

# New 'Family' Business Proposed for the Courts

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In August 1995, the former Commonwealth Attorney-General arranged for the Human Rights and Equal Opportunity Commission (HREOC) and the Australian Law Reform Commission (ALRC) jointly to conduct a wide-ranging inquiry into children and the legal process. An issues paper seeking responses was produced in March 1996 and the Commissions have now released a draft recommendations paper: *A Matter of Priority: Children and the Legal Process* (HREOC/ALRC 1997). It provides a further basis for consultation before a final report is provided to the Attorney in September this year.

The Inquiry has covered a wide range of subjects and systems concerning children, such as education, consumer affairs, juvenile justice, and family law proceedings. What follows is a brief discussion of proposals which would bring more care and protection matters for decision by the Family Court and more Family Law Act matters into State and Territory children's courts.

## Current arrangements

Under current arrangements, each State and Territory has its own legislation and systems for dealing with care and protection matters. Each has a children's court which may or may not have specialist magistrates hearing cases, and there are differences in the frequency with which children are legally represented and whether such representation is on the child's instructions or on the basis of what is thought to be in the child's best interests. If a children's court decision is appealed, it is heard in a higher court of the State or Territory. These are generalist courts rather than a specialist court such as the Family Court of Australia.

Abuse allegations also arise in the course of private disputes over children under the Family Law Act. In such cases, notifications are made to the relevant State or Territory authority which, if it issues

proceedings, brings the care and protection matter to the Children's Court. Alternatively, the authority may intervene or otherwise participate in or provide information to the Family Court proceedings. Where a legal representative is appointed for the child, his or her core responsibility is to represent the best interests of the child.

The Commissions identify many unsatisfactory features to the existing fragmented arrangements, which are derived more from the history and politics of a federal system of government than child-centred design (HREOC/ALRC 44-45). In the recent landmark decision of *B and B: Family Law Reform Act 1995* (not yet reported, judgment delivered on 9 July 1997, at para 3.27— see also Harrison in these columns), the Full Court of the Family Court drew the following comparison between the English and Australian structures:

'[England's] unification of the two areas of private and public law appears to provide a coherent and systematic view of child-related law which is absent in this country despite the advantages which would be likely to be provided by cross-vesting and/or the reference of powers [over care and

protection matters to the Commonwealth]. The fusion of both systems would minimise risks to children and avoid the dangers of overlapping or lacunae in legislation and services. The absence of possibly competing and inconsistent State and Federal laws offers many advantages: see the discussion of this by the Full Court in *Re Z* (1996) FLC 92-694.'

While noting that a wholesale transfer of decision-making responsibility about care and protection matters to the Family Court was a frequent suggestion to the Inquiry, the report proceeds on the pragmatic basis that such a step 'is unlikely to attract the necessary political support of all jurisdictions' (HREOC/ALRC 46).

## The Commissions' proposals

The Commissions have recommended that responsibility for hearing care and protection cases should remain a responsibility of State and Territory Children's Courts, but that a specialist magistracy should be 'cultivated'. Such a magistracy would, in the long term, handle all children's matters including juvenile justice cases and certain Family Law Act cases.

In a context where the Commonwealth Attorney-General is considering the estab-

## Counselling and Mediation Fees



The Federal Government has changed the Family Law Regulations and now requires fees to be paid for voluntary counselling and mediation services provided by the Family Court. These new fees are effective from 1 July 1997.

Payment can be made on the day of the appointment if held at the Court, or five days beforehand if attending an outreach centre or taking part in a telephone conference.

The fees do not apply to information sessions, group sessions, emergency telephone counselling or intake sessions. Interpreters, support persons or extended family members not directly involved in the dispute are exempt from the fees.

You may apply to the Family Court not to pay the fee if payment would cause financial hardship or if you hold a pension card, health card or receive any other Commonwealth benefit. If you think you may qualify for non-payment ask registry staff for the application form.

**New fees effective from 1 JULY 1997**

Counselling \$30 a session, for each adult. Mediation \$50 a session, for each adult.

lishment of a federal magistracy, the Commissions have also recommended that the Family Court should have a specialist magistracy of its own (rather than a generalist one which also spans other federal courts like the Industrial Relations Court and the Federal Court of Australia). This support for specialisation is very much in keeping with the reason for the Inquiry as well as suggestions made by the Chief Justice of the Family Court and the Family Law Council which advises the Attorney.

