

On 27 October 2002, the Attorney-General, The Hon Daryl Williams MP, launched the Family Law Council's Report, *Family Law and Child Protection*.

This summary sets out the background and main recommendations raised in that report.

Family law and child protection



The ability of the Family Court of Australia and the Federal Magistrates Service to properly assess child abuse allegations is a matter of great public concern. Wrong decisions in this area can have tragic long-term consequences for children and families.

– *Family Law and Child Protection* (2000: 9)

During the past year the issue of child protection has rarely been out of the media. There have been inquiries in New South Wales and South Australia, and calls for initiatives such as a National Summit concerning child abuse, a Royal Commission into child abuse, and the appointment of a National Commissioner for Children modelled on the Commissioners for Children operating in some states of Australia. All of this has meant the role of states, territories, and the Commonwealth in child protection matters have been subject to a great deal of scrutiny.

The Attorney-General requested the Family Law Council, as part of its statutory advisory function, to consider options for reform relating to the efficient and effective integrated delivery of child and family law services in relation to the care and protection of children.¹

The Family Law Council's final report, *Family Law and Child Protection* (2002), is the culmination of several years' work which saw the release of two discussion papers which lay the groundwork for the analysis in the final report. The first of these was *Principles and Minimum Standards*, in 1998. The second was *The Best Interests of the Child? The Interaction of Public and Private Law in Australia*, in 2000.

The second discussion paper focused on the interaction of Commonwealth family law with state and territory child and family legislation. Under the Constitution, the Commonwealth does not have power to make laws relating to child welfare *per se*. Rather, the Commonwealth has constitutional powers to legislate with respect to marriage, divorce and matrimonial causes. These powers have been exercised in the form of the Family Law Act 1975 and the Federal Magistrates Act 1999.² Hence, to be a valid exercise of power, the Commonwealth must deal with child protection issues only insofar as they arise *incidentally* to the exercise of its powers.

In drafting the final report, the Council was sensitive to the fact that each state and territory has child welfare laws on its statute book and a distinct, professionally staffed child welfare service to implement the laws and policies designed to protect children (such as, for example, the New South Wales Children and Young Persons (Care and Protection) Act 1998).

The report presents many of the difficulties resulting from the lack of a national framework in child and family services generally. It focuses on areas of family violence and child protection, where jurisdictional overlaps frequently occur, such that legal action is taken on the same matter in both the state and federal spheres. It attributes the difficulties largely to the constitutional division of legislative and other responsibility for children between the Commonwealth and the states and territories.

The report, which aims to address the problems identified in the second discussion paper, draws on the submissions received in response to the series of questions posed in that discussion paper. It takes a particular interest in remedying the egregious cases of "jurisdictional overlap", where in some cases inconsistent orders have been made by different courts.

The report also examines cases where neither system acts to protect the child. This occurs usually when the states and territories do not get involved because it

is a family law matter, while parents, left to take action for themselves in the family law system, are unable to navigate the system to get the help they need – either to prove the child abuse case, or to defend themselves against the allegations.

The report's recommendations are based on analyses set out in chapters canvassing complex issues and drawing on several case studies. The chapters are: Federal involvement in child protection; Responses of child protection authorities to abuse notifications in family law cases; When neither federal nor state systems protect children; Proposal for federal child protection service; Improving coordination between state and federal jurisdictions; and Confidentiality of disclosures of child abuse.

Recommendations

The report contains 17 recommendations, which fall under the following four broad headings: federal child protection service; "one court principle"; admissibility of evidence; and high-level implementation committee.

Federal child protection service

The first and most numerous set of recommendations concerns the proposal to establish a Federal Child Protection Service.

This would provide the Family Court and the Federal Magistrate Service with the capacity to initiate early and comprehensive child abuse risk assessments. The report suggests that the current inability to initiate such assessments places children at risk and also hinders efforts to resolve disputes where child abuse allegations have been made. It describes situations where wrong decisions in this area have had tragic long-term consequences for children and families.

