



Family Violence Courts

by Edwina Schneller

1 Introduction

In Australia and internationally there is growing recognition of the limitations of the criminal justice system in responding to complex social issues. One response is in the form of the creation of specialist courts. In Australia, there are a range of specialist courts covering:

- family violence;
- drug dependent offenders;
- Indigenous offenders; and
- mentally impaired offenders

This e-brief looks specifically at specialist family violence courts (FVCs). As background, selected overseas developments are discussed, as are various Australian innovations, including the NSW Domestic Violence Intervention Court Model (DVICM) pilot.¹ A starting point for much of the analysis is the 2010 joint report by the Australian Law Reform Commission (ALRC) and NSW Law Reform Commission (NSWLRC), [Family Violence—A National Legal Response](#), (ALRC & NSWLRC's Joint Report).² The key recommendation of the Joint Report was that State governments should establish or further develop specialised family violence courts within existing courts in their jurisdictions.

In 2010, in response to that report, the former NSW Attorney General, John Hatzistergos, raised the issue of creating specialist FVCs.³ Mr Hatzistergos and the former Premier, Kristina Keneally, announced that the Government would establish a working group to examine the implementation of FVCs in NSW.⁴ Advice received from the Criminal Law Review Division, Department of Attorney General Justice suggests that the working group never eventuated.⁵

2 Recent Developments in NSW

The major legal, policy and strategic developments in this area are set out in the NSW Auditor-General's November 2011 performance audit report, [Responding to Domestic and Family Violence](#).

The Legislative Council's Standing Committee on Social Issues is currently holding an inquiry on [Domestic violence: trends and issues in NSW](#). The inquiry was referred to the Committee by the Minister for Family and Community Services and Minister for Women, Pru Goward and is expected to report this year.⁶

In addition, the NSW Attorney General, Greg Smith, announced this year an independent review of all NSW court support services for victims of crime.⁷

3 Statistics on Family Violence

3.1 National

According to [Access Economics \(2004\)](#), domestic violence is the single biggest health risk to Australian women aged 15 to 44 years.⁸

[KPMG Management Consulting \(2009\)](#) reported that in 2008–09, the total cost to the Australian economy of all violence against women and their children (including non-domestic violence) was estimated to be \$13.6b; if no action were to be taken to address the problem, the cost in 2021-2022 was estimated to be \$15.6b.⁹

The most recent national domestic violence survey is six years old, [Personal Safety Survey](#)¹⁰ (ABS, 2006):

Summary of key statistics

Gender	
Females	<ul style="list-style-type: none"> ➤ 4.7% of females (363,000) were physically assaulted; ➤ Of these women, 31% (73,800) were assaulted by their current or former partner.
Males	<ul style="list-style-type: none"> ➤ 10% of men (779,800) were physically assaulted; ➤ 4.4% (21,200) of whom were assaulted by their current or former partner.

(Based on data taken 12 months prior to the survey)

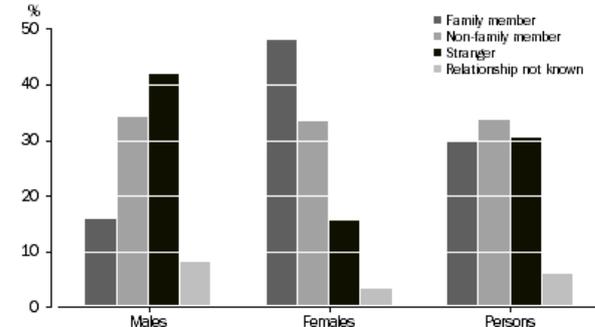
3.2 New South Wales

In 2010, NSW police responded to over 126,000 incidents involving domestic and family violence. Domestic and family violence costs the NSW economy more than \$4.5 billion each year and on average, kills 36 people each year.¹¹

In 2010, there were 73,969 victims of assault in NSW, with males accounting for 57% of victims and females 43%. However, male victims are most likely to be assaulted by a person unknown to them. This is contrary to the

experience of females, with 48% of victims identifying a family member as the offender.¹²

Victims of Assault, Sex by relationship of offender to victim - New South Wales



Source: Australian Bureau of Statistics, June 2011

The NSW Bureau of Crime Statistics and Research (BOCSAR) recently published a detailed [report](#) examining trends and patterns in domestic violence across NSW.¹³ It shows that over the last ten years, the trend in domestic assault has been stable across NSW. The majority of domestic violence occurs between persons presently or formerly in an intimate relationship and typically with women as victims. For example, in NSW 69% of domestic assault victims reported to the police are female and 31% male.¹⁴

The BOCSAR report confirms that there continues to be an over representation of Indigenous Australians¹⁵ as both victims and offenders of domestic violence¹⁶.

Table 3 of the BOCSAR report lists the 20 Local Government Areas (LGAs) that had the highest per capita rates of domestic assault in 2010. The State average rate for domestic assault in 2010 was 360 incidents/100,000 population. The top five LGAs had a rate between three and ten times the state average. The top five LGAs were in descending order: Bourke, Walgett, Moree Plains, Coonamble and

Wentworth. The only metropolitan LGA within the top 20 LGAs was Campbelltown, which was ranked seventeenth.¹⁷

Of further concern is the estimate that less than half of all respondents who had been victims of a domestic assault in the previous 12 months reported the incident to the police.¹⁸ The possible reasons for this are discussed in the Australian Institute of Criminology's paper, [Key issues in Domestic Violence, Research in Practice No.7 \(2009\)](#),¹⁹ which provides a detailed review of the prevalence, impact, victim composition and risk factors of domestic violence.

In addition, the Australian Institute of Criminology paper, [Responding to Intimate partner Violence Victimization: Effective Options For Help-Seeking](#),²⁰ examines predictors for victims seeking help.

