Intersection of legal systems

The most common legislative mechanism used to address domestic and family violence at state and territory level is the protection order (referred to as a 'family violence order' under the *Family Law Act 1975* (Cth)) – a civil law response to a victim's immediate concerns of safety (and in some jurisdictions, police are also empowered to initiate proceedings [Croucher 2014]).

Where domestic and family violence occurs in the context of families with children, and parents separate, parties may also apply to a court exercising jurisdiction under the *Family Law Act 1975* (Cth) (primarily, the Federal Circuit Court of Australia, Family Court of Australia or Family Court of Western Australia) for parenting orders (under Part VII of the *Family Law Act 1975* (Cth) (*FLA*) and Part 5 of the *Family Court Act 1997* (WA) (*FCA*) – here called a 'Family Court'). Proceedings for a parenting order can also be instituted in a state or territory court of summary jurisdiction subject to the limitations set out in Section 69N *FLA* and Section 43 *FCA*.

In all parenting proceedings the child's best interests are the paramount consideration (Section 60CA *FLA*; Section 66A *FCA*). In any determination of what is in a child's best interests a Family Court must give greater weight to ensuring that the child lives in an environment where they are safe from violence or abuse than any benefit to the child of having a meaningful relationship with both parents (Section 60CC(2A) *FLA*; Section 66C(3A) *FCA*).

When allegations of child abuse or family violence are raised each party has an obligation to file and serve a Notice of Risk (Federal Circuit Court of Australia) or Notice of Child Abuse, Family Violence or Risk of Family Violence (Family Court of Australia and Family Court of Western Australia) (see Sections 67Z and 67ZBA *FLA* and Sections 159 and 162A *FCA*).

When an allegation of family violence or abuse is raised, a Family Court is required to take prompt action (Section 67ZBB *FLA* and Section 162B *FCA*). Such prompt action includes considering what interim or procedural orders (if any) should be made to enable appropriate evidence about the allegation to be obtained as expeditiously as possible and so as to protect the child or any of the parties to the proceedings. Prompt action also includes making such orders as the court considers appropriate (such as orders or injunctions for personal protection of the child or any other person) and dealing with the issues raised by the allegations as expeditiously as possible.

A Family Court has the power to gather evidence directly through:

- Obtaining material from a child welfare authority, police or other prescribed government agency by order (Section 69ZW *FLA*; Section 202K *FCA*);

- Requesting information as a “Prescribed Body” under state and territory child welfare laws;
- Requesting material from other courts and tribunals, subject to any legislative limitations on such requests. This may be of particular assistance when seeking to obtain transcripts of evidence given in other courts or tribunals so that it may be received into evidence in child-related proceedings (Section 69ZX *FLA*; Section 202L *FCA*);
- Ordering parties to attend one or more appointments with a Family Consultant who then prepares and provides a report to the Court (Sections 11F and 62G *FLA*; Sections 65 and 73 *FCA*);
- Appointing an Independent Children’s Lawyer (Section 68L *FLA*; Section 164 *FCA*);
- Requiring that a party or Independent Children’s Lawyer file and serve a subpoena.

When making a parenting order, a Family Court must apply a presumption that it is in the best interests of the child for the child’s parents to have equal shared parental responsibility (Section 61DA(1) *FLA*; Section 70A(1) *FCA*). However, the presumption does not apply where there are reasonable grounds to believe that a parent or person living with a parent has engaged in child abuse or family violence and the presumption may be rebutted by evidence which demonstrates that the application of the presumption is contrary to the child’s best interests.

Parties are required to ensure that a copy of any existing protection order is filed with a Family Court when making an application for parenting orders (Section 60CF *FLA*; s.66F *FCA*) (see also 10.5 Information sharing) and if a protection order is in force the court must consider any relevant inferences that can be drawn from the protection order by taking into account the nature of the order, the circumstances in which the order was made, any evidence admitted in proceedings for the order, any findings made in the protection order proceedings and any other relevant matter (Section 60CC(3)(k) *FLA*; Section 66C(3)(k) *FCA*). Where, however, a party withdraws their protection order application on the basis of undertakings given by the other party to the court; where a protection order is made by consent without admission; and where the responding party makes a cross application resulting in mutual orders [ALRC & NSWLRC 2010], there may be no admission of fact capable of being relied upon by a Family Court in making a determination regarding the perpetration of domestic and family violence.

