

## Child protection and family law... Joining the dots

Daryl Higgins & Rae Kaspiew

In this paper, we look at the specific issues facing those responsible for ensuring the safety and wellbeing of children in the context of parental separation, and the two separate legal systems: family law and child protection. There is a range of ways in which state-based child protection systems intersect with the federal family law system, with some gaps and some areas of overlap. Recent research—as well as reports from national inquiries—highlights the lack of clarity regarding responsibilities and how families and professionals navigate within and between the systems.

### 1. Introduction

Concerns about child abuse and neglect in the context of separated families highlight the intersection between two different legal systems in Australia. Child protection concerns are dealt with by state and territory systems that are authorised to intervene when children are at risk of harm in the care of their families. However, allegations about safety, abuse and neglect are also commonly raised in the context of disputes between separated parents about the care of their children. Such disputes are dealt with in the federal family law system and are private law disputes for which the parents are responsible. When allegations of child abuse and/or neglect are raised in cases where the parents are separated, it is possible for both the child protection system and the federal family law system to become involved. Recent research has highlighted the prevalence of concerns about child safety, abuse and neglect in post-separation parenting disputes (Kaspiew et al., 2009) and there is increasing recognition of the need for more effective responses in this area (Australian Law Reform Commission & NSW Law Reform Commission [ALRC/NSWLRC], 2010; Chisholm, 2009; Family Law Council [FLC], 2002, 2009) with the interactions between child protection systems and the family law system giving rise to significant concern at a range of levels.

Recent empirical evidence has established that child protection concerns are likely to be pertinent to a significant number of families who use the family law system. It is clear that families with complex problems form the core client-base across family dispute resolution services, lawyers and courts (FLC, 2002; Kaspiew et al., 2009). Most separated parents manage to sort out their parenting arrange-



## Australian Government

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## The authors

**Daryl Higgins** is the Deputy Director (Research) at the Australian Institute of Family Studies, and Principal Advisor to the National Child Protection Clearinghouse.

**Rae Kaspiew** is a Senior Research Fellow at the Australian Institute of Family Studies and was the lead author of the evaluation of the 2006 family law reforms.

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Australian Institute of Family Studies  
Level 20, 485 La Trobe Street, Melbourne VIC 3000 Australia  
Phone: (03) 9214 7888 Fax: (03) 9214 7839  
Internet: <[www.aifs.gov.au](http://www.aifs.gov.au)>

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ments with minimal use of services and lawyers. However, those that rely heavily on the family relationship service system, courts and lawyers tend to be affected by issues relating to family violence, child safety concerns and issues related to mental illness and substance addiction (Kaspiew et al., 2009; see pp. 232–233).

Family violence has been a major contributor to the massive growth in child abuse reports that statutory child protection systems across Australia have experienced in the past decade. Along with parental mental illness and substance misuse, family violence is recognised as the key characteristic of families about whom notifications are made (Allen Consulting Group, 2003). This is particularly the case now that family violence is included within the mandatory reporting obligations in three jurisdictions: New South Wales, Northern Territory, and Tasmania (see Higgins, Bromfield, Richardson, Holzer, & Berlyn, 2010).

Research evidence suggests that often this pre-separation inter-parental violence continues—or is even exacerbated—by the relationship separation (see Braaf & Sneddon, 2007; Kaye, Stubbs, & Tolmie, 2003).

Child protection concerns may arise in two main ways in separated families:

1. where the child is alleged to be currently at risk from spending time in either parent's household, through exposure to child abuse, neglect or family violence; and/or
2. where concerns have arisen about the treatment of the child (child abuse, neglect, exposure to family violence) by either or both parents prior to separation and this history is argued to be relevant to post-separation parenting arrangements.

The Australian Institute of Family Studies (AIFS) *Evaluation of the 2006 Family Law Reforms* has demonstrated that a history of either physical hurt prior to separation or emotional abuse before during or after separation is common among separated parents (Kaspiew et al., 2009, Table 2.2). For example, the 2008 study of 10,000 separated

parents showed that 26% of mothers reported being physically hurt and 39% reported emotional abuse, with the remaining 35% reporting no violence (Kaspiew et al., 2009). Among fathers, 17% reported physical hurt, 36% reported emotional abuse, and 47% reported no violence.

Research shows that there is considerable overlap between the experience of family/domestic violence and children's experiences of other direct forms of abuse and neglect (Higgins, 2004; Hughes, Parkinson, & Vargo, 1989).<sup>1</sup> In one US study of families involved in the child protection system, approximately 45% of female caregivers had experienced partner violence in their lifetime, and nearly 30% in the past 12 months, which is around twice the rate of the general population, despite the definition of intimate partner violence excluding sexual and psychological abuse (Hazen, Connelly, Kelleher, Landsverk, & Barth, 2007).

In the context of high levels of inter-spousal violence, a key concern for separating parents is the safety of the child in the care of the other parent. Significant minorities of both mothers and fathers in the AIFS study of 10,000 separated parents in 2008, said that they had safety concerns associated with ongoing contact with the other parent (Kaspiew et al., 2009, Table 2.4). A greater proportion of mothers had concerns (for themselves: 3.6%; their child: 9.1%; or both themselves and their child: 8.4%) compared with fathers (for themselves: 1.6%; their child: 12.3%; or both themselves and their child: 2.6%). This is consistent with recent research by Cashmore and Parkinson (2009) showing that concerns about the safety of quite young children (including child abuse concerns) are a major issue driving inter-parental conflict. Similarly, in their report on shared care, Cashmore et al. (2010) found that those with concerns about the safety of their child(ren) were more likely to report negative outcomes for their children and to consider that arrangements—whether shared or not—were working poorly. The AIFS evaluation also showed that these families where there was a reported history of violence or the presence of ongoing safety concerns were much more likely to use formal services—family dispute resolution (FDR), lawyers and courts—than families without these concerns (see Kaspiew et al., 2009, p. 232).

This paper examines how the child protection and federal family law systems operate, so that their intersection may be better understood by those working in each system. In addition, the paper outlines recent research findings and policy recommendations that are intended to address some of the difficulties highlighted by the Family Law Council (FLC, 2002) and subsequent research (e.g., Higgins, 2010; Higgins & Kaspiew, 2008).<sup>2</sup> The paper begins by discussing evidence of the extent to which issues that may give rise to child protection concerns are evident among separating families. It then describes how the child protection and family law systems operate. Areas of overlap are identified, together with mechanisms for dealing with them. Finally, recent developments in policy recommendations are discussed.

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. (Family Law Council, 2002, p. 15)

- 1 Through a range of different studies based on parents' perceptions of children's experiences, as well as adults retrospectively reporting on their own childhood experiences, Higgins and colleagues demonstrated that witnessing family violence is significantly associated with other forms of child maltreatment. For example, in one study, witnessing family violence was highly correlated with all other forms of child maltreatment, including: sexual abuse ( $r = .24$ ), physical abuse ( $r = .45$ ), psychological maltreatment ( $r = .47$ ) and for neglect ( $r = .47$ ) (Higgins & McCabe, 2000).
- 2 Some of the key issues raised by the FLC (2002) included: many child abuse concerns raised in family law proceedings not being investigated by the state/territory child protection authorities; the importance of coordination and timely investigation of concerns; the importance of concerns being addressed in one court proceeding—either Family Court or Children's Court, but not both (the "One Court" principle); and their call for the establishment of a federal child protection service to investigate child abuse concerns.