4 Characteristics of Specialist Courts

Specialist courts were first established in the United States in the late 1980s and emerged, according to Rottman & Casey, in response to the enormous pressure being placed on courts to respond to social problems.²¹

Most specialist courts are an example of 'therapeutic jurisprudence',²² in that they tend to recognise the behavioural and environmental factors that contribute to offending. The judicial response often incorporates psychological and/or medical treatment in the hope of rehabilitating offenders in order to prevent further re-offending. Hence, they are often referred to as 'problem-solving courts'.²³ For example, the aims of drug courts are often to reduce drug dependency and the criminal activity associated with it and to improve the

general health of participants. This is often achieved through rehabilitation programmes as an alternative to a custodial sanction.

Berman and Feinblatt are acknowledged for their work in defining specialist courts.²⁴ Their definition includes four common characteristics:

Case outcomes – Specialist courts seek to achieve tangible outcomes for the three key stakeholders in the court process: victims, offenders and communities. Depending on the court's specific goals, outcomes may be confined to one of the three key stakeholders, while the number of outcomes can range from one to many.

System change: Specialist courts seek to re-engineer how governments and justice systems respond to broader social and community problems. System changes are usually evident in the roles of the court (moving away from traditional practices) and its layout. These changes are believed necessary to deliver the case outcomes.

Judicial monitoring: Specialist courts rely on judicial authority to monitor offenders, solve problems and change behaviour.

Collaboration: Specialist courts utilise the services and expertise of government and non-government agencies in the management of offenders. The level of collaboration often depends on the desired case outcome. Collaboration occurs in two main forms: within the administration of the court process, and within the delivery and development of offender programs.²⁵

5 Characteristics of Family Violence Courts

In general FVCs differ from other 'problem solving courts' as they focus on the victim and their safety over other considerations.²⁶ This is not to say that FVCs ignore an offender's well-being and rehabilitation. In fact, offender programs are part of all FVCs in Australia.

FVCs seek to improve the criminal justice response to domestic violence by increasing the prosecution of offenders, providing victim support services and enhancing community awareness of the incidence of family violence. The court operates primarily in an adversarial, non-therapeutic environment.²⁷ The ALRC/NSWLRC Joint Report provides the following overview of the typical traits of specialised family violence courts.²⁸

- *Specialised personnel:* These will include specialised judicial officers, but may also involve specialised prosecutors, lawyers, victim support workers, and community corrections officers. In some cases, these personnel may be chosen because of their specialised skills, or be given specialised training in family violence.
- *Specialised procedures:* These will include special days in court dedicated to family violence matters ('dedicated lists'). They may also include 'case coordination mechanisms' to 'identify link, and track cases related to family violence', such as integrated case information systems, or the use of 'specialised intake procedures' (specialised procedures that apply when the victim first enters the court system).
- *Emphasis on specialised support services:* There will be someone,

employed by the court or another organisation available to support family violence victims in managing the court process, and often these workers are responsible for referring victims to other services, such as counselling. There may also be specialised legal advice or representation available for both the victim and defendant.

- *Special arrangements for victim safety:* Some courts will also include specially designed rooms and separate entrances to ensure the safety of victims, and may offer facilities which enable vulnerable witnesses to give evidence remotely.
- *Offender Programs:* Some courts have the capacity to order or refer an offender to a program which aims to educate the offender and address personal issues to prevent re-offending, usually through counselling. Some courts have offender support workers to engage and refer offenders to behavioural change programs.

6 Arguments For and Against FVCs

6.1 Potential Advantages

Based on the joint ALRC/NSWLRC Joint Report, arguments in favour of establishing specialist family violence courts, either as stand-alone courts or as part of the existing court structure, include:

- Improvements in the response of the legal system, for example, improved rates of reporting, prosecution, convictions and sentencing leading to potential changes in offender behaviour.²⁹
- Those experiencing family violence would be less likely to drop out of the system without

the remedies they need for achieving safety.³⁰

- Greater integration, coordination and efficiency in the management of cases through identification and clustering of cases into a dedicated list, case tracking, inter-agency collaboration, and the referral of victims and offenders to services.³¹
- Premises with safety protection; and co-location of services—including legal and family violence support services.³²
- Confidence in the ability of the legal system to respond to family violence would build, leading to better outcomes in terms of victim satisfaction.³³
- Specialisation acts both as a way of attracting those with an interest and aptitude for family violence work and allows education, training and other resources to be focused upon a smaller group for more immediate results and improved outcomes.³⁴
- Specialised personnel including: judges, court staff, lawyers and prosecutors with a better understanding of the nature, features and dynamics of family violence.³⁵
- This knowledge and understanding allows these individuals to better assist victims sensitively in navigating the legal, social and health systems by connecting together legal frameworks and social services.³⁶
- Specialisation can improve consistency and efficiency in the interpretation and application of

laws as a result of shared understandings and the awareness and experience of a smaller number of decision makers.³⁷

- Parties would not be shuttled from court to court. There may be fewer court appearances, less repetition of evidence and thereby a quicker resolution of issues.³⁸
- Less cost as specialisation may result in substantial savings elsewhere in the system: For example, more effective legal intervention may result in fewer cases requiring child protection agencies to intervene, and fewer demands on medical and psychological services.³⁹

6.2 Potential Challenges

The ALRC/NSWLRC Joint Report discussed various challenges to FVCs and specialist courts generally, including:

- Operational challenges such as: the accessibility of specialised services; the appropriate selection and retention of specialists; and the ongoing need to ensure and maintain adequate resourcing and support.⁴⁰
- One concern is that specialised services, because of the resources they require, may only reach a certain segment of the population, leaving some victims of family violence, especially those in regional and remote communities no better off.⁴¹
- Another concern relates to how specialists are selected; the recruitment and retention of staff is a challenge for many

specialised courts in the area of family violence due to the traumatising nature of the work.⁴²

Justice Michael Moore of the Federal Court of Australia, in a [paper](#) presented at a Lawasia Conference in 1999, outlined additional concerns about specialist courts, including:

