IN THE MATTER OF THE ROYAL COMMISSION INTO FAMILY VIOLENCE

ATTACHMENT LM-7 TO STATEMENT OF LEEANNE MILLER

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Filed on behalf of: State of Victoria
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[redacted]

This is the attachment marked '**LM-7**' produced and shown to **LEEANNE MILLER** at the time of signing her statement on 26 July 2015.

Before me

[redacted]

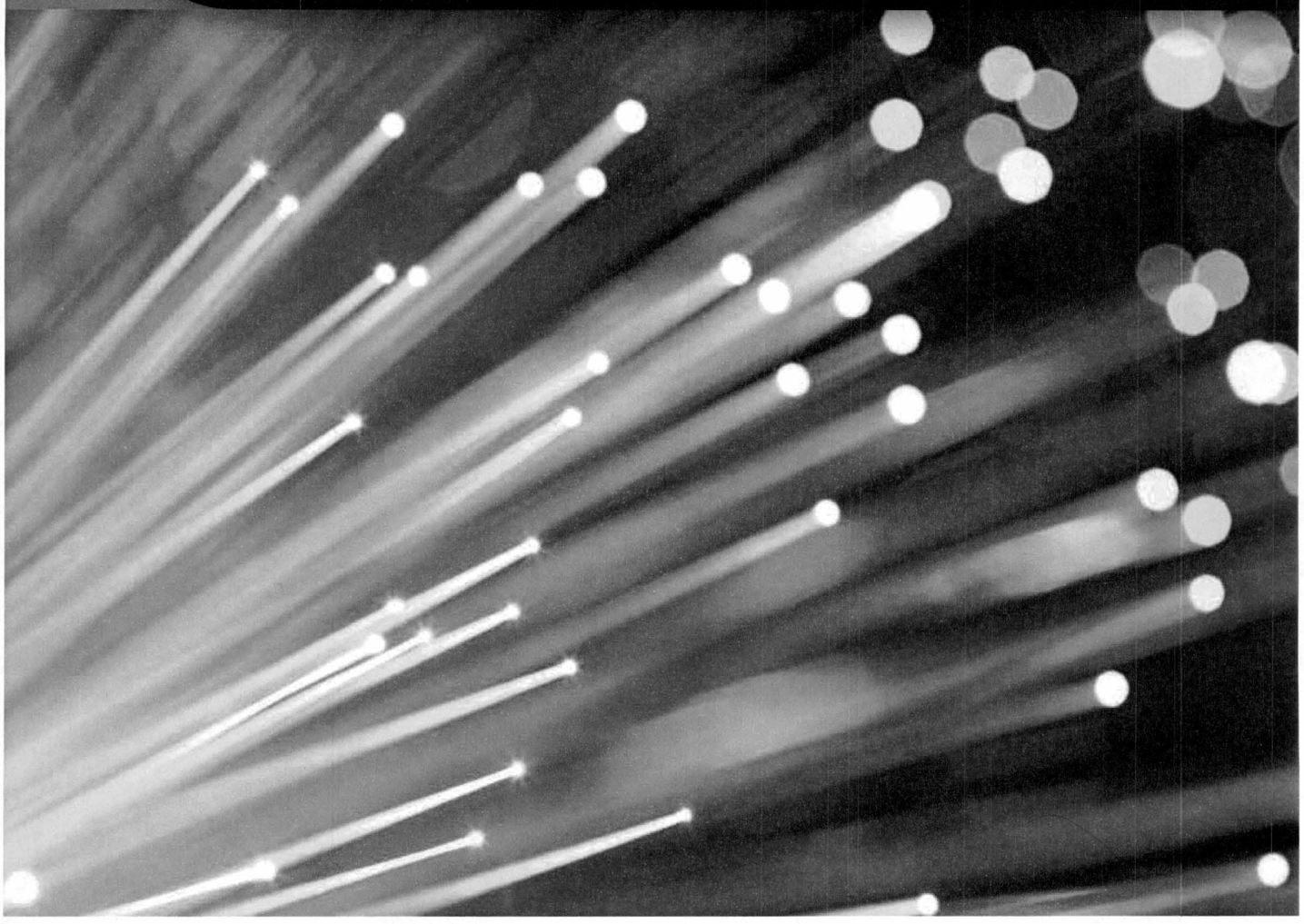
An Australian legal practitioner
within the meaning of the
Legal Profession Uniform Law (Victoria)

