them cope with the demands of helping a needy and often traumatised customer base and have registries that are safe.

Family Violence Action Plan 2014 - 2016

72. Registries of the Family Court and the Federal Circuit Court have well developed policies designed to keep people safe which are subject to constant review. The Family Violence Strategy first published by the Family Court in 2005 is now reflected in the courts' *Family Violence Action Plan 2014 - 2016*[13]. The current plan was developed by the Family Violence Committee which is a joint committee of both courts. The areas of focus of the current plan are:

- Information and communications
- Screening and risk assessment
- Operational processes, including safety at court
- Staff awareness and capability
- Community engagement
- Linking services

Safe Court Environment

73. The original plan resulted in the redesign of court registry public areas to include:

- Airport standard security screening at the entrance of the registries so that no one could attend court or other events in possession of a weapon or something which could be used as a weapon; and
- Counter service areas were restructured so that people can sit down at a client service desk and talk across that desk at the same level as the client service officer. More sensitive information can be discussed in relative privacy and referrals effectively made.[14]

Safety Plan

74. A safety plan may be developed for attendance at court. Safety plans are available to all parties. These plans, tailored to a party's particular needs can encompass the use of separate waiting rooms and safe rooms, security escort to and from court rooms and conference rooms, staggered arrival/departures, teleconference and shuttle conferencing and the use of support persons. Video conferencing allows the alleged victim to provide evidence from a separate and safe location as appropriate and security personnel are available to be in the courtroom where necessary.

75. The policy is to regularly enquire whether there are safety concerns. It is not enough to ask about risk of family violence once and client service officers thus at each point of contact with clients ask if there are any safety concerns about attending court.

Accessible Information

76. The National Enquiry Centre enables parties to make a call to obtain information with the assurance that the advice is of a high quality and provided by well trained staff. This centre now allows "web chat" which means that an instant messaging system is available from our enquiry service to a party who needs quick accessible information including any links to procedural advice or referral information. This may be very important to a person in a violent situation.

77. The courts' web sites have recently been redesigned to create more accessible pages for people seeking access to justice. There is specific information for those who are in violent situations. In addition there are pages for children which are especially designed to provide age appropriate content (5-8 years; 9-12 years; 13-18 years) and include assurances for children that they are entitled to be safe.

78. The courts' portal is also a convenient access point where a party can readily establish the status of his or her case; what listings are scheduled; and any orders made. This can be crucial especially where there are concurrent proceedings in state jurisdictions.

Other Initiatives

79. The Family Violence Best Practice Principles were developed by the Family Court and Federal Circuit Court joint Family Violence Committee. They are designed to provide practical guidance to courts, legal practitioners, service providers, litigants and other interested persons in cases where issues of family violence or child abuse arise. They contribute to furthering the courts' commitment to protecting children and any person who has a parenting order from harm resulting from family violence and abuse. They have been amended from time to time in and most recently following the 2011 reforms.

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[1] References to statutory provisions are to the *Family Law Act 1975* (Cth) unless stated otherwise

[2] See, for example, Commonwealth, Joint Standing Committee on Family Law, the Family Law in Australia (Volumes 1 and 2) Parl Paper No 150 (1980); Commonwealth, Select Committee in Family Law – Certain Aspects of its Operation and Interpretation, Family Law Act 1975: Aspects of its Operation and Interpretation, Parl Paper No 326 (1992); Commonwealth, Standing Committee on Family and Community Affairs, Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation, Parl Paper No 43 (2003) "Every Picture Tells a Story"

[3] Although the court was enjoined not to make an order contrary to the wishes of a child over 14 years except in special circumstances

[4] AIFS - *Evaluation of the 2006 Family Violence Law Reforms*, Dec 2009; The Hon. Prof. Richard Chisolm AM, *Family Courts Violence Review*, Nov 2009; Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Law and Family Law Issues*, Dec 2009; Australian Law Reform Commission *Family Violence: Improving Legal Frameworks* ALRC 117, Consultation paper 2010 and Report February 2012

[5] For a preliminary analysis of the effectiveness of the 2011 reforms see The Hon. Justice Stephen Strickland and Kristen Murray "*A Judicial Perspective on the Australian Family Violence Reforms 12 Months On*" (2014) 28 Australian Journal of Family Law.

[6] The Family Court and Federal Circuit Court are open courts and judgments are available on the courts' websites and Austlii.

[7] A family law order may not be discharged in an application for an interim Intervention Order (s 68(R)(4)

[8] This implements recommendations made by the ALRC

[9] Family Violence Best Practice Principles

[10] Law Council of Australia: Best Practice Guidelines for Lawyers Doing Family Law

[11] The Australian Law Reform Commission *Family Violence: Improving Legal Frameworks* ALRC 117, Consultation paper 2010 and Report February 2012 contains a useful discussion of difficulties about disclosing family violence

[12] For an examination of the judges' apparent understanding of family violence see Easel and Grey: Risk of harm to children from exposure to family violence: Looking at how it is understood and considered by the judiciary (2013) 27 AJFL 59

[13] See http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/policies-and-procedures/fv-plan

[14] Also refer "*Fortress or Sanctuary Enhancing Court Safety by Managing People, Places and Processes*", Report on Study funded by the Australian Research Council, Linkage Project, December 2014