- The costs of forming the separate administration of a specialist court would be considerable (premises; staff and judges).
- There is the potential for jurisdictional uncertainty and conflict.
- Specialist courts may lead to fragmentation of the court system and diminish its legitimacy.
- Specialist courts may prevent the evolution of general courts and their adaptation to change.⁴³

Justice Heydon recently expressed concerns with specific reference to the Industrial Relations Commission of NSW in *Kirk v Industrial Relations Commission*⁴⁴. The Commission may be constituted as the Industrial Court of New South Wales, and in such circumstances is a specialist jurisdiction court of equivalent status to the Supreme Court.⁴⁵ His Honour stated:⁴⁶

Thus a major difficulty in setting up a particular court, like the Industrial Court, to deal with specific categories of work, one of which is a criminal jurisdiction in relation to a very important matter like industrial safety, is that the separate court tends to lose touch with the traditions, standards and mores of the wider profession and judiciary.....They tend to feel that they are not fulfilling their duty

unless all, or almost all, complaints that that mischief has arisen are accepted. Courts which are "preoccupied with special problems", like tribunals or administrative bodies of that kind, are "likely to develop distorted positions.

7 International Case Studies

The ALRC/NSWLRC joint report notes that overseas jurisdictions have adopted various models of specialised FVCs (some operating in the civil setting only or dealing exclusively with criminal cases, others handling both civil and criminal matters).⁴⁷ In the US, where they originated during the 1980s, over 300 FVCs now exist. FVCs were established shortly after in Canada, and since 1999, the UK has rolled out over 141 FVCs. New Zealand has several well-established specialised FVCs.⁴⁸

7.1 United States

The ALRC/NSWLRC Joint Report documents the **New York model**:

This model includes both Domestic Violence Courts and Integrated Domestic Violence Courts (IDVCs). There are now 44 IDVCs in operation, servicing approximately 90% of the population of New York. While the Domestic Violence Courts deal with criminal matters relating to intimate partners, cases are transferred to the IDVCs where there are overlapping civil, criminal, or family law claims arising out of a family violence incident between intimate partners. In IDVCs, a single judge conducts all related criminal, civil and family law matters from beginning to end. As in other specialised courts, the cases are not consolidated, but rather remain separate civil, criminal, and family law matters. As a result, each case has its own burden of proof and is conducted as any other like case would be. A resource coordinator

keeps judges informed of offender compliance and refers the defendant to appropriate services.

The report continues:

Considerable research into the effectiveness of specialised family violence courts in the US has been conducted. The implications from this research have been stated as follows. Some, but not all, family violence courts are associated with reduced levels of reoffending. Family violence courts are associated with increased rates of conviction and decreased dismissal rates. Victims of family violence rate their satisfaction in specialised courts more highly. Victims of family violence who were aware that there was a family violence court, reported greater willingness to report repeat offending. Family violence courts are associated with more efficient case processing. Finally, family violence courts report higher levels of offender compliance.⁴⁹

7.2 Canada

In Canada the first court to specialise in family violence and the most studied is the FVC in Winnipeg, Manitoba, which began operating in 1990. The FVC was designed to address the "special needs of victims who are in 'a relationship of trust, dependency and/or kinship' with their alleged offender."⁵⁰ The provincial court has specialised staff, special rooms and victim support services dealing with spousal abuse, elder abuse and child abuse (including sexual). All child sexual assault cases are held at the FVC.⁵¹

According to research, offenders convicted of child abuse are more likely to receive a gaol sentence in the Manitoba Family Violence Court than in a non-specialist court, and when a sentence is given it is on average for a

longer term.⁵² In the court's first 10 years, the annual number of spousal assault cases where charges were laid in Manitoba went from 1137 to 3842. Such figures "suggest that with greater public confidence in the justice system, support and awareness, more complainants are prepared to report to the police and go through the system."⁵³ Studies in Canada have found higher conviction rates in specialist courts for all categories of family violence compared to non-specialist courts.⁵⁴

7.3 United Kingdom

The UK Government's consultation paper on domestic violence '[Safety and Justice](#)', 2003 acknowledged that domestic violence required focused attention. A key means of achieving this focus has been the development of specialist domestic violence courts (SDVCs) and fast track systems (FTSs).⁵⁵

The first English SDVC was established in 1999 in Leeds. By November 2010 there were 141 SDVCs operating across England and Wales.⁵⁶

The aims of SDVCs are to combine criminal and civil settings in order to deal with domestic abuse more effectively. SDVCs take a multi-agency approach to domestic violence with criminal justice agencies, magistrates and specialist support agencies working in partnership⁵⁷. An early evaluation found that SDVCs:

Enhance the effectiveness of court and support services of victims, make advocacy and information sharing easier and victim participation and satisfaction was improved.⁵⁸

All Crown prosecutors are trained in prosecuting cases relating to domestic violence. By 2006 there were 43 Crown Prosecution Service Domestic Violence Coordinators.⁵⁹ Under the *Code of Practice for Victims of Crime*, 2006, witnesses and victims of domestic violence appearing in criminal courts can apply for special measures, such as being screened off and giving evidence by live television links.⁶⁰

In a 2006 paper Professor Dee Cook and his colleagues at the University of Wolverhampton evaluated five SDVCs in England and Wales. The paper recommended the development of a unified definition of domestic violence to be used across all agencies⁶¹ and the roll-out of SDVCs across England and Wales.⁶²

Domestic violence is currently a high priority policy issue for the UK Government. In November 2010, the Home Office set out domestic violence guiding principles in [Call to end Violence against Women and Girls](#). In March 2011, an action plan was created, [Taking Action-The New Chapter](#). It contained 100 actions to tackle violence against women in the areas of prevention, provision of services, justice outcomes and reducing the risk to victims.⁶³ Two 'actions' are of note: action 76 which proposes considering expanding SDVCs and action 77 which proposes revising the definition to be used for domestic violence.