Attachment LM-7

A REPORT BY PROFESSOR RICHARD CHISHOLM AM

March 2013

INFORMATION-SHARING IN FAMILY LAW & CHILD PROTECTION
ENHANCING COLLABORATION



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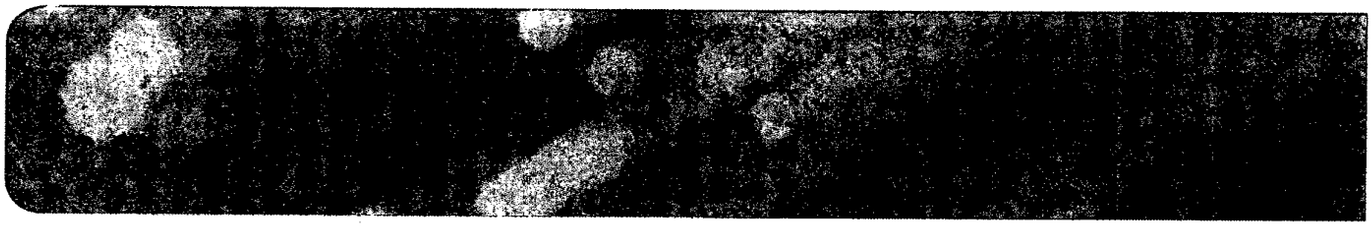


Contents

Executive Summary

Collaboration and sharing of information between the family courts and state and territory child protection departments are essential if we are to make good decisions about families and children. We need to supplement the relevant state and federal laws with agreements that set out principles and procedures to support such collaboration. These things are made very clear in the background literature, and were again emphasised by the stakeholders whose advice was of great assistance in the preparation of this report.

Considerable progress has already been made, and there are useful agreements in a number of jurisdictions. This report builds on the work of the Attorney-General's Department in suggesting ways in which formal agreements might be improved.

Chapters 2 and 3 review the relevant legal framework, in particular the federal and state laws that affect information-sharing. This review indicates that some of these laws could unduly inhibit appropriate information-sharing, and might usefully be reconsidered. **Chapter 4** describes a number of formal written information-sharing agreements between the family courts and child protection departments (and other parties). **Chapter 5** reviews general issues about drafting such agreements, and makes a number of recommendations. **Chapter 6** deals with the most important specific issues, making recommendations about how formal agreements might best address each issue. **Chapter 7** deals with information-sharing mechanisms other than formal agreements.

These chapters underpin the **Model Agreement**, which is intended to assist in the formulation of such agreements, while of course leaving it to the parties to mould each agreement in the way that best meets their needs in the particular jurisdiction. The various reccmendations made throughout the report are collected in the **List of Recommendations**.

The first two recommendations urge state and territory governments to consider amending laws that might hinder information-sharing, and to consider passing legislation that positively encourages information sharing between various agencies, including the federal family courts. The passing of such legislation, perhaps accompanied by some amendments to the Family Law Act 1975, could create a legislative platform for more consistent and effective information sharing, which would surely benefit many children and families.

In the main, however, this report works within the existing law. The remaining 28 recommendations, together with the Model Agreement, attempt to distil the best elements of existing practice and current formal agreements. The ideal is that those who make decisions about our most vulnerable children do so with the best available information, and in a spirit of collaboration with all the state and federal agencies involved. It is hoped that the analysis and suggestions in this report will help those authorities create an environment in which that happens.

List of Recommendations

LAW REFORM ISSUES (CHAPTER 3)

Recommendation 1

State and territory governments should consider amending any laws that might inhibit personnel of child protection departments from responsibly providing information to the Family Court of Australia, the Family Court of Western Australia and the Federal Magistrates Court ('the family courts') that would assist the courts in making decisions relating to children.