## 2. Child protection systems in Australia<sup>3</sup>

The way legislative power is allocated under the Australian Constitution means the major responsibility for investigating and responding to child protection issues falls to the six states and two territories. However, the Commonwealth also plays an important role through its provision of universal services for families and children, targeted services for vulnerable families, and through the family law system (Council of Australian Governments [COAG], 2009). Although this means there are eight different child protection systems across the nation, there is significant consistency in their approach. The differences are primarily in areas such as the legislative grounds for intervention and the systems for receiving and allocating priorities to notifications of child safety concerns (i.e., “intake” processes). Intake is the most procedural aspect of statutory child protection services in Australia, and therefore the area subject to the greatest variability (Bromfield & Higgins, 2005). In contrast, the processes of investigation, case-determination (substantiation), referral for services to community agencies, and ongoing case-management processes are substantially similar across jurisdictions, as described below.

Much has been written in recent years about the problems of child protection systems across the Western world (see: Higgins & Katz, 2008; O’Donnell, Scott, & Stanley, 2008). There are a number of key characteristics that are seen as problematic:

- Systems are overloaded due to massive increases in the workload of departments (e.g., in Australia, during the past decade notifications have more than tripled).
- Increased demand for services (notifications) and limited budgets result in the need to prioritise resources to cases where children are most at risk of harm.
- Risk-assessment processes are highly proceduralised and forensically driven.
- Decision-making processes are perceived as highly risk averse, due to the level of public scrutiny and concern.

In addition, a number of reviews of child protection services across Australia have highlighted problems with high case-loads, poor training and supervision, burnout, and high turnover of child protection workers, leading to relatively junior, inexperienced staff conducting investigations and making recommendations on complex cases (Stevens & Higgins, 2002; Wood, 2008, Office of the Victorian Ombudsman, 2009, 2010). Child protection services are also dealing with families with increasingly complex issues – including multiple, intersecting problems such as including domestic violence, mental illness and substance misuse (Bromfield, Lamont, Parker, & Horsfall, 2010).

However, in some jurisdictions policy initiatives intended to address these problems include:

- differential approaches to family support (referral to family support services after initial entry into the statutory child protection system);
- alternative referral pathways (diversion before the point of entry in to the statutory system, such as community-based referrals directly into child and family services where the risks are not assessed as high);
- non-stigmatising entry points into the serviced system (statutory and non-statutory); and
- family-inclusive decision-making processes (Higgins & Katz, 2008).<sup>4</sup>

3 This description of child protection in Australia is based on a synthesis of documents from the website of the National Child Protection Clearinghouse <[www.aifs.gov.au/nch](http://www.aifs.gov.au/nch)>. In particular, the reader is referred to the following sources for further information about child protection legislation (Holzer & Lamont, 2009); definitions of a child in need of protection (Holzer & Bromfield, 2010); mandatory reporting laws (Higgins et al., 2010); and different child protection systems across Australia (Bromfield & Higgins, 2005).

4 For an in-depth analysis of the current approach and description of key areas of reform for each jurisdiction, see Bromfield and Holzer (2008).

A key focus across the system is balancing children’s need for stability against the hope of family reunification—recognising that children do best when they are provided with adequate care and safety by their parents. State/territory child protection departments undertake their investigations and take action with these outcomes in mind.

Below, the five key elements of the statutory child protection process—notification, intake, investigation, outcome (substantiation), and action—are briefly outlined.

## Notification—reporting concerns about child safety

Any person who has concerns about harm to a child may make a report (“notification”) to the state/territory’s statutory child protection service. Across Australia in 2009–10, there were 286,437 notifications to statutory child protection services (down from 339,454 in 2008–09). These notifications concerned 187,314 different children (down from 207,462 children in 2008–09). Of these notifications, 54,621 cases were “substantiated”, where it was verified that the child was harmed or at (significant) risk of harm.<sup>5</sup> (These notifications related to 31,295 different children.) Although there has been a small decrease in the past year, in the decade prior, the number of reports to statutory child protection departments has increased rapidly (e.g., there were 107,134 notifications in 1999–00) (Australian Institute of Health and Welfare, 2011).

For information on the legislation and contact details for the statutory department in each of the states and territories, see <[www.aifs.gov.au/nch/resources/state.html](http://www.aifs.gov.au/nch/resources/state.html)>

## Mandatory reports

Each state/territory has laws mandating who is obliged to report concerns about children’s safety. A number of jurisdictions have made legislative changes regarding mandatory reporting in the past 5 years. Although child protection authorities encourage anyone with any concerns about children’s safety to make a report, there are some variations in the legislative provisions for mandatory reporting—in terms of *who is mandated* to notify concerns (e.g., Queensland has perhaps the most limited range of mandated notifiers); the *types of harm* subject to mandatory reporting (e.g., under both ACT and Victorian law, mandatory reporting only relates to sexual and physical abuse); or whether there is any restriction in terms of the *context* of the child safety concern (e.g., mandatory reporting in NSW is restricted to cases where the grounds for concern arise during the course of, or from the person’s work relating to specified services for children; in Queensland it is restricted to particular professionals’ health or care work) (Higgins et al., 2010).<sup>6</sup>

## Intake and initial assessment—assessing initial risk

Based on an assessment of risk, the “intake team” determines whether the concern meets the threshold for statutory intervention, and the priority for responding (depending on the severity and immediate safety concerns). The main task of child protection departments is to conduct investigations to determine whether there is a risk of (significant) harm to the child. However, due to high volumes of notifications (which have increased exponentially over the past 10–15

5 Some jurisdictions have ‘harm’ as their threshold for intervention, whereas others have ‘significant harm’ (see further detail on page 6).

6 Western Australia has recently introduced mandatory reporting laws, with a range of restrictions: apart from family law and childcare providers, mandatory reporting for the other four main groups of professionals (doctors, nurses and midwives, teachers, police) is restricted to sexual abuse concerns.

years), a “threshold assessment” is undertaken, whereby cases only proceed to investigation if concerns are assessed as constituting harm, and there is sufficient information to proceed. The level of severity determines the priority for conducting the assessment. This involves risk assessment processes, based on characteristics of the family and the child’s circumstances. Such processes rely on professional judgement of child protection workers, the use of actuarial decision-making frameworks, or a combination of the two.

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*Family law implications:* Resource limitations constrain the ability of child protection departments to respond to all notifications. Given the rise in demand for statutory services, it is almost inevitable that risk management processes play a role in prioritising service system response within child protection systems. As noted by the FLC (2002), serious allegations made in the family law context may not meet the state/territory authorities’ priorities for investigation. The legislative grounds for intervention as well as policy directives across a number of state/territory departments means that the presence of (at least) one protective parent is likely to lead to a lower priority of response (see Holzer & Bromfield, 2010). The exception is cases in the Family Court of Australia’s Magellan list (described in more detail later), where there are agreements to ensure investigations are carried out in a timely way, regardless of whether it would otherwise have met the threshold for intervention).

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## Investigation—determining whether there are grounds for intervention

Child protection staff from the local office conduct the investigations. However, where the concern relates to a police matter (i.e., sexual abuse, or very serious physical abuse/neglect), most jurisdictions have arrangements in place for interviews with children and their families to be conducted jointly with police, as well as medical assessments to be conducted when necessary. This is to ensure that charges can be laid where appropriate, that evidence is not contaminated, and that children are not burdened by multiple interviews by different agencies about the same issues.