In March 2012, the Government released [Taking Action the Next Chapter](#), which continues the developments in this area. Also in March 2012 the Government announced a one-year pilot known as the [Domestic Violence Disclosure Scheme](#). The pilot will test a process

for enabling the police to disclose information about previous violent offending by a new or existing partner where this may help protect the public (most likely a new partner).

7.4 New Zealand

There are two FVCs in New Zealand: Waitakere FVC established in 2001 and Manukau FVC, which began in 2005 after long-standing collaboration with community organisations.⁶⁴

These courts aim to provide a more holistic response to family violence than currently available in the conventional court setting. They also seek to provide a more timely response to family violence, enhance safety for victims and families experiencing family violence, and encourage accountability among offenders. The Waitakere FV Court has an additional aim to provide specialist services to victims, offenders and those involved in the operation of the court.⁶⁵

The Ministry of Justice in 2008 released an evaluation report of the two FVCs - [The Waitakere and Manukau Family Violence Courts: An Evaluation Summary](#). This research reported disappointing outcomes in terms of conviction and re-offending rates, which may raise doubts about the expansion of FVCs in New Zealand.

Conviction rates in the FVCs were even lower than in the general courts. In fact, before the establishment of the FVC in Manukau, discharge 'without conviction' occurred in 1.5% of charges, but since the establishment of the FVC its use has increased by 15%, which is larger than the national increase of 4.3%.⁶⁶

The report also concluded that the FVCs had no significant effect on reoffending.⁶⁷ Further, the evaluation found that victims had been put at risk by waiting in common waiting rooms with their abusers and that the Manukau Court had been overwhelmed by the volume of cases.

The Chief District Court Judge, Russell Johnson, who championed the creation of the Manukau Court, believes that the problems outlined in the report have since been rectified.⁶⁸

8 Family Violence Courts in Australia

Family violence issues arise in a number of judicial settings straddling the constitutional division of powers between the Commonwealth, States and Territories:

- magistrates courts;
- district and supreme courts;
- children's courts and;
- family courts—including the Family Court of Australia and the Federal Magistrates Court.

The ALRC/NSWLRC Joint Report provides a [detailed outline](#) of the jurisdictions of the above courts and where family violence issues arise in the context of each jurisdiction.

Protection orders are the primary legal tool used by States and Territories in relation to family violence.

8.1 Specialist Family Violence Courts in Australia

The first family violence "court" was established in South Australia in 1997. Subsequent developments include:

NSW	Pilot in Campbelltown and Wagga Wagga commenced 2005.
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ACT	Pilot started 1998 of specialist list in the Magistrates Court and FV list established 2000. Specialist Family Violence Court established 2011 under <i>Magistrates Court Act 1930</i> .
QLD	Pilot Rockhampton Magistrates Court commenced 2006.
SA	Specialist list in the Magistrates Court commenced 1999.
VIC	Specialist list in the Magistrates Court commenced 2005.
WA	Specialist stream of the Magistrates Court of Western Australia. Commenced in 2000. ⁶⁹

A comparison of the different models is set out in the [Joint Report](#) (Table A on p 1496).⁷⁰ Discussed in more detail here are the South Australian, Victorian, ACT and NSW models, each of which represents the basic models in place in Australia.

8.2 South Australia

The South Australian FVCs deal with both criminal matters and applications for protection orders.⁷¹ Where both criminal and civil matters arise in a case, these are heard together. While the courts have specially assigned magistrates, there is no specialised training for judicial officers. The FVCs are monitored by a steering committee comprised of court staff, magistrates, prosecutors, policy officers, offender-treatment workers, and the Commissioner for Victims' Rights (South Australia). The South Australian model also provides support workers for victims, offenders and children; and can refer offenders to offender programs (known as Violence Intervention Programs).⁷²

8.3 Victoria

The Family Violence Court Division (FVCD) of the Magistrates' Court of Victoria 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. It can also sit as the Victims of Crime Assistance Tribunal to hear applications for statutory victims' compensation in family violence cases. The following features of the FVCD can be noted:

- It is expressly established by legislation.
- All judicial officers must be formally appointed to the court.
- The same judicial officer hears related cases, but each case is heard using the applicable standard of proof and procedure. Judicial officers report satisfaction with managing these processes.
- All selected judicial officers and staff receive specialised and ongoing training.
- In addition to specialised magistrates and police prosecutors, the court also has support workers for victims and offenders, family violence outreach support workers, legal aid and community lawyers for victims and defendants, and a specialised registrar.⁷³

The ALRC /NSWLRC Joint Report said that the Victorian model is the closest example of a 'one stop shop' model for victims of family violence in Australia.⁷⁴

8.4 ACT

A more recent development is the ACT's Family Violence Court, established in 2011, under Chapter 4B of the [Magistrates Court Act 1930](#). One effect of the legislation was to give statutory recognition to the Family Violence list already established within

the Magistrates Court. The relevant explanatory memorandum stated:

Legislating for a specialised FV Court acknowledges the specialisation and integration of the Family Violence Court and recognise[s] the complexities, vulnerabilities and special interest in protection of individual victims and the community as a whole. The proposal is consistent with the goals of the ACT Family Violence Intervention Program (FVIP), a coordinated ACT Government, criminal justice and community response to criminal family violence.⁷⁵

By s 291I, the purpose of the ACT Family Violence Court is to operate as a specialised court to deal with domestic violence offences, recognising that:

- (a) the nature of domestic violence and the particular needs involved in protecting victims is complex; and
- (b) great social harm results from domestic violence; and
- (c) domestic violence offences take place in the context of a special relationship between people.

By s 291J of the *Magistrates Court Act 1930*, where a Magistrate hears a domestic violence offence as defined in s291H,⁷⁶ the Magistrates Court is known as the "Family Violence Court" and the Magistrate may be referred to as the "Family Violence Court Magistrate".

The Court's jurisdiction is set out by s 291K, which provides that the Family Violence Court may exercise the jurisdiction of the Magistrates Court in relation to proceedings for: summary domestic violence offences involving adults; indictable domestic violence offences involving adults; bail proceedings involving adults charged

with a domestic violence offence; and breaches of sentences imposed by the Court on persons for domestic violence offences. This is therefore a court of criminal jurisdiction.