Recommendation 2

State and territory governments should consider passing legislation to promote information-sharing between the family courts and state and federal bodies and agencies having responsibility for the safety and welfare of children such as New South Wales' *Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009*, and consult with their federal counterparts about any consequent amendments that might need to be made to the Family Law Act 1975.

FORMAL INFORMATION-SHARING AGREEMENTS: GENERAL MATTERS (CHAPTER 4)

Recommendation 3

In jurisdictions where they currently rely on informal arrangements, the family courts, the state or territory child protection departments ('Child Protection') and the Legal Aid Commission ('Legal Aid') are encouraged to consider carefully the possible advantages of having a formal information-sharing agreement ('Agreement').

Recommendation 4

The content of formal agreements should relate to their basic purpose, for example to set out principles and procedures agreed by the parties relating to information-sharing and associated procedural matters. Agreements should not be used to state or summarise the law or describe the procedures ordinarily used by the parties.

Recommendation 5

The parties to agreements should normally be (1) one or more of the family courts (2) the child protection department of the relevant state or territory, and (3) the Legal Aid Commission of the relevant state or territory.

Recommendation 6

The drafting of agreements, and any education or training relating to them, should acknowledge that although agreements cannot alter the law or interfere with the exercise of jurisdiction by the courts, it might be proper in some circumstances for judicial officers to have regard to the terms of agreements.

Recommendation 7

Agreements should be entitled 'Information-sharing agreement between [the parties]' rather than 'Protocol' or 'Memorandum of Understanding'.

Recommendation 8

Agreements should be expressed simply and clearly, and in a way suited to the intended readership.

Recommendation 9

Agreements should include words to the effect that the parties commit themselves to use effective, practical and efficient procedures to share information with the other parties, where the information appears relevant to another party and where providing it is lawful and reasonably practicable.

Recommendation 10

Agreements should state that parties are committed to a co-operative working relationship, and refer to the value of such co-operation.

Recommendation 11

Agreements should specify which person or body in each agency is to be responsible for information-sharing generally and (if different) in relation to particular matters.

Recommendation 12

If agreements refer to promoting the interests of children, they should avoid using the language of the relevant state or federal legislation but instead refer, for example, to 'working together to produce the best possible outcomes for children'.

Recommendation 13

Agreements should include a commitment to the 'one court principle', namely that so far as possible decisions about a particular child should be made by only one court, namely the court that is most appropriate in the circumstances.

Recommendation 14

Agreements should encourage parties to act in open and collaborative ways, in which they may agree on measures additional to those specified in the agreement.

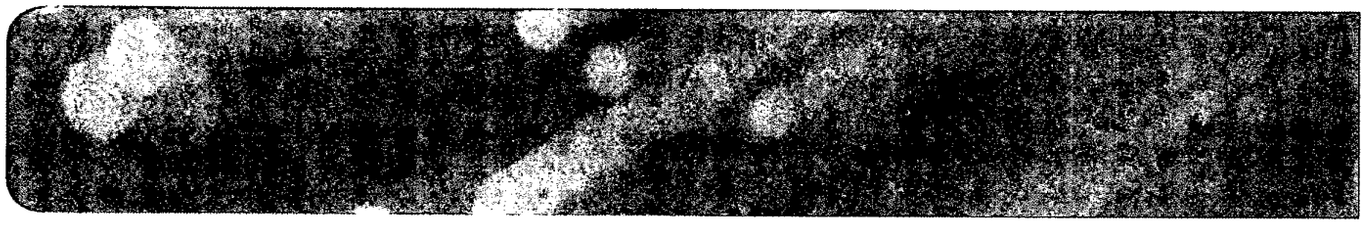
Recommendation 15

So far as possible, agreements should state principles that are agreed between all the parties, rather than stating the position of particular parties on particular issues.