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*Family law implications:* As family courts do not have an investigatory body (or authority to do so), they rely on state-based child protection (and police) departments to investigate allegations and provide their reports on the outcomes.<sup>7</sup> However, questions that these different authorities are attempting to address are different (see Box 1).

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## Decision—case outcome determination

After investigating, child protection workers determine whether the harm/risk of harm is substantiated or unsubstantiated, based on their legislative definition of grounds for intervention and decide what, if any, action should be taken if the case is substantiated.

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*Family law implications:* The critical issue in the context of family law proceedings is that the child protection department is determining whether there is currently a clear, present (and in some jurisdictions, significant) risk of harm to the child. This decision does not necessarily reflect whether (a) harm has occurred in the past, or (b) whether a subsequent change in circumstances—as a result of a family law proceeding—would then raise concerns (e.g., if a court ordered that a child was to spend time unsupervised with a parent). Yet both of these issues are of relevance in family law matters. The outcome of the department’s investigations simply relates to the circumstances at the time of the assessment. If one parent is acting protectively and preventing the other parent—alleged to be abusing the child—from spending any time unsupervised with the child, then the outcome of the department’s investigation may be “unsubstantiated”.

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<sup>7</sup> The Family Law Council’s 2002 recommendation for the establishment of a federal Child Protection Service has not been implemented. To do so would require a significant investment of funds in a new system that could—if not implemented well—end up duplicating some of the work that is currently undertaken by states and territories. This recommendation has not been taken up in the National Framework for Protecting Australia’s Children 2009–2020.

### Box 1: What question are you asking?

Where parents who are separating raise allegations of child abuse, the five key bodies with a role to play have a different focus, with their actions and investigations addressing different questions or issues:

- *Statutory child protection departments:* Are you a protective parent? Is the child currently safe? Does the situation meet the threshold for statutory intervention?
- *Children’s Court:* Are you an adequate parent? What actions need to be taken to improve the parent’s capacity and ensure the child’s safety?
- *Family courts:* What pattern of time spent with you and the child’s other parent (and under what circumstances) is in the child’s best interest? Is the child protected from harm under these arrangements? Are you a “friendly parent” (facilitating the child’s relationship with the other parent)?
- *Police:* Is there sufficient evidence of a crime for a conviction to be likely?
- *Criminal courts:* Has the alleged crime been proved beyond reasonable doubt?

None of these systems is focused specifically or exclusively on whether abuse occurred, or is it likely to occur (or recur).

In family law disputes, the following questions are central, yet are not necessarily directly covered by any of the relevant investigative agencies:

- Is the child at risk of harm in the household of either parent (or other caregiver)?
- Would the child be safe if he/she was to spend time unsupervised with the parent against whom allegations of abuse have been raised?

## Action—family support, court interventions

When it is determined that a child is at risk, the role of the department is then to intervene to ensure the child’s safety. There is a range of statutory intervention options available. Child protection authorities can:

- provide a referral for the family to voluntarily engage with support services (e.g., parenting classes, domestic violence services);
- obtain an order from the Children’s Court to mandate parental involvement with particular support services (e.g., drug and alcohol services); or
- commence a care and protection proceeding in the Children’s Court to remove the child from the care of their parent and place the child in out-of-home care (on a temporary, long-term or permanent care order). The two most common types of placement are kinship and foster care.

Children’s courts provide for a range of different orders (in terms of length of time, who has responsibility/guardianship) to allow sufficient time, where appropriate, for interventions to be put in place to afford parents the opportunity of meeting their parental obligations.<sup>8</sup> In determining matters, Children’s courts weigh up the evidence on the balance of probabilities. As with family law matters, a key consideration is that decision-making should be guided by what is in

<sup>8</sup> Where a Children’s court authorises the child protection department to remove the child, and place the child into alternative care (“out-of-home care”), in Australia, this refers either to kinship care (where someone from the extended family takes on the parental role), or most commonly, foster care (where an unrelated, accredited member of the community volunteers to take on the care of a child). Carers are eligible to receive monetary entitlements from the state to offset the cost of care. All jurisdictions have limited capacity for residential care—typically for adolescents and/or those children with severe behavioural difficulties or needs that would be difficult to manage in a family home environment. In some jurisdictions, kinship carers are only eligible for financial support from the state/territory if the placement is a formal or “statutory” placement, made under a court order.

the child's best interests. For example, the report from the Victorian Law Reform Commission (VLRC, 2010) on Protection Applications in the Victorian Children's Court stated:

The Department of Human Services, as the representative of the state, is obliged to protect children from harm. Parents have an interest in protecting and preserving the family unit. Children have interests of their own which may not always be the same as those of the state or their parents, particularly when trying to balance a natural desire to remain part of a family with the need to be protected from harm. (VLRC, 2010, p. 16)

Despite these potentially competing interests, the majority of the child protection applications in the Children's Court in Victoria are resolved by agreement, rather than adjudication (VLRC, 2010).

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*Family law implications:* There may be dual applications, with parents bringing parenting matters before the family courts where there are unresolved child protection concerns, and statutory child protection departments taking out children's court applications where parents are separating (or have never lived together).

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### 3. The family law system

The family law system comprises a range of relationship support services including Family Relationship Centres and family dispute resolution (FDR) providers as well as legal practitioners (including publicly funded organisations, such as Legal Aid Commissions, and community legal centres and private practitioners) and courts. There are three main courts exercising family law jurisdiction: Western Australia has its own court,<sup>9</sup> the Family Court of Western Australia, and the Family Court of Australia and the Federal Magistrates Court operate across the rest of Australia. The Family Court of Australia hears matters that are more complex. About 21% of children's matters are initiated in the Family Court of Australia. The Family Court of Australia has a dedicated case-management system for matters involving serious allegations of sexual or physical abuse: Magellan (see Box 2). In 2009, about 2% of the total filings in children's matters across the two courts were Magellan matters (Kaspiew et al., 2009).

Empirical research has confirmed that the bulk of the work at the apex of the family law system in Australia—those cases that come to family courts for judicial determination—contain allegations of family violence and/or child abuse and that such allegations are frequently relevant in matters that are dealt with in the community sector through family dispute resolution (Kaspiew et al., 2009). Issues relating to family violence and child safety are recognised in integral ways in the legislation that governs post-separation parenting arrangements, the *Family Law Act 1975* (Cth), and amendments currently under consideration by Parliament in 2011 place even greater emphasis on ensuring children are protected from harm (Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2010) (see Box 5, on page 15). In broad terms, two key objects of the legislation as it currently stands are to ensure the best interest of children are met by “ensuring that children have the benefit of both their parents having meaningful involvement in their lives” (s60B(1)(a)) and “protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence” (s60B(1)(b)).

The bulk of the work at the apex of the family law system in Australia—those cases that come to family courts for judicial determination—contain allegations of family violence and/or child abuse.

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<sup>9</sup> The *Family Law Act 1975* (Cth) came into force on 5 January 1976, replacing the *Matrimonial Causes Act 1959* (Cth) and superseding state and territory laws about “guardianship, custody, access and maintenance of children of a marriage”. Western Australia elected to exercise its power under the Family Law Act to establish its own family court rather than having a West Australian registry of the Family Court of Australia. Therefore, Western Australia has a state family court that exercises both federal jurisdiction under the *Family Law Act 1975* (Cth) and state jurisdiction.