8.5 NSW Domestic Violence Intervention Court Model (DVICM)

The pilot of the DVICM was developed following a Carr Government election commitment in 2003 to run a trial of the model in two courts, one regional, and the other metropolitan. The courts selected were Wagga Wagga and Campbelltown. The DVICM was developed as an interagency model with an understanding between the:

- NSW Attorney General's Department (AGD),
- NSW Police Force,
- Department of Community Services (DoCS),
- Department of Corrective Services (DCS),
- Legal Aid Commission of NSW and the NSW Department of Housing.

The DVICM pilot was intended to run for two years at each site and was officially implemented in Campbelltown on 12 September 2005 and in Wagga Wagga on 10 October 2005.⁷⁷ According to the [ALRC/NSWLRC Joint Report](#):

The DVICM program focused on improved evidence collection by the police, automated referrals to victim services, and increased information sharing and co-ordination from key agencies through Regional Reference Groups and Senior Officers Groups. The Local Courts implemented a Practice Note requiring early disclosure of evidence. Stakeholder agencies met weekly to update matters before the court. Magistrates could, if deemed

appropriate as part of the sentence, place an offender on a perpetrator program run by the Probation and Parole Service in Wagga Wagga and Campbelltown.⁷⁸

Further details of the operation of the DVICM can be found in BOCSAR's 2008 paper, [An Evaluation of the NSW Domestic Violence Intervention Court Model](#); and in the NSW Government's [submission](#) to the current inquiry into domestic by the Legislative Council Standing Committee on Social Issues.

BOCSAR conducted a [follow-up study](#) in 2012.⁷⁹ The results were mixed, with the study finding that 'the DVICM was successful in achieving some but not all of its aims'. The [BOCSAR study](#) found that:

The DVICM increased the proportion of persons of interest charged in Macquarie Fields but not in Campbelltown or Wagga Wagga Local Area Commands. It reduced the time taken to finalise domestic violence matters in Campbelltown and Wagga Wagga Local Courts. The DVICM did not affect the proportion of matters finalised on a plea of guilty; the proportion of matters finalised on a dismissal; the proportion of penalties of bonds with supervision; nor the proportion of penalties of imprisonment.⁸⁰

9 Constitutional Issues

Constitutional issues would arise if NSW considered establishing FVCs that exercised a broader jurisdiction, similar to the international models.

The Australian Constitution provides the Commonwealth with the power to make laws with respect to:

- Marriage- s51 (xxi);
- Divorce and matrimonial causes and in relation there to, parental

rights and the custody and guardianship of infants-s51(xxii);

- Matters incidental to the execution of any power vested by the Constitution in the Parliament-s51 (xxxix).⁸¹

The Commonwealth's jurisdiction has been further expanded by the referral of powers from the States, in relation to ex-nuptial children and later the *Family Law Amendment (De facto Financial Matters and Other Measures) Act 2008* (Cth) allowing de facto couples to settle property, parenting and child support issues in any court with jurisdiction under the *Family Law Act 1975* (Cth). Previously de facto couples had to deal with children issues in a family court and property issues in a State court.

The effect of these constitutional arrangements is that the Commonwealth has jurisdiction over: marriage, divorce, parenting and family property upon separation. The States retain jurisdiction over adoption, child welfare and importantly criminal law.⁸²

The federal division of power between the Commonwealth, the States and Territories has led to a system that has been described as "fragmented" and where the boundaries between the courts are not always clear when family law and family violence issues interact.⁸³

The ALRC/NSWLRC Joint Report provided the following example:

One family in which there is serious, ongoing controlling violence may need to go to three different courts in order to deal with that violence. The family is likely to commence proceedings in a magistrates court for a protection order. The conduct that led to the need for protection may constitute a criminal offence;

and there may be a prosecution, often also in the magistrates court—but in more serious cases in the District (County) or Supreme Court. The violence may have alerted family, neighbours or the police to notify a child protection agency, which may commence care proceedings in a children's court. At the same time, one of the parents may wish to see the children and commence proceedings in a family court for parenting orders governing the children's living arrangements.⁸⁴

10 Potential Reform Options

With the above constitutional issues in mind, outlined below is a discussion of the options to achieve seamlessness in dealing with the wide range of issues involved in family violence.

10.1 Dual Judicial Appointments

One strategy to deal with the constitutional division of power is for judicial officers to hold simultaneous State and Federal judicial appointments. In 2009 the then Commonwealth Attorney General, Robert McClelland and the Victorian Attorney General, Rob Hulls issued a joint press release announcing their intention to make the first Federal-State judicial appointment. The former Attorney General of NSW, John Hatzistergos also indicated his intention to facilitate a similar appointment.⁸⁵ To date, no such appointment has been made. It is also the case that the constitutional validity of such dual appointments remains in doubt.⁸⁶

10.2 Expansion of the Commonwealth jurisdiction

The ALRC/NSWLRC Joint Report posed the option of expanding the jurisdiction of the family courts to include child protection responsibilities.⁸⁷ This option rests on the foundation that both systems have

the best interest of the child as their primary focus. Such an option would require the referral of powers from the States and the enactment of Commonwealth legislation pursuant to such a referral.⁸⁸

The ALRC/NSWLRC Joint Report stated:

The benefits of a consolidation of jurisdiction, depending on the extent of any referral of powers, may be that:

- Cases that involve both child protection issues and parenting issues could be dealt with in one court, perhaps accompanied by protection orders under federal law;
- For those families presenting in family courts, there would be greater seamlessness and accessibility—and safety.⁸⁹

The report went on to say:

Such a consolidation of jurisdiction would, however, have to meet a number of challenges, including that:

- family courts are federal and most services—including child protection and police—are at state level, with existing intersecting legislation and established processes between state law and state agencies;
- family courts would be making orders that affect the workload of state agencies—such as child protection agencies and the police;
- family courts and child protection agencies have different objectives and different focuses, and there may be a lack of trust;
- there would still be a gap in the system, requiring some

families to go to a family court for child protection and parenting issues and to magistrates courts for family violence protection orders and criminal prosecutions.⁹⁰

10.3 Expansion of State and Territory Jurisdiction

Conversely, it could be argued that the 'one court' be a State/Territory court. This suggestion would at first glance appear more logical given that States/Territories have jurisdiction in relation to family violence protection orders, crime and child protection.