Recommendation 16

Parties should ensure the effective implementation of the agreement by such measures as

- ensuring that it is prominently published so that it is readily available for the parties' personnel and others affected by it, such as legal practitioners and family counsellors;



- designating individuals to have responsibility for implementing the agreement, attending to any problems or disputes that arise in its administration, and recommending amendments as necessary;
- ensuring that the agreement is given appropriate attention in all staff training and supervision; and
- providing for periodic reviews of the agreement after a period, and any necessary amendment.

FORMAL INFORMATION-SHARING AGREEMENTS: SPECIFIC MATTERS (CHAPTER 6)

The family courts notifying Child Protection of suspected child abuse: sections 67Z and 67ZA

Recommendation 17

Agreements should treat notifications under s 67Z and 67ZA as the commencement of a process of information-sharing between the family courts and Child Protection, and should therefore set out in relation to these notifications (unless the matter is covered elsewhere in the agreement):

- the person or body to whom notifications should be made and the manner of continuing communication between the parties;
- what information the family courts will provide to Child Protection when they send Child Abuse notifications;
- a commitment by Child Protection to advise the family court of steps it proposes to take, and the time frame for providing such advice;
- a commitment by both parties to keep the other advised of significant developments;
- a commitment by both parties to provide the other with relevant information about the child and family (to the extent that this is not covered elsewhere in the agreement); and
- measures by which each party seeks to minimise unnecessary use of resources by the other.

THE FAMILY COURTS REQUIRING INFORMATION: SUBPOENAS AND SECTION 69ZW ORDERS

Recommendation 18

Agreements should formulate preferred approaches in each jurisdiction relating to subpoenas and s 69ZW orders and relating to preliminary inquiries and the possible use of 'pre-s 69ZW orders'.

Recommendation 19

Agreements should set out in relation to subpoenas and s 69ZW orders (and, if appropriate, preliminary inquiries and 'pre-s 69ZW' orders) agreed arrangements relating to lines of communication, standard procedures, time frames for responses, and measures to minimise delay and duplication of effort.

Appendix 2List of Recommendations

CHILD PROTECTION INTERVENING IN FAMILY COURT PROCEEDINGS: SECTION 91B

Recommendation 20

Agreements should include provisions to the effect that when making a s 91B request, unless there are reasons for not doing so, the family court will

- indicate that the court is concerned that a child is likely to be exposed to a serious risk of harm if Child Protection does not intervene (as, for example, where it appears that the court may be unable to place the child with a viable carer);
- indicate the nature of the risk and the reasons for such concern;
- indicate the reasons for believing that the risk would not be averted by Child Protection providing information to the court or contributing in other ways without intervening;
- ensure that Child Protection has been provided with copies of any orders made in the proceedings, and information about the next steps to be taken in the proceedings;
- take all other appropriate steps to ensure that Child Protection has appropriate access to any relevant information held by the family court (including making an order permitting Child Protection to inspect the Court file and make copies of relevant documents); and
- specify the person or body within the family court to whom Child Protection should respond, and with whom Child Protection should continue to communicate in relation to the matter.

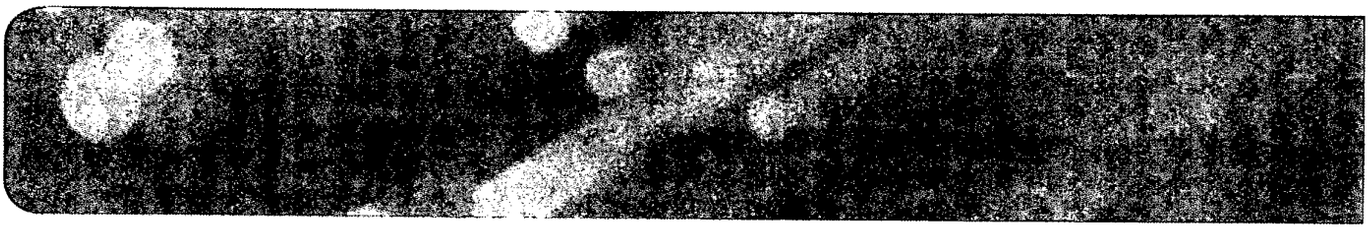
Recommendation 21

Agreements should include provisions to the effect that the family courts will collaborate with Child Protection to develop check-lists or other such measures to assist judges to identify relevant matters when making s 91B orders, and to formulate them in a way that will assist Child Protection in considering the request.