In considering a parenting order, a Family Court must, to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration, ensure that the order is consistent with any protection order and does not expose any person to an unacceptable risk of domestic and family violence (Section 60CG *FLA*; Section 66G *FCA*). While a Family Court has no jurisdiction to vary a protection order, it is permitted by Section 68P *FCA* and Section 174 *FCA* to make a parenting order (or make a recovery order or grant an injunction) that is inconsistent with the protection order, however the court must ensure the parties fully understand the nature and effect of the parenting order. This may occur in cases where information or evidence comes before a Family Court that was not available to the court of summary jurisdiction that made the protection order. In circumstances of ongoing violence, where a protected person is having difficulty with enforcement of a protection order as a result of the operation of a parenting order made by a Family Court, the protected person may need to return to the court of summary jurisdiction and make application under Section 68R *FLA* or Section 176 *FCA* to ensure the consistency and enforceability of orders.

In making or varying a protection order, a court of summary jurisdiction is empowered to resolve any inconsistencies with an existing parenting order (Section 68R *FLA*; Section 176 *FCA*). There is, however, an inherent tension between the focus of protection orders and parenting orders: on the one hand, the protection order may direct one parent to keep away from the other parent and their children; on the other hand, the parenting order is focused on the time (with possible conditions including supervision) that children are to spend with their parents and with whom the children shall live.

Intervention by a child protection authority may present additional challenges: a parent experiencing domestic and family violence by the other parent is expected to be protective of their children, or risk having them removed by the relevant child protection authority. When a protection order is in force it is possible that a Family Court determining a subsequent application for a parenting order may make an order that permits the respondent in the protection order application proceedings to spend time with the children, or requires the parent protected by the protection order to continue to have contact with the respondent (for example, at changeover times [Croucher 2014]). Such determinations would be made by reference to the evidence in the particular case and an assessment of risk. For example, a Family Court may consider it necessary for changeovers to occur at a neutral venue and/or to be arranged in a way where the parties are not required to come into contact with one another.

When a child is subject to a state or territory child welfare order a Family Court cannot make a parenting order with respect to that child unless the order is expressed to come into effect at the expiration of the child welfare order or with the consent of the relevant child protection authority (Section 69ZK *FLA*; Section 202 *FCA*). The 2010 joint Australian Law Reform Commission and New South Wales Law Reform Commission Report [ALRC & NSWLRC 2010], *Family Violence—A National Legal Response* noted that "…each state and territory has its own system of child protection laws and supporting agencies. These laws are invoked when parents are determined to be insufficiently protective of a child. In each jurisdiction there are thresholds for intervention by child protection authorities to protect children and to assist parents and families."

As these thresholds vary considerably between jurisdictions, a Family Court considering a parenting order application may experience some difficulty in deciding the relevance of and weight to be given to information provided by a child protection authority. Child protection cases may potentially present themselves in multiple jurisdictions: a state or territory children's court for care proceedings; a state or territory criminal court if the violence or abuse is subject to criminal charges; a state or territory magistrates' court for a protection order application; and a Family Court for parenting orders. The need to go to multiple courts increases the possibility of inconsistent orders, and the possibility that parties will drop out of the system without the protections they need, thus putting them at risk of further violence abuse [ALRC & NSWLRC 2010].

The families most likely to be involved with more than one of these jurisdictions are those with support needs associated with domestic and family violence at a time of high risk and vulnerability. For example, a party may be an applicant for a protection order, a prosecution witness for assault charges where they are the victim, a respondent in a child protection application, and simultaneously experiencing related legal issues concerning parenting issues and housing and debt [Family Law Council 2015]. While the expectation of the courts is that in matters relating to domestic and family violence and child abuse the legal responses should be as seamless as possible, the fragmentation of legal systems and differing requirements and processes in each may be confusing to affected parties, in particular those who are self-represented, and may result in delays in the finalisation of cases [Croucher 2014].