## Box 2: The Family Court of Australia's Magellan Case-Management Model

Given that family courts have no investigatory capacity or responsibility, one of the key drivers for developing protocols between the Family Court of Australia and the state/territory child protection departments is to ensure that matters are prioritised for investigation, regardless of whether they would otherwise have reached the threshold for investigation by the department. For children's safety, arrangements need to be resolved in their best interests as quickly as possible, while allowing time for appropriate investigations to be conducted and the information to be made available to the court. To achieve this, Magellan was developed to improve outcomes for vulnerable children and families in the family law system.\*

Magellan is an inter-agency, collaborative, judge-led approach to case-management for responding to allegations of sexual or serious physical abuse in a way that focuses on children's best interests. The Magellan case-management pathway consists of a team of Judges, Registrars and Family Consultants who handle the case from start to finish. Significant resources are directed to the case in the early stages with an aim of resolving the case within 6 months.

Key elements of Magellan are:

- being judge-led
- active cooperation between all the agencies involved with families;
- timeliness and prioritisation by the court and other agencies;
- receipt of a report from the statutory child protection department as early as possible;\*\*
- good individual case-management by a dedicated team of a Judge, Registrar and Client Services Officer;
- provision of un-capped Legal Aid funding for parties; and
- independent representation of children's best interests.

Magellan has improved effectiveness of the Family Court's procedures, but questions remain about eligibility criteria and the problem that this private law dispute resolution mechanism relies on overworked state/territory child protection systems, which are not intended to assess risk in the federal family law context. Regarding allegations of sexual abuse or serious physical abuse in parenting matters brought before the Family Court, Magellan provides a significant improvement, but does not completely address the absence of a federal forensic mechanism to investigate and respond to such allegations (FLC, 2002; Higgins & Kaspiew, 2008).

While Magellan is a high profile example, and one that has been independently evaluated (Brown, Sheehan, Frederico, & Hewitt, 2001; Higgins, 2007), there are other models for agreeing on ways to cooperate and "join the dots" between the systems. As the ALRC/NSWLRC (2010) noted, the key features of any program or process for linking up family violence, child protection and family law processes are:

- integrated services;
- specialist courts (or specialist divisions or lists within a court); and
- agreements, Memoranda of Understanding, protocols and/or practice notes to support and reflect the cooperative arrangements.

As was demonstrated by Higgins (2007), each of these elements existed within Magellan to some degree, and were associated with why it was perceived as successful.

\* For information on the development and evaluation of the pilot, see Brown et al. (1998, 2001). Also, there was a comparable project in WA, the Columbus Project. Unlike Magellan, however, Columbus also addressed the circumstances of children exposed to domestic violence where that is believed to pose a significant emotional and physical risk (Kovacs, 2002; Murphy & Pike, 2005). The Federal Magistrates Court does not have an equivalent process for Magellan, as complex matters, including child abuse allegations, are required to be filed in the Family Court of Australia, not the Federal Magistrates Court (though this does not always occur in practice—see Higgins, 2007).

\*\* The department's role is to investigate allegations and where there are circumstances that meet their grounds for intervention, to ensure safety (i.e., where there is a protective, "good enough" parent, the state/territory child protection legislation precludes statutory intervention. As many of these cases would not meet the threshold for investigation (or not be prioritised) by child protection departments, a critical element of the success of Magellan was the development of protocols where departments agreed to investigate all Magellan cases, to do so in a timely manner, and provide the court with a short, focused report on their investigations and the outcome (referred to as the "Magellan Report").

Circumstances involving family violence and child abuse are exceptions to two other significant provisions in the legislation. Matters where concerns about these issues can be established on “reasonable grounds” (a low evidentiary threshold below the balance of probabilities) are:

1. exempt from the requirement to attend family dispute resolution (s60I(9)) prior to filing a court application (s60I(9)); and
2. not liable to attract the application of the presumption of equal shared parental responsibility (s61DA(2)).

While the *Family Law Act 1975* (Cth) and the regulations that apply to FDR practice<sup>10</sup> recognise that circumstances in which there has been a history of family violence may lead to a situation where a resultant power imbalance renders FDR an unsuitable mechanism for handling parenting disputes, it is clear that matters involving family violence and/or child abuse are not automatically screened out of such processes for a range of reasons (Kaspiew et al., 2009, p. 100, p. 232). It is clear from the findings of the AIFS *Evaluation of the 2006 Family Law Reforms* that many families with a history of family violence and/or the presence of child protection concerns (a) use family dispute resolution (Kaspiew et al., 2009, p. 100) and (b) have shared care arrangements (Kaspiew et al., 2009, pp. 232–233).

Where disclosures concerning child abuse and neglect are made in family law proceedings, the *Family Law Act 1975* (Cth) imposes obligations on courts and professionals working in the system to make notifications to child protection authorities in certain circumstances, and describes how family law courts are to be notified of child abuse and neglect allegations and provisions relating to child welfare authorities (see Box 3). The following sections provide a broad overview of how allegations of child abuse and neglect are dealt with in family dispute resolution and proceedings in family courts.

## Family dispute resolution

In practice, many matters that present to family dispute resolution practitioners may involve concerns about child abuse and neglect (Kaspiew et al., 2009). FDR processes start with screening and risk assessment where a practitioner assesses the parties and the issues in dispute. Concerns about child abuse and neglect may emerge at this initial stage but it is also possible that they may not emerge until the actual mediation sessions have commenced. In conducting the initial assessment process, and assessing the suitability of a matter for FDR, practitioners have an obligation to consider whether “the risk that a child may suffer abuse” (among other matters) is relevant to the ability of the parties to negotiate freely (Family Law (Family Dispute Resolution Practitioners) Regulations 2008 R25(d)). Where concerns about child abuse emerge during the course of family dispute resolution, and the practitioner concludes that FDR is no longer appropriate, they must terminate the FDR process (R29(c)).

Where a matter is assessed as being unsuitable for FDR at the outset or after commencement because of concerns about child abuse (or other reasons), the FDR practitioner may issue a certificate under the *Family Law Act 1975* s60I(8) that will enable the parties to file a court application. Of course, as noted above, matters where there are reasonable grounds to believe a party has engaged in child abuse, or there is a risk of child abuse, are exempt from the requirement to attend FDR.

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<sup>10</sup> Family Law (Family Dispute Resolution Practitioners) Regulations 2008 (Cth) (R25).

## Box 3: Summary of key legislative provisions

### Family Law Act 1975 (Cth)

#### Process

##### Family dispute resolution

- Matters where there are “reasonable grounds to believe” a party to the proceedings has, or is at risk of, committing child abuse against the child that is subject to proceedings, or family violence (s60I(b)).

##### Court

- Where a document is filed that alleges a child has been abused or is at risk of abuse and that these allegations are relevant to the orders the court should make, as soon as practicable (s60K) the court should consider what interim or procedural orders should be made to obtain appropriate evidence expeditiously and consider what orders should be made to protect the child or a party.

#### Information handling

##### Confidentiality

- Disclosures relevant to risks of harm to children (whether physical or psychological) are exceptions to confidentiality in family counselling (s10C(4)(a)) and family dispute resolution (s10G(4)(a)).

##### Inadmissibility

- Disclosures made in family dispute resolution and referrals from family dispute resolution, or to a family consultant (s11C(3)), that indicate a child has been abused or is at risk of abuse may be admissible in court (s10J(2)).

##### Courts

- May make orders requiring child protection authorities to provide documents or information relating to notifications (but not the identity of the notifier), assessments, investigations and reports in relation to notifications (s69ZW).
- Rule 15.17 provides for the issuing of subpoenas.