To appreciate the need for a Federal Child Protection Service it is necessary to understand the proper statutory scope and powers of state and territory child protection authorities. They do not have a general investigatory role. Generally speaking, they are directed to intervene when children are not being *currently* properly cared for by their parents, or are not *currently* safe in the family home.³

The report notes that, once a state or territory child protection agency is notified about a child protection matter, the agency makes an assessment to determine whether an investigation is required under the relevant legislation. Generally speaking, four factors are taken into account. These are: the seriousness of the reported concern; the level of information to justify the concern; whether the child is currently at risk of abuse; and competing demands upon scarce resources.

The threshold for taking action is therefore different from that which may arise as part of family law proceedings. Thus state and territory child protection authorities may properly take no action – indeed, they may be *bound* to take no action by the laws they operate under – where there is no indication that a child is not currently or at risk, or where it appears court orders made under the Family Law Act could make the child safe.

The report concludes that for legal reasons, as well as in some instances resource constraints, state and territory child protection authorities may assess as many as half of all reports as not requiring further investigation. Therefore

the stark reality is that there is a category of cases arising in family law proceedings where no investigations of child abuse allegations will occur. The Federal Child Protection Service was designed to deal with this gap in child protection services.

In the absence of such a service the allegations are left to be dealt with by the parents as best they can. Council considers that it is unsatisfactory to leave such crucial matters to the vagaries of parental willingness, and their capacity to deal with such allegations, in what is often an emotionally debilitating period.

Regarding the operation of the service, the report (p.11) gives the following description of the proposed Federal Child Protection Service:

“The Council recommends that to meet this serious problem and gap in services, the Federal Government should establish its own Child Protection Service to investigate child abuse concerns arising in family law proceedings. This service would need to be organisationally separate from the Family Court of Australia or the Federal Magistrates Service, although it could be co-located with the courts or with another agency. It would only investigate matters on referral from the Court, and only then where two conditions were fulfilled: first, where the child abuse allegation is likely to be a major disputed issue in any subsequent proceedings; second, where there is a need for the investigation of allegations of child abuse because evidence is not likely to be presented to the Court through other means.”

Other recommendations relate to improving the interaction between the Commonwealth family law system and the state and territory child protection agencies and state and territory courts.

The one court principle

The second major set of recommendations seeks to ensure that a decision should be taken as early as possible as to whether a matter should proceed under the Family Law Act or under state and territory child welfare law, and that one court should have the jurisdiction to deal with the matter. This is referred to as the “one court principle”.

The report (p. 14) outlines the principle in these terms: “The One Court Principle requires that at the earliest possible point in managing a case, the decision should be taken whether a matter proceeds under state or territory child welfare law or under the Family Law Act. Once that decision has been taken, in all but the most exceptional circumstances, the matter should proceed in the chosen court system and if, for example, a child protection authority is dissatisfied with the outcome of proceedings under the Family Law Act it should address those concerns by way of appeal rather than commencing new proceedings in a different jurisdiction.”

These recommendations are designed to avoid situations where both the federal and state systems attempt to deal with child protection issues, or where neither system assumes responsibility for a child protection issue.

The report also notes that there is currently effectively no reporting of decisions made in state and territory Children's and Youth Courts. The Family Law Council recommends that Children's and Youth Courts be encouraged

to collaboratively develop and implement short-form reports of their decisions.

There are also other specific recommendations seeking to enhance information sharing between agencies concerned with child protection.

Admissibility of evidence

The third major set of recommendations seeks to ensure that judges should be allowed to hear evidence which is vital to the protection of children but which arises from disclosures in the course of confidential counselling and mediation, or attendance at post-separation parenting programs.

Currently sections 19N, 62F, and section 70NI of the Family Law Act 1975 provide for the absolute inadmissibility of evidence in any court of anything said in family and child counselling or mediation, or during attendance at a post-separation parenting program.