The ALRC/NSWLRC Joint Report raised the issue of a gap being created:

If all family violence matters were to go to state courts, would the Australian Government then vacate the field of family law, leaving it to the states? It would hardly be sensible for family violence cases to be dealt with in a state court and family disputes not involving violence to be dealt with in a federal court. Such a move would create another gap in the system.⁹¹

This concern was premised on the assumption that there is a significant overlap between family violence and family law proceedings, which, in turn, raises the question of how many family law matters involve family violence. Professor Chisholm in the 2009 report ['Family Courts Violence Review'](#) stated:

It is difficult to assess the extent of family violence in a community generally, or, for example, in cases coming to the family courts. This is partly because of the difficulty in determining what happened in any particular case (family violence may often happen behind closed doors, and there may be little corroborative

evidence), and partly because of the wide range of behaviour that can be included as family violence: when one does find research evidence, different studies are often measuring different things.⁹²

Under section 60K of the *Family Law Act 1975* (Cth), a court must consider and take action on notices of or risk of abuse or family violence. Figure 3.39 of the [Family Court of Australia Annual Report 2010-2011](#) shows that the number of notices filed has declined in the past five years though the proportion of cases raising issues of abuse and family violence continued to rise until 2010–11 where they fell by two per cent.

Proportion of final order cases in which a notice of child abuse or risk of family violence was filed, 2006–07 to 2010–11:⁹³

Year	Proportion
2006/2007	7.7%
2007/2008	10.3%
2008/2009	11.5%
2009/2010	11.9%
2010/2011	10.3%

The overall trend suggests that no more than 12% of family law cases involve family violence. However, the 2009 report, [Evaluation of the 2006 Family Law Reforms](#) by the Australian Institute of Family Studies suggests a higher proportion of separating parents (72% of mothers and 63% of fathers) reported having experienced violence before separation. In fact, one in four mothers and approximately one in six fathers reported physical abuse.⁹⁴ A 2007 report by the Australian Institute of Family Studies, [Allegations of family violence and child abuse in family law children's proceedings: a pre-reform exploratory study](#), undertakes a detailed literature review of empirical studies of family violence in the context of divorce. Once again these studies report higher levels of violence

than recorded in the Family Court of Australia's Annual Report 2010-2011.

10.4 Making the existing court systems more effective

This option, which was favoured by the ALR/NSWLRC Joint Report, seeks to ensure that existing powers of State, Territory and Commonwealth courts are used to their maximum, so that users of the system:

[G]et all—or most—of the legal protections and services they need from the court they first approach, at least on an interim basis.⁹⁵

The Joint Report considered that State and Territory magistrates courts "[H]old the best promise of providing 'one court' in practice."⁹⁶ These courts already deal with protection orders, criminal matters and have limited jurisdiction under the *Family Law Act 1975* (Cth) ([s 69J](#)), including the power to make parenting orders ([s68R](#)) only by consent ([s 69N](#)).⁹⁷

The Joint Report suggested that specialist family violence divisions or lists should be established.⁹⁸ This would appear to be modelled on the Family Violence Court Division (FVCD) of the Magistrates Court of Victoria and to an extent on the South Australian FVC.

The Joint Report acknowledged that this option was not without legal and practical difficulties. Practical issues to be overcome included:

The width of matters that magistrates must deal with already is very extensive, and adding family law to their workload adds to an already considerable burden. The workload of magistrates courts is such that expanding the federal matters considered will not be manageable without increased resources and access to services. Increasing education, training and

specialisation within magistrates courts; Magistrates courts have the strongest geographical coverage of any court, but providing specialised services in rural and remote areas is a challenge.⁹⁹

The Joint Report made the following recommendations:

Recommendation 32–1

State and territory governments, in consultation with relevant stakeholders, should establish or further develop specialised family violence courts within existing courts in their jurisdictions.¹⁰⁰

Recommendation 32–2

State and territory governments should ensure that specialised family violence courts are able to exercise powers to determine: family violence protection matters; criminal matters related to family violence; and family law matters to the extent that family law jurisdiction is conferred on state and territory courts.¹⁰¹

Recommendation 32–3

State and territory governments should ensure that specialised family violence courts have, as a minimum:

- (a) specialised judicial officers and prosecutors;
- (b) regular training on family violence issues for judicial officers;
- (c) prosecutors, lawyers and registrars;
- (d) victim support, including legal and non-legal services; and
- (e) arrangements for victim safety.¹⁰²

Recommendation 32–4

State and territory governments should, where possible, promote the following measures in all courts dealing with family violence matters, including courts in regional and remote communities:

- (a) identifying and listing on the same day, protection order matters and criminal proceedings related to family violence, as well as related family law and child protection matters;
- (b) training judicial officers in relation to family violence;
- (c) providing legal services for victims and defendants;
- (d) providing victim support on family violence list days; and
- (e) ensuring that facilities and practices secure victim safety at court.¹⁰³

Recommendation 16 sets out how each State and Territory should alter their family violence legislation to ensure effective interaction with the *Family Law Act 1975 (Cth)*.¹⁰⁴

11 Conclusion

Several jurisdictions have recognised that family violence is an issue that needs to be addressed by the court system in a direct and particular way. Different models of specialised family violence courts have been established for this purpose, in Australia and internationally where stand-alone FVCs are in place. In many cases, these specialist courts have produced positive results, in terms of reduced offending rates and/or increased rates of conviction. In some cases, however, including the DVICM pilot in NSW, the results have been more mixed. Overall the research suggests that no one single solution is likely to answer all the difficult issues raised by family violence.