#### Notification requirements

##### Parties

- Where a party alleges that a child is being abused or is at risk of abuse, the party must file a notice (known as a Form 4 notice) in the court and serve a copy on the person alleged to have committed, or be at risk of committing, the abuse (s67Z).

##### Professionals

- Where a Form 4 notice is filed, the Registry Manager must notify the child welfare authority.

In addition, notification requirements apply to the following professionals under the *Family Law Act 1975* (s67ZA):

- Registrars or Deputy Registrars of the Family Court of Australia and the Family Court of Western Australia;
- Registrars of the Federal Magistrates Court;
- family consultant;
- family counsellor;

- family dispute resolution practitioner;
- arbitrator; and
- independent children’s lawyer.

These professionals **must**:

- Notify a child welfare authority if they have reasonable grounds for suspecting that a child has been abused or is at risk of abuse (s67ZA(2)) unless no such notifications have been made previously in relation to the child.

These professionals **may**:

- Notify a child welfare authority if they have reasonable grounds for suspecting a child has, or is at risk of, being ill-treated or subject to behaviour that causes psychological harm (s67ZA(3)).

#### Substantive provisions in relation to parenting arrangements

- Best interests paramount (s60CA).
- Child needs to be protected from harm from exposure to or actual abuse, neglect or family violence (s60B(1)(b), s60CC(2)(b)).
- Presumption of equal shared parental responsibility not applicable where there are reasonable grounds to believe a parent (or a person with whom a parent lives) has engaged in, or is at risk of engaging in, child abuse of the child or another child who was a member of the parent’s family (s61DA(2)(a)).

#### Child welfare laws and Family Law Act jurisdiction

- Courts exercising Family Law Act jurisdiction cannot make orders overriding care arrangements made under state welfare legislation unless they are expressed to come into effect when the child ceases to be in such care or the order is made with the consent of the child welfare officer in the relevant state or territory (s69ZK).

#### Family Law Act jurisdiction in relation to child welfare

- Section 67ZC provides that the court has jurisdiction to make orders relating to the welfare of children. The scope of this power is uncertain, but it has been applied in relation to medical procedures (e.g., sterilisation of minors with disabilities (Marion’s Case (1992) 175 CLR 218); and medical treatment for gender reassignment (Re Alex (hormonal treatment for gender identity dysphoria) (2004) 31 Fam LR 503).

#### Intervention by a child welfare officer

- Courts may request an officer of a state, territory or Commonwealth child welfare authority to intervene in proceedings relating to the welfare of a child. Where this occurs, and the officer intervenes, they become a party to the proceedings (s91B).

## Courts

Allegations in relation to child abuse and neglect are commonly raised in parenting disputes heard in the family courts (Brown & Alexander, 2007; Brown, Frederico, Hewitt, & Sheehan, 1998; Higgins & Kaspiew, 2008; Moloney et al., 2007, Table 5.1; Kaspiew et al., 2009, Table 13.8). Such allegations may be raised by one or both parties as a question of fact relevant to the issue of what parenting orders may be in a child's best interests. Where such allegations are raised, the court needs to consider whether evidence has been provided to satisfy it to the relevant standard of proof—the balance of probabilities—that the allegation is true. In some instances, the court will apply what is known as the “unacceptable risk test” (*M and M* 1988 166 CLR 69 ¶ 23). Assessment of whether or not to make an order for contact with the parent who allegedly represents a risk to the child's safety involves assessing the evidence and asking the question whether, on the basis of the evidence, the child “may be exposed to an unacceptable risk of harm”. In applying this test, the court is to have regard to any evidence of past abuse (findings in this context are made on the so-called *Briginshaw* standard of proof, which is the balance of probabilities to the “stricter end of the civil spectrum” (*Briginshaw v Briginshaw* (1938) 60 CLR 336, s140 *Evidence Act 1995* (Cth)). It also considers whether the evidence discloses the existence of future risk (evidence in relation to this consideration is required to meet the ordinary balance of probabilities standard: *Johnson and Page* [2007] Fam CA 1235; (2007) FLC ¶93–344 (May, Boland and Stevenson JJ)). This determination will then be one of the factors that the court considers in deciding what parenting orders will be in the child's best interests (Parkinson, 1999).

The court has a wide discretion to tailor such orders. Court orders usually deal with two main issues: parental responsibility and time. Parental responsibility may be specified to be: (i) shared or (ii) allocated to one parent or (iii) aspects of decision-making (e.g., health or education) may be reserved to one parent or may be decided by the court—for example which school a child is to attend. A range of circumstances may lead a court to make orders allocating all or some aspects of parental responsibility to one parent and these include situations where concerns about family violence and child abuse are upheld. However, positive findings in relation to such issues do not always lead to this outcome—it depends on the facts of each situation.

In relation to time, a wide range of possibilities is open to the court in specifying what amount of time a child will spend with each parent. Where the evidence supports concerns about risks to a child, a court may: make orders for no time to be spent with the parent found to pose a risk to the child (sometimes orders may permit telephone contact, or cards to be sent to the child on special occasions); the parent to spend time with the child on a supervised basis (at a contact centre, for example); or the parent to spend time with the child in accordance with special conditions specified in the order that may be designed to ameliorate risks. For example, an order may specify that time is to be spent during the day, in the presence of a third party and the parent is to abstain from drinking alcohol.

After having briefly described the two systems, we look more specifically in the next section at the ways family law and child protection systems interact, the overlaps, and the gaps.

## 4. The intersection of the two systems: overlaps and gaps

In practice, the intersection between the child protection system and the federal family law system is evident in three main ways (see Figure 1; also see Box 6 for case summaries providing examples).<sup>11</sup>

1. Evidence from child protection systems may be of significant forensic relevance in determining parenting disputes where allegations of child abuse or neglect are raised. For example:

- There may be current concerns about the care the child receives from either or both parents in the context of current family law proceedings. In these cases, notifications may be made to the statutory child protection department and the results of such notifications will be of relevance to the family law proceedings.
- In the past, concerns about the child may have been notified to the child protection department and this may be of relevance to current family law proceedings.

2. Where child protection departments are involved with a family, the federal family law system may be an avenue whereby child protection concerns are resolved through court orders being sought in the family law courts by a party deemed to be a protective carer, as an alternative to action being taken in Children's Courts. For example a child protection department may:

- be involved with a family where it has determined that one parent represents a risk to a child, and may encourage the "protective" parent to seek parenting orders that favour him/her through the family law system; or
- conclude that neither parent is fit to parent the child and encourage a third party (i.e., a grandparent) to seek orders for parental responsibility through a family law proceeding.

3. A third manifestation, perhaps of increasing significance and recently identified as a problem requiring action by the ALRC/NSWLRC (2010), is where in a family law matter, the court determines neither parent is a viable carer. There is some uncertainty about the scope of the court's power to make an order in favour of the child protection department in such instances without the department's consent (see discussion of *Ray and Anor and Males and Ors* [2009] FamCA 219 and *Secretary of the Department of Health and Human Services and Ray and Ors* [2010] FamCAFC 258 (22 December 2010) in Appendix) and the ALRC/NSWLRC (2010) has recommended legislative change to make this power clear and unambiguous (Rec 19.2).