The report (p.14) concludes that: "The blanket exclusionary rule can cause serious difficulties in a small number of cases where the only evidence capable of proving abuse is that which emerges from a mediation session or some other forum covered by the exclusion provisions. It recommends therefore the most limited exception possible to the exclusionary rule – one which allows evidence to be adduced of admissions of serious abuse or disclosures of serious abuse (or in each case the risk thereof), unless other sufficient evidence is available to the Court in relation to such an admission or disclosure."

High-level implementation committee

The fourth key recommendation is to establish a high-level committee to implement the report's recommendations, and review areas that the report identifies as requiring a degree of political commitment and involvement in order for progress to be made.

Producing better outcomes for families

Stressing the need for reform, the report (p.15) states that:

"There is no greater problem in family law today than the problems of adequately addressing child protection concerns in proceedings under the Family Law Act. Council's research and consultations on this issue indicate that the problems in the present system are very serious indeed. Reform is urgently needed, and will require a commitment from governments, at both state and federal levels, to deal with the systemic problems which arise, in no small measure, from the allocation of responsibility between state and territory authorities, and the federal government, under the constitutional arrangements existing in Australia.

"Child protection is a fundamental responsibility of government. As this report demonstrates, it is not only a responsibility of the governments of the states and territories. Through the Family Law Act, the federal government has a major responsibility for child protection. It requires the co-operation of the states and territories also, in meeting that obligation and ensuring that no children are endangered because of preventable harm arising from system failure."

The Council's report is an important and timely contribution to the debate about how to produce better outcomes for families involved in proceedings concerning the children at both the federal and state or territory levels.

As earlier noted, the report was not designed to address the full spectrum of child protection issues. The terms of reference set clear boundaries to its consideration of material and hence the framing of reform options. In short, the report's recommendations recognise that there must be an appropriate link between the Commonwealth's core functions under the Constitution in this area – sanctioning marriage and effecting divorce – and the need to deal with child protection issues that arise in the course of discharging these functions. The Family Law Council's recommendations are framed with an eye to what is, from the Commonwealth's perspective, constitutionally valid and operationally feasible.

The Family Law Amendment Bill 2003 contains measures to substantially implement the recommendations (16 and 17) of the report. These deal with the admissibility as evidence of disclosures relating to child abuse by children or admissions by adults in privileged counselling or mediation. That Bill was introduced in February 2003 and is expected to be debated in the current sitting.

The Attorney-General is currently considering the report's other recommendations.

Endnotes

- 1 The Family Law Act 1975, section 115, establishes the Family Law Council, and sets out its composition functions and operational aspects: see www.law.gov.au/flc
- 2 The position of Western Australia is different, having enacted its own family law legislation and creating the Family Court of Western Australia.
- 3 *The Best Interests of the Child? The Interaction of Public and Private Law in Australia*, Family Law Council (2000). Appendix B provides a matrix summarising state and territory child protection legislation (as at 1 September 2000).
- 4 Kelly, F. and Fehlberg, B. (2002), "Australia's fragmented family law system: Jurisdictional overlaps in the area of child protection", *International Journal of Law, Policy and the Family*, vol. 16, no. 1, April, pp. 38-70
- 5 See, for example, "Family law and parent-child contact: Assessing the risk of sexual abuse" (1999), *Melbourne University Law Review*, vol. 33, pp. 45-371.
- 6 Family Law Pathways Advisory Group (2001), *Out of the Maze: Pathways to the Future for Families Experiencing Separation*, Commonwealth of Australia, Canberra.
- 7 For an evaluation of the pilot project see <http://www.familycourt.gov.au/papers/html/magellan.html>. Note also the Family Court of Western Australia's similar project – the Columbus project.

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Family Law and Child Protection, published by the Family Law Council (October 2002), is available on the Council's website at www.law.gov.au/flc/