A second ALRC report was published in February 2012, [Family Violence and Commonwealth Laws—Improving Legal Frameworks](#).¹⁰⁵ This is the basis of the current proposal to expand the definition of domestic violence under Commonwealth law, to include emotional manipulation, withholding

money and harming the family pet.¹⁰⁶

This development begs the question of a national uniform definition of domestic violence.

¹ Rodwell L & Smith N, *An Evaluation of the NSW Domestic Violence Intervention Court Model*, NSW Bureau of Crime Statistics and Research, Sydney 2008.

² Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence- A National Legal Response*, Sydney, October 2010.

³ John Hatzistergos, NSW Attorney General, Media Release, 11 November 2010.

⁴ Kristina Keneally, Premier of NSW, News Release, 11 November 2010.

⁵ Telephone advice to the author from the Criminal Law Review Division, Department of Attorney General Justice, 11 April 2012.

⁶ Parliament of NSW, Legislative Council, Standing Committee on Social Issues, *Improving Compliance with Apprehended Domestic Violence Orders*.

⁷ Greg Smith, Attorney General, Minister for Justice of NSW, Media Release, 28 February 2012.

⁸ Access Economics Pty Ltd, "The Cost of Domestic Violence to the Australian Economy," Canberra, 2004. Commissioned by the Office for Women, Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA).

⁹ KPMG, "The Cost of Violence against Women and Their Children", March 2009. Commissioned by the National Council to Reduce Violence Against Women and Their Children, Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA).

¹⁰ Australian Bureau of Statistics, 4906.0-Personal Safety, Australia, 2005 (Reissue) Latest ISSUE Released at 11:30 AM (CANBERRA TIME) 21/08/2006 Reissue.

¹¹ Media release, Auditor-General's Report, *Responding to Domestic and Family Violence*, 8 November, 2011.

¹² Australian Bureau of Statistics, 4510.0-Recorded Crime-Victims, Australia, 2010. Released at 11:30 AM (Canberra Time) 23/06/2011.

¹³ Grech K & Burgess M, " Trends and Patterns in Domestic Violence Assaults: 2001 to 2010," *Issue Paper No. 61*, NSW Bureau of Crime Statistics and Research.

¹⁴ Note 13 at 3, 6 &7.

¹⁵ The Victorian Law Reform Commission *Review of Family Violence Laws Report* also shows a similar trend in Victoria, with

Indigenous people being eight times more likely to experience family violence than the non-Indigenous community: Victorian Indigenous Family Violence Task Force, *Final Report* (2003) 125 in Victorian Law Reform Commission, *Review of Family Violence Laws Report*, (Melbourne, December 2005) at 37.

¹⁶ Note 13 at 8.

¹⁷ Note 13 at 5.

¹⁸ Note 13 at 11.

¹⁹ Morgan A & Chadwick H, "Key Issues in Domestic Violence", *Research in Practice* no. 7, Australian Institute of Criminology, (Canberra, December 2009).

²⁰ Meyer S, "Responding to Intimate partner Violence Victimization: Effective Options for Help-Seeking," Australian Institute of Criminology, Canberra, March 2010.

²¹ Rottman D & Casey P, "Therapeutic Jurisprudence and the Emergence of Problem Solving Courts", (199) 240 *National Institute of Justice Journal* 12,13 in Blagg H "Problem-Oriented Courts" A Research paper prepared for the Law reform Commission of Western Australia, Project 96, March 2008 at 12.

²² Winick BJ & Wexler DB (eds) (1995), *Law in Therapeutic Key; Developments in Therapeutic Jurisprudence*, Academic Press (Durham, Carolina) in Blagg H "Problem-Oriented Courts" A Research paper prepared for the Law reform Commission of Western Australia, Project 96, March 2008 at 18.

²³ Payne J, "Specialty Courts: Current Issues and Future prospects," *Trends & issues in Crime and Criminal Justice* No 317 June 2006 at 1.

²⁴ Note 23 at 3.

²⁵ Berman G & Feinblatt J (2001) "Problem-Solving Courts: A Brief Primer" *Law and Policy* 23 (2): 125 -140.

²⁶ Freiberg A, "Innovations in the Court System" (Paper presented at the Australian Institute of Criminology Conference on crime in Australia: International Connections, Melbourne, 29-30 November 2004.) referenced in Blagg H, "Problem-Oriented Courts- A Research paper Prepared for the Law Reform Commission of Western Australia, project 96", Perth, March 2008.

²⁷ Note 24 at 3.

²⁸ Note 2 at 1489.

²⁹ Note 2 at 1490.

³⁰ Note 2 at 145.

³¹ Note 2 at 1490.

³² Note 2 at 144-145 and 1486.

³³ Note 2 at 145.

³⁴ Note 2 at 1487.

³⁵ Note 2 at 1486.

³⁶ Note 2 at 1486.