These overlaps between the two systems raise significant problems (see Box 4). Family law courts do not have independent forensic capacity, as they operate in a private law context and the individual parties have responsibility for the conduct and the cost—unless legally aided—of the litigation (see Figure 1). However, the child protection concerns in family law matters may not reach the state/territory department's threshold for intervention in a context where resource constraints mean that the more serious notifications are prioritised for investigation. Moreover, if investigations are conducted, they are done within the framework of the child protection jurisdiction, to answer the question of whether the child is safe, not whether the child would remain safe, or whether the child's best interests are served by a particular pattern of time spent with each parent.

The ALRC/NSWLRC (2010) report canvassed a range of difficulties evident in this area (Chapter 19). It discussed how family court judicial officers report being unable to engage child protec-

<sup>11</sup> In this section, we have drawn heavily on the work of the Family Law Council (2002); Kelly and Fehlberg (2002); Fehlberg and Kelly (2000); and Higgins and Kaspiew (2008).

tion authorities where they have formed a view intervention is warranted, and child protection departments indicate that priority is given to cases in the Children's Court system because those are the cases most in need of attention. Also, where federal family courts are relied upon to ensure that carers identified as viable by the child protection department obtain appropriate court orders, there is no certainty that in any particular case the family court determination will be consistent with the view taken by the child protection department (Fehlberg & Kelly, 2000; Kelly & Fehlberg, 2002).

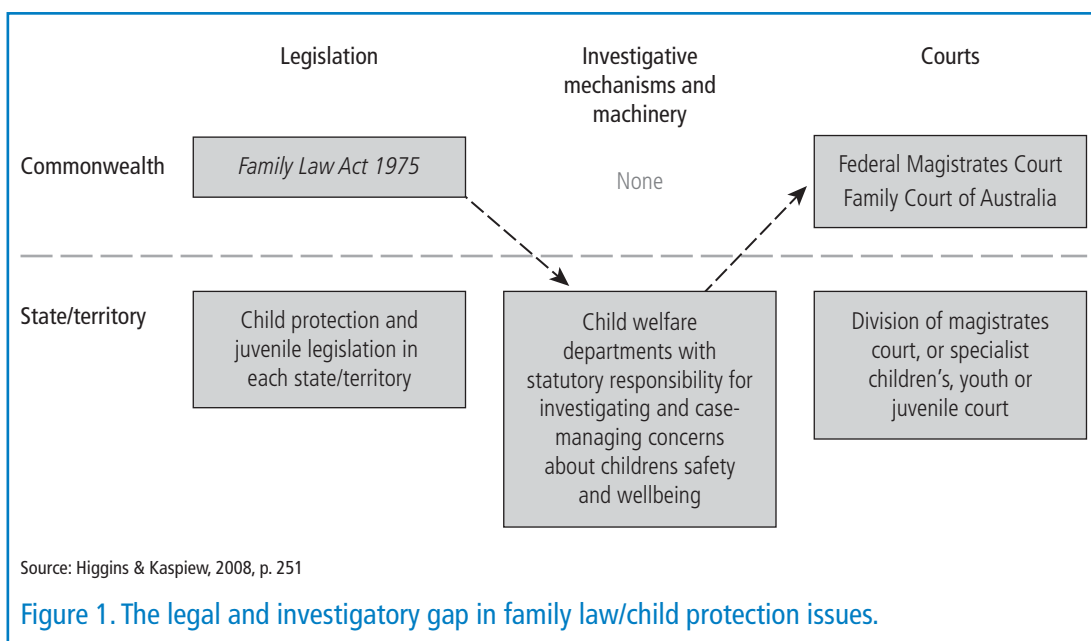


Figure 1. The legal and investigatory gap in family law/child protection issues.

#### Box 4: Overlaps and gaps

There is a wide range of agencies and social systems that interconnect in understanding and responding to allegations of abuse raised in family law proceedings, including: police, criminal courts, magistrates courts (regarding family violence/restraining orders), child protection departments, children's courts, family law courts and legal aid commissions (Higgins, 2007). Each agency has distinct responsibilities, foci and ways of operating and viewing evidence.

However, it is increasingly recognised that there is a poor fit between the two frameworks of federal private family law and state-based public child protection systems. The key problem is a jurisdictional gap: family law is a commonwealth responsibility, and child protection a state/territory responsibility, with a growing body of research demonstrating the problems in the way the two jurisdictions handle overlapping matters, and the need for better interagency co-ordination, including information sharing (ALRC/NSWLRC, 2010; Chisholm, 2009; FLC, 2002, 2009; Higgins, 2007; Higgins & Kaspiew, 2008; Kelly & Fehlberg, 2002).

The crux of these differing responsibilities is summarised by Higgins and Kaspiew (2008):

The mandate of child protection authorities is to intervene to protect children only when a parent is neither willing nor able to protect the child from harm. In contrast, the task of the federal law system that deals with parenting disputes is to resolve disputes between parents who are separated over what arrangements are in the best interest of their children. (p. 244)

“Forum shopping” between the two systems that have an interest and jurisdiction to hear matters (family and children’s courts) can also arise as a concern with the potential for parties to turn to the other system if they were unhappy with the outcome in the first (Sheehan, 2001). Where there are family violence and child abuse or safety concerns, families take longer to resolve their disputes and are using more services—and the gaps and overlaps inhibit speedy and effective resolutions for children at risk (Brown et al., 1998; Higgins & Kaspiew, 2008; Kaspiew et al., 2009). The ALRC/NSWLRC (2010) report considered the implications of this from the perspective of the families involved and noted the disadvantages that flow from the necessity of using multiple services, including requiring parties to re-tell their stories multiple times and inspiring feelings of distress and frustration in individuals which compounds the impacts of trauma.

## 5. New research and emerging policy developments

### Box 5: Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011

The Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 was introduced into Parliament by the Attorney General, The Hon Robert McClelland, on 24 March 2011. If passed, the Bill would:

- introduce a wider definition of family violence;
- explicitly recognise exposure to family violence as a source of harm to children;
- specify that where the principles of meaningful involvement and protection from harm were in conflict, greater weight should be given (by courts and advisors) to protection from harm;
- impose an obligation on advisors to inform parents that parenting arrangements should be in a child’s best interests and protect them from harm;
- impose an obligation on courts to inquire whether concerns about family violence or child abuse are of relevance when hearing a parenting application; and
- repeal both the friendly parent criterion, where the court has to take into consideration “the willingness and ability of each of the child’s parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent” (s60CC(3)(c) and the provision for costs orders for knowingly making false statements (s117AB).

In the past 12 months, four significant reports have highlighted the need to address the gaps and overlaps between the child protection and federal family law system. One was a large empirical study that considered these issues as part of an overall evaluation of the 2006 family law reforms (the AIFS Evaluation, Kaspiew et al., 2009). The other three reports were based on consultation and legislative and process analysis: they were by the Australian Law Reform Commission and NSW Law Reform Commission (ALRC/NSWLRC, 2010), Professor Richard Chisholm (2009) and the Family Law Council (FLC, 2009).<sup>12</sup> Some common themes that emerge from these reports include:

1. the frequency with which the provisions relating to shared parenting in the *Family Law Act 1975* (Cth) are misunderstood, and the lack of awareness among some professionals and parents that the presumption in favour of equal shared parental responsibility does not apply

<sup>12</sup> However, it should be noted that the reports from the FLC and Chisholm were concerned mainly with family law and intimate partner violence, not child protection.