In respect of arrangements for hearing cases when they are first brought, the preferred option in the report is to build on existing legal models which allow one court to deal with all connected matters once a case is properly before it. These arrangements are termed 'cross-vesting schemes' and are presently confined to the transfer of matters between superior courts (such as the Supreme Courts, the Family Court, and the Federal Court). The nub of Draft Recommendation 6.1 is that:

'A cross-vesting scheme should be established between the relevant State and Territory children's courts and the Family Court in relation to the exercise of State and Territory care and protection and related federal family law matters . . . The first court to receive a matter involving issues relevant to the other jurisdiction should be able to deal with the whole range of matters. Only where considerations of justice so require or where proceedings are considered to have been instituted in the court as a result of inappropriate choice of forum or forum shopping should the proceedings be transferred to the other court. In considering a transfer, the court should prefer the court which will allow the most effective and expeditious, and least expensive, resolution of the matter.' (HREOC/ALRC 47)

### Evaluating the proposals

The attractiveness of the proposals has to be assessed against the report's support for the development of a specialist magistracy to hear children's matters. Under the suggested cross-vesting scheme, the present requirement that parties consent to having matters heard by a State or Territory magistrate rather than the Family Court would be removed. Thus, the Family Court would decide more care and

protection decisions and there would also be an increase in Family Law Act matters heard by magistrates sitting as a children's court.

Two particular matters will need to be elaborated by the Commissions. First, it is not entirely clear from the report whether it is envisaged that a specialist magistracy would have to be identified or developed before the cross-vesting scheme commences. To so require would be consistent with the Commissions' preference for greater specialisation in children's matters and may necessitate the staggered conferral of federal jurisdiction on children's courts. Another issue of uncertainty is what constitutes 'a related federal family law matter' when proceedings are commenced in a children's court. A choice will be necessary between specifying what such matters are or leaving it to determination by individual courts.

The changes in the amount and type of workload resulting from the proposal have significant implications for funding, training, case management processes and linkages between children's courts and the Family Court. Particularly for children's courts, the Commissions appreciate that ready access would be needed to the conciliation services which the Family Court has found to be so important in diverting disputes from trial. As noted in the report, budgetary constraints already limit the availability of Family Court counselling services, particularly in rural areas.

The proposed arrangements will also have implications for lawyers who have been required to use differing models of representation depending on whether they were appearing in the Family Court (best interests representation) or children's courts where there is a presumption that lawyers will represent children and young people based on the instructions received from the child (for example, Victoria). If family law and care and protection matters are heard together, it would be confusing to say the least to a child or young person for the same lawyer to shift models or for different lawyers to deal with different aspects of the blended case.

The Commissions have made inroads on this problem by recommending a common standard for the representation of children and young people in all family law and care and protection matters. Draft Recommendation 7.4 includes the following:

'In all cases where a representative is appointed and the child is able and willing to express views or provide instructions, the representative should allow the child to direct the representation as an adult client would. The criterion to be applied in determining the basis of representation is the child's willingness and ability to participate rather than any assessment of the 'good judgment' or level of maturity of the child . . . Where a representative considers he or she is unable to proceed on the direct instructions model as directed by the court or, contrary to court order for the best interests model, where the child has indicated a desire to directly instruct, the representative should approach the court for direction.' (HREOC/ALRC 56)

In Family Court cases where a child or young person is unwilling or unable to instruct a representative, the Commissions propose that a Family Court Counsellor would undertake a more detailed inquiry of 'best interests'. Comparable social science resources are recommended for attachment to children's courts and would be expected to carry out these functions too.

The final point of note concerns appeals from magistrates' decisions in care and protection matters. The Commissions have proposed that these should be heard by a single Judge of the Family Court of Australia. Where cases have been originally heard by a single Judge, such matters would go on appeal to the Full Court of the Family Court.

If implemented, this structure will result in a welcome enhancement of national consistency and the jurisprudence to guide initial decision-makers. The change would also go a long way to remedying the scant body of reported caselaw on protection matters – a deficit that operates to the detriment of children, young people and their families.

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Requests for copies of *A Matter of Priority: Children and the Legal System*, and responses to it, should be directed to The Secretary, Australian Law Reform Commission, GPO Box 3708 Sydney NSW 2001. Phone (02) 9284 6333; Fax (02) 9284 6363. TTY (02) 9284 6379; Fax: (02) 9284 6363.