Recommendation 22

Agreements should include provisions to the effect that on receipt of a s 91B request, Child Protection will

- promptly acknowledge receipt of the request, and indicate the person or body with whom the family court should thereafter communicate in relation to the matter;
- as soon as practicable, respond to the request by indicating
  - whether Child Protection intends to intervene in the proceedings;
  - what other steps if any Child Protection intends to take in relation to the matter;
  - if decisions remain to be made, what steps are being contemplated and when it is likely that such decisions will be made; and
  - what involvement, if any, Child Protection has had in relation to the child, and what information is held in relation to the matter; and
- if unable to respond within [specify time frame], advise the court of the reasons, and the time within which it will respond.



Recommendation 23

To the extent that these matters are not dealt with elsewhere, agreements should deal with the following matters in connection with s 91B requests:

- what information the family court will provide to Child Protection at the time of the order;
- the mechanics of communication between the family court and Child Protection following a s 91B request;
- how Child Protection is to inform the family court about its decision in relation to the s 91B request, and about any proposals for further action (eg taking children's court proceedings);
- how Child Protection and the family court will inform the other of any relevant information each holds; and
- the time within which Child Protection will normally respond to a s 91B order, and procedures to be adopted if Child Protection needs longer.

CHILD PROTECTION REFERRING CLIENTS TO FAMILY COURTS

Recommendation 24

Agreements should make it clear that information-sharing arrangements apply in circumstances where Child Protection, having been involved with a family, suggests that a person take proceedings in a family court.

INDEPENDENT CHILDREN'S LAWYERS

Recommendation 25

Agreements should provide that on appointment an Independent Children's Lawyer who is aware that Child Protection has been involved with the family, or considers that such involvement is desirable or likely, will provide or offer to provide the following information (so far as it is known to the Independent Children's Lawyer) to Child Protection:

- whether any orders have been made, or are likely to be made, under s 69ZW;
- whether any orders have been made, or are likely to be made, under s 91B;
- whether any subpoenas have been issued, or are likely to be issued, to Child Protection;
- any notifications that have been made under s 67Z, 67ZA or 67ZBA;
- information about the next steps in the family court proceedings, notably the dates and times of future court hearings or mentions;
- whether the Independent Children's Lawyer is concerned for the immediate safety or welfare of the child, and the basis of such concern; and
- any other information about the family court proceedings that the Independent Children's Lawyer considers is likely to be helpful to Child Protection.

Recommendation 26

Agreements should include provisions to the effect that when writing to advise of his or her appointment, the Independent Children's Lawyer may request information from Child Protection

that is (1) likely to be important to enable the Independent Children's Lawyer to discharge his or her functions and (2) is not already available to the Independent Children's Lawyer, whether from the family court file or otherwise.

The information requested may relate, for example, to the following matters:

- whether Child Protection has been involved with the child or the child's family, and the nature of that involvement;
- whether any reports had been received by Child Protection and whether they had closed any files on the basis that the allegations made were 'unsubstantiated'.
- the nature of Child Protection's current plans, including any plans relating to responding to orders, subpoenas or requests by the family courts, commencing proceedings in the children's court, and intervening in the family court proceedings.
- the nature of information held by Child Protection or known to Child Protection relating to the child (for example expert reports) and how that information might be accessed by the Independent Children's Lawyer.

Recommendation 27

Agreements should provide that Child Protection should make information available to the Independent Children's Lawyer when the information has not already been provided, or is not being provided, to the relevant family court, and when providing the information is likely to assist the Independent Children's Lawyer, and providing it is reasonably practicable, and not legally prohibited (as, for example, when it would reveal the name of a notifier contrary to state law).

The information may be provided by facilitating photocopy access by the Independent Children's Lawyer, or providing photocopies, or, where it is more convenient, by preparing a report for the Independent Children's Lawyer that contains the information.