- where there are grounds to believe a party has engaged in family violence or child abuse;
2. concern about some aspects of the *Family Law Act 1975* (Cth) that may deter parents from raising concerns about family violence and child abuse, namely a provision that obligates courts to make costs orders against parties found to have knowingly made “false statements” in proceedings (s117AB) and a provision requiring courts to consider the extent to which one parent has facilitated the involvement of the other parent in the child’s life (s60CC(3)(c));
  3. the need for better and more comprehensive processes for screening for family violence and child abuse across the family law system;
  4. the need for better education and training of professionals across the family law system in relation to family violence and child abuse; and
  5. the need for better co-operation between professionals and agencies in the federal family law system and child protection departments in the states and territories.

The Attorney General’s proposed amendments to the *Family Law Act 1975* (Cth), summarised in Box 5, reflect the Australian Government’s response to the reports by AIFS, Chisholm and the Family Law Council (McClelland, 2010).

### Australian Institute of Family Studies 2009 report: *Evaluation of the 2006 Family Law Reforms*

In relation to family violence and child abuse, key findings of the AIFS report (Kaspiew et al., 2009) were that:

- parents who report a history of family violence and/or ongoing concerns for their own safety or that of their children as a result of ongoing contact with the other parent are no less likely (and perhaps more likely) to have shared care arrangements than parents without these concerns (pp. 165–166);
- where parents report safety concerns as a result of spending time with the other parent, child wellbeing is lower, particularly for children in shared care arrangements, according to mothers’ reports (Figure 11.11);
- sometimes family dispute resolution processes are applied inappropriately for families where there is a reported history of family violence and/or the presence of ongoing safety concerns (p. 102); and
- family law system professionals are more confident about the adequacy of the system’s ability to ensure that children maintain meaningful involvement with each parent after separation than they are about its ability to ensure that children are protected from harm (pp. 235–236).

### Australian Law Reform Commission and New South Wales Law Reform Commission 2010 report: *Family Violence—A National Legal Response*

The consultation paper (April 2010) and final report (November 2010) highlighted a range of problems with the current legal frameworks for family law and child protection systems in relation to family violence and children’s safety. The reports acknowledged that the problems are at the intersections, and noted the absence (or limited nature) of interagency protocols. The report emphasised three key levels at which differences occur between the sectors of family law, criminal law, family violence legislation, and child protection legislation—including statutory departments and children’s courts. Not only are there structural barriers (largely a result of the

constitutional division of responsibilities between Commonwealth and states<sup>13</sup>), but also practice silos (reflected in organisational structures, protocols, and daily work routines) and cultural differences (beliefs and expectations about families, change etc.).

Launched on 11 November 2010, some of the key recommendations in the final report relating specifically to the intersection between family law and child protection included:

- strengthening the provision of investigatory and reporting services to family courts in cases involving children's safety by creating mechanisms for child protection services to provide these services (R19–1);
- expanding the jurisdiction of courts dealing with family violence to maximise the chance that families will be able to get all the legal protections they need from any court they approach—for example, giving family courts the power to confer parental rights and duties on a child protection agency in cases where there is no other viable and protective carer (R19–2);
- requiring judicial officers who make or vary a protection order in a state magistrates court to consider reviving, varying, discharging or suspending an inconsistent parenting order (R16–1); and
- ensuring family courts give primary consideration to the protection of a person affected by a parenting order over the other factors that are relevant to determining the best interests of the child (R16–4).

### Another national initiative: The National Framework for Protecting Australia's Children

COAG's endorsement in April 2009 of a National Framework for Protecting Australia's children 2009–2020 (along with the 3-yearly implementation plans that will progressively be developed) provides the context for understanding nationally the approach to children's safety and wellbeing in Australia. It makes clear the principles to guide actions to protect children, with a key recognition of the shared responsibility across levels of government, agencies, organisations, individuals, families and communities, to ensure children are safe and well. The framework articulates some of the connections between the work of statutory departments (in responding to at-risk children) and those other sectors who can be involved in either prevention, early intervention, or other systems and services that can be enlisted to assist with detecting and responding to the needs of children at risk. These include adult-focused services (like mental health and substance abuse services) as well as domestic violence services and the family law system.

Although there is little explicit acknowledgement of family law issues in relation to protecting children, under supporting outcome 1 ("Children live in safe and supportive families and communities"), one of the initial 3-year actions is to continue improvements to the experience of court processes for children, such as the rollout of Magellan (COAG, 2009). In addition, a number of the national priorities identified in the first 3-year action plan relate to "joined-up service delivery" and information sharing protocols, both of which are essential for improving the intersection between the family law and child protection systems.

### Recent state/territory child protection inquiries

On 18 October 2010, the Board of Inquiry into the Child Protection System in the Northern Territory released its two-volume report, *Growing Them Strong, Together: Promoting the Safety and*

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13 The ALRC/NSWLRC reference required review of the operation and intersection between 26 different laws.

*Wellbeing of the Northern Territory's Children*. There is only one mention in the report about interactions between the Family Court of Australia and the child protection department or children's court. The report documented complaints that:

Departmental workers may refer concerned family members to the Family Court to resolve matters that were clearly of a protective nature. For example, where a grandmother has assumed care of a grandchild because of concerns about his/her safety, it has been alleged that the Department routinely refers such concerned relatives to the Family ... Court in order to validate the arrangement rather than dealing with the matter as a kinship placement. The Children's Commissioner has referred to such practices." (Board of Inquiry into the Child Protection System in the Northern Territory, 2010, p. 306).

While acknowledging the role of Magellan in improving case-flow issues and provision of appropriate information, in light of submissions to the Inquiry, the Board concluded that a number of gaps in the intersecting jurisdictional responsibilities remain.

Similarly, in the report from the Wood Inquiry into Child Protection in NSW,<sup>14</sup> family courts and the family law service system were not specifically singled out; however, Justice Wood (2008) made broad recommendations in relation to interagency collaboration, as well as the importance of addressing the needs of children in the context of family violence.

Key principles underpinning the recommendations—which are now being implemented through the NSW Government's reform agenda, "Keep Them Safe"—included the acknowledgement that child protection is the collective responsibility of the whole of government and of the community, and the importance of service integration is seen as vital.

The Victorian Law Reform Commission (VLRC, 2010) produced a report on their inquiry into protection applications in the Children's Court. Highlighting issues such as the problems created by poor interagency collaboration, the VLRC report identified several areas of relevance to family law, including, notably, the need to build common understanding of what the "best interests" principles means across both jurisdictions. In keeping with its terms of reference, the report focused on how court processes can be reformed—in light of the traditional adversarial character of current approaches, which have their roots in criminal law approaches as a result of the historical development of the child protection jurisdiction from a legal perspective. The report recommends that any reform reflect an overarching objective:

The processes for determining the outcome of protection applications should emphasise supported child-centred agreements and should rely upon adjudication by inquisitorial means only when proceeding by way of supported agreement is not achievable or not appropriate in the circumstances. (VLRC, 2010, p. 17)

The VLRC (2010) put forward five possible options that would be consistent with achieving this objective, with the resolution of child protection matters through agreement rather than litigation, and the use of less adversarial court processes where litigation is necessary, being the central recommendation for reform. However, the report does not explicitly address the interaction with, or overlap in jurisdictional responsibility for child protection concerns raised in family law matters.

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<sup>14</sup> The Wood Report is the product of a special commission of inquiry into child protection services in NSW that was set up in June 2006 and reported in November 2008. In March 2009, the NSW Government published a response to the report, *Keep Them Safe: A Shared Approach to Child Wellbeing*. Many of Justice Wood's recommendations—as well as other changes that were not included in the Wood Inquiry report—have been implemented by the NSW Parliament in April 2009 with the passage of the *Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009*.