- 37 Note 2 at 1487.
- 38 Note 2 at 144.
- 39 Note 2 at 144 at 1487.
- 40 Note 2 at 1487.
- 41 Note 2 at 1487.
- 42 Note 2 at 1487.
- 43 Justice Michael Moore, "The Role of Specialists Courts- An Australian Perspective", [2000/2001] *LAWASIA Journal*, 139-154.
- 44 [2010] HCA 1 (3 February 2010).
- 45 Industrial Relations Commission > http://www.lawlink.nsw.gov.au/lawlink/irc/ll_irc.nsf/pages/IRC_about_us_ircpurpose> Accessed 16 May 2012.
- 46 *Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v Work Cover Authority of New South Wales (Inspector Childs)* [2010] HCA 1 (3 February 2010) at 122.
- 47 Note 2 at 1491.
- 48 Note 2 at 1491.
- 49 Note 2 at 1491 and 1492.
- 50 Ursel & Gorkoff (2001) at 81 cited in A Cossins 'Alternative Models for Prosecuting Child Sex Offences in Australia', *Report of the National Child Sexual Assault Reform Committee*, Sydney 2010.
- 51 A Cossins (2010) 'Alternative Models for Prosecuting Child Sex Offences in Australia' *Report of the National Child Sexual Assault Reform Committee* at 292.
- 52 63% of offenders convicted of child sexual assault in Winnipeg received a sentence compared to 54% of offenders nationwide. In Winnipeg - 37% of those sentenced received two years or more, compared to 6% nationwide. Figure quoted in EJ Ursel, "The Possibilities of Criminal Justice Intervention in Domestic Violence: A Canadian Case Study" (1997) Vol 8 *Current Issues in Criminal Justice* at 266 at 301.
- 53 "Responding to Sexual Assault: The Way Forward" (2006), NSW Criminal Justice Sexual Offence Taskforce, at 157
- 54 Ursel, EJ, "The Possibilities of Criminal Justice Intervention in Domestic Violence: A Canadian Case Study", (1997) Vol 8 *Current Issues in Criminal Justice* at 301
- 55 The FTSs seek to 'cluster' domestic violence cases in order to increase the effectiveness of existing court systems. Cook D, Burton M & Robinson A (2006), "[Enhancing Safety and Justice: the Role of Specialist Domestic Violence Courts in England and Wales.](#)" *British Society of Criminology*: 7 (008).
- 56 Matczak A, Hatzidimitriadou E, Lindsay J (2011), "Review of Domestic Violence policies in England and Wales". London: Kingston University and St George's University of London at 16.
- 57 Note 56 at 16.
- 58 Cook D, Burton M & Robinson A & Valley C (2004), "[Evaluation of Specialist Domestic Violence Courts/Fast track Systems.](#)" in Note 56 at 16.
- 59 Note 56 at 15.
- 60 Note 56 at 15.
- 61 Note 55 at 22
- 62 Note 55 at 26.
- 63 Home Office, United Kingdom, [Action Plan](#).
- 64 Ministry of Justice, Research Report, "The Waitakere and Manukau Family Violence Courts: An Evaluation Summary," August 2008.
- 65 Note 64 at 7.
- 66 Note 64 at 37.
- 67 Note 64 at 36 and 41.
- 68 New Zealand Herald News "Specialist Family Violence Courts Fail", Simon Collins, 13 August 2008.
- 69 Note 2 at 1496-1501.
- 70 Note 2 at 1496.
- 71 Note 2 at 1494.
- 72 Note 2 at 1498-1499
- 73 Note 2 at 1498-1499
- 74 Note 2 at 1499.
- 75 , *Courts Legislation Amendment Bill 2010*, presented by Simon Corbell MLA, Attorney General, the Legislative Assembly For The Australian Capital Territory, 9 December 2010
- 76 For an offence to fall within the jurisdiction of the Family Violence Court the offence has to satisfy certain provisions of the [Domestic Violence and Protection Orders Act 2008](#) (DVPO Act); and an offence is a domestic violence offence if it falls within ([s 90](#)) or [schedule 1](#) of the DVPO Act and satisfies the definition of the term in [S 13 \(1\)](#). Further, in order for the Family Violence Court to be able to exercise its jurisdiction, the victim must meet the definition in ([s 15](#)) of the DVPO Act.
- 77 Note 1 at 2.
- 78 Note 2 at 1497. A copy of the Local Court Practice Note is provided in Appendix A of Note 1. Practice directions mandating strict time limits have been issued in other local courts. See also the NSW Auditor-General's November 2011 performance audit report, [Responding to Domestic and Family Violence](#), p 26.
- 79 Birdsey E & Smith N, "The Domestic Violence Intervention Court Model: A Follow-Up Study", BOSCAR, Sydney 2012.
- 80 Note 79 at 1.
- 81 Note 2 at 125.
- 82 Note 2 at 127. Western Australia is the only State to have a family court exercising both

Commonwealth and State Jurisdiction. The reason for doing so is explained in the Second Reading Speech to the *Family Court Act 1975 (WA)* referenced in Note 2 at 127.

⁸³ Note 2 at 136.

⁸⁴ Note 2 at 139.

⁸⁵ Note 2 at 131.

⁸⁶ Note 2 at 131.

⁸⁷ Note 2 at 146.

⁸⁸ Note 2 at 146.

⁸⁹ Note 2 at 147.

⁹⁰ Note 2 at 147.

⁹¹ Note 2 at 145.

⁹² Chisholm R, '*Family Court Violence Review*', 27 November 2009 at 41.

⁹³ Family Court of Australia, *Annual Report 2010-2011*, Canberra Australia at 80.

⁹⁴ Kaspiew R, Gray M, Weston R, Moloney L, Hand K, Qu L and the Family Law Evaluation Team, "Evaluation of the 2006 Family Law Reforms", Australian Institute of Family Studies, Canberra, December 2009 at 26.

⁹⁵ Note 2 at 148.

⁹⁶ Note 2 at 148.

⁹⁷ Note 2 at 148.

⁹⁸ Note 2 at 149.

⁹⁹ Note 2 at 149.

¹⁰⁰ Note 2 at 1505.

¹⁰¹ Note 2 at 1505.

¹⁰² Note 2 at 1511.

¹⁰³ Note 2 at 1514

¹⁰⁴ **Recommendation 16** also recommended the *Family Law Act 1975 (Cth)* be amended to avoid inconsistencies with State and Territory family violence legislation. Further, **Recommendation 18** outlined amendments to State and Territory protection orders and family violence legislation to prohibit a respondent in protection order proceedings from personally cross-examining any person against whom the respondent is alleged to have used family violence.

¹⁰⁵ ALRC, *Family Violence and Commonwealth Laws-Improving Legal Frameworks*, Final Report (Sydney, November 2011).

¹⁰⁶ S Peatling, "Net widens on family violence", *The Sun-Herald*, 3 June 2012, p 7.

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