Recommendation 28

Independent Children's Lawyers should keep Child Protection informed if they have information that might reasonably be required by Child Protection, and should provide such information on request if doing so is reasonably practicable, and is not legally prohibited.

RECOVERY ORDERS

Recommendation 29

Unless other provisions for information-sharing make it unnecessary, agreements should provide that the family courts should where practicable ascertain whether Child Protection has relevant information before the family court makes a recovery order.

FUTURE DEVELOPMENTS: FAMILY VIOLENCE

Recommendation 30

Consideration should be given to developing other information-sharing agreements between the relevant parties on other topics, such as family violence.

Introduction

'It takes a village...'

> Jack and Sophie, aged 5 and 7, have been living with their alcoholic mother, but have repeatedly been in hospital with suspicious injuries. They have complained that 'Uncle Frank', the mother's de facto partner, hurts them and locks them outside the house when he is angry. The state child protection department has visited the home on many occasions, as a result of notifications by neighbours worried about the children, and has an extensive file on the family. The children's father, who has mild intellectual impairments, recently obtained legal aid and has commenced proceedings in the Federal Magistrates Court seeking urgent orders that the children live with him and that an Independent Children's Lawyer be appointed for the children.[1]

How can we protect these unfortunate children? How can their needs be met — now, and next week, and next month, and next year?

Hard questions; but we know part of the answer. It 'takes a village to raise a child', we say.[2] We mean that many people — family, friends, neighbours — all have significant parts to play in the intimate business of bringing up a child. And we think of a village as a community, where everybody knows everybody else, and everybody else's business.

For Jack and Sophie, the 'village' they need includes a range of professionals, working in different agencies: police, health and education, but most relevantly to the present task, child protection and the family courts. These professionals will need to work together, understanding each other's roles, sharing information, and treating the protection of children as 'everyone's business'.[3]

But this will not be easy, because we don't start with a village; we start with separate organisations. Even to speak of the Australian 'family law system' is optimistic: there are a number of separate agencies at Commonwealth and state or territory level, each having separate legislative objectives, histories, and characteristics.

1 This is a hypothetical example; an actual decision illustrating the general problem is *Simmon & Dailey* [2012] FMCAfam 549.

2 The saying, apparently an African proverb, was made famous by Hilary Clinton's 1996 book *It Takes a Village* (Simon and Schuster 1996).

3 To quote the title of a significant government report, 'Protecting Children is Everyone's Business': National Framework for Protecting Australia's Children 2009–2020 (FaHCIA, 2009).

[redacted]

We don't know what arrangements will be best for Jack and Sophie. But we do know that their best chance is if those working in the relevant agencies work together as colleagues, understanding each others' role and sharing their work, information and insights, rather than operating separately.[4] To take a different analogy, they need to work together somewhat in the way that a team of health professionals might work together in caring for a diabetic patient.

Much valuable work has already been done, most obviously in the Magellan program but elsewhere as well, to improve collaboration. But more needs to be done if we are to provide Jack and Sophie, and the thousands of children like them, with a coherent and intelligent response to their vital and urgent needs.

Background to this report[5]

On 22 July 2010 the National Justice Chief Executive Officers' Group approved a project plan for the development of national initiatives to improve collaboration between the federal family courts and child welfare authorities to better protect children. The project plan provided for the development of an Options Paper by the Commonwealth Attorney-General's Department. In December 2011 the Department published the Options Paper, entitled 'Improving the interface between the child protection systems and the family law system', and distributed it to key stakeholders.

The Options Paper made fifteen recommendations for national initiatives, aimed at streamlining processes across jurisdictions, to support families who are involved in both systems and to improve the outcomes for their children. The measures recommended were all achievable without changing any laws. The recommendations were aimed at developing best practice frameworks for:

- case management and information-sharing;
- risk identification and assessment;
- expanding the exercise of current jurisdiction; and
- relationship-building.

The Options Paper was informed by:

- extensive consultations conducted by the Commonwealth Attorney-General's