## Conclusion

There is now a solid empirical evidence base in Australia showing that allegations of child abuse are common in post-separation parenting disputes in family law courts and the family dispute resolution sector. There is increasing recognition of the adverse consequences of the poor fit between child protection systems and the federal family law system that stems from the fact that each system has different aims and imperatives. Finding more effective ways of responding to the needs of children in separated families where there are concerns about exposure to family violence, abuse, and neglect has become a key focus of policy development—though recent reports have had a stronger focus on inter-spousal violence, rather than child protection issues in family law matters. Federal initiatives that address the gaps between the two systems are under consideration. At the same time, several state and territory child protection departments are reforming or examining proposed reforms to their systems. This is a dynamic area, where policy development is occurring at several levels and in many ways. Further publications and alerts from the National Child Protection Clearinghouse will keep practitioners and policy-makers abreast of these developments.

### Box 6: Case studies

The following case studies are based on family court judgements. Their purpose is to illustrate how the family law and child protection systems intersect.

*Ray and Anor and Males and Ors* [2009] FamCA 219; *Secretary of the Department of Health and Human Services and Ray and Ors* [2010] FamCAFC 258 (22 December 2010)

This case involved competing applications for residence of two children aged 15 (“J”, a boy) and 9 (“Y”, a girl). Each child was represented by an Independent Children’s Lawyer. There were allegations that one of the children had been sexually abused by an uncle, that the mother had drug, alcohol and emotional problems and the father had been violent to the mother during the relationship. The mother had taken out an intervention against the father and just months prior to the proceedings an intervention order had been granted against the father to protect his new partner and the older child. The father was seeking sole parental responsibility and orders for supervised contact for the mother. Early in the proceedings, the judge formed a concern that both children were at risk of “emotional, physical and sexual abuse” (¶124) and that “it is possible if not likely that . . . none of the parties or available members of family are suitable to have parental responsibility” (¶107). Forming the view that a possible outcome of the proceedings may be an order for parental responsibility in favour of the Secretary of the Department of Health and Human Services (Tas), the judge invited him to intervene pursuant to Family Law Act s91B. The Secretary declined, and argued that the court would not have the power to make a parental responsibility order in his favour without his consent (¶128). The judge nonetheless made an order joining the Secretary as a party on the basis of an analysis that the court had the power to do this and also to make orders for parental responsibility in favour of the Secretary. This decision was appealed and the Full Court upheld the appeal, finding that the Family Law Act did not confer power on courts to make parental responsibility orders in favour of state child protection authorities in circumstances where the department did not consent.

*Akston and Boyle* [2010] FamCAFC 56

At the time of the proceedings, the child (a boy) in this case was 12. At the time of his birth, both parents were drug addicts. They had both engaged in criminal activity to support their addiction: the father had criminal con-

victions and the mother worked as a prostitute. The child was born with severe drug withdrawal. When the child was about 2 the father underwent rehabilitation as a condition of an intensive corrections order. The parents' relationship broke up and the mother continued using drugs. The father continued using drugs sporadically and at the time of trial was on a methadone program and admitted using marijuana. The mother became completely drug free when the child was about four.

The child lived with the father from aged 2 to age 5. During this time, child protection authorities removed the child from the father's care on three occasions, the last time for a period of 12 months under 2 year protection order. These interventions occurred as a result of concerns about neglect, emotional abuse and the father's drug use and his mental health. When the child was 6, child protection authorities arranged for him to be in the full time care of his mother, who had re-partnered, had two other children and was living in stable circumstances.

When the child was 10, the father applied for family court orders that would see the child's time divided equally between the parents. The case involved "competing parenting applications ... about a very vulnerable and needy child who had been exposed to mistreatment, lack of proper hygiene and care, and who had for much of his life not received appropriate emotional nurturing" (Boland J, ¶ 32). The federal magistrate hearing the case made orders for the child to live week about with each parent with school holiday time being shared. The Family Consultant, who had reviewed the child protection department's file (describing it as "harrowing reading") and interviewed both parents and the child, had recommended that he remain living with his mother and spending three days a fortnight with his father, with perhaps an increase of a day with his father. The mother appealed. The appeal was upheld, with an important conclusion of the appeal court being that the federal magistrate had failed to properly consider whether the father's drug use, and the possibility that he may revert to the use of hard drugs, meant that the court orders would expose the child to an "unacceptable risk". The matter was remitted to the federal magistrates court for re-hearing.

### *Mallory and Alden and Alden [2009] FMCAfam 61 (27 January 2009)*

This case involved two girls aged 6 and 5. They were living with their mother, who had chronic schizophrenia, and her mother. An additional member of the household was their half-brother, aged 12. The mother had another child, aged 14, who lived with her father and stepmother. The court was considering an application for contact by the girls' father. Initially, both the mother and father had made competing applications for the girls to live with them. However, the federal magistrate hearing the matter had indicated neither of these applications had a prospect of success because of the mother's mental illness and a range of issues relating to the father, including a history of drug and alcohol problems, a lack of suitable accommodation and allegations relating to family violence and child abuse. The girls involved in the case were the youngest of nine children the father had with various mothers. The Director General of the Department of Community Services (NSW) was an intervener in the case. By the time of trial, the parties and the intervenor had agreed that the orders for the children to live with the grandmother should be made. The main issues in the trial related to parental responsibility and the time the children should spend with the father and whether it should be supervised. The judge found the evidence disclosed:

- a history of family violence perpetrated by the father upon the mother;
- the father's criminal convictions for assault on a former partner;
- the father had pleaded guilty to assault occasioning actual bodily harm on the children's elder brother who was fearful of the father and hyper-vigilant as a result of his treatment by him;
- the child protection department in another state had investigated an incident in which the father was alleged to have kicked the older girl and verbally abused her; and
- the mother had made allegations of sexual abuse of the girls against the father.

In considering whether orders for contact would expose the girls to an unacceptable risk of abuse, the federal magistrate noted that: "[a]lthough in this case the mother has previously made allegations that the father has

sexually abused the children they have never been substantiated. There appears to be suggestions that he has previously been spoken to by police in relation to complaints of a sexual nature involving children but there was no evidence to support any finding that he has in any way been sexually inappropriate towards children" [¶ 93]. In considering the question of contact, the federal magistrate took into account the evidence of an expert witness, a psychiatrist, about the father's behaviour, his relationship with the children and the circumstances in which any risks to the children arising from contact could be mitigated. He made orders that would see contact progress from limited supervised periods to unsupervised alternate weekends in four phases:

1. contact occur for 2 hours every second Saturday at a contact centre for 6 months;
2. then that contact take place from 10 am until 4 pm on Saturday on an unsupervised basis for 6 months;
3. then contact was to be from 10 am until 4 pm on Saturday and Sunday every second weekend until the oldest child turned 11;
4. then, provided that the father had appropriate accommodation (of not less than two bedrooms with "all the usual facilities"), the children would stay from 10 am Saturday until 4 pm Sunday.

The orders also restrained the father from consuming alcohol or illegal substances in the period 12 hours prior to, and during, his contact with the children. The parties were also ordered to attend the local office of the Department of Community Services to seek assistance. Orders for the maternal grandmother to have sole parental responsibility were also made, with the proviso that she consult the parents in relation to changes in arrangements for matters such as school and extra-curricular activities.

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National Child Protection Clearinghouse  
Australian Institute of Family Studies  
Level 20, 485 La Trobe Street  
Melbourne VIC 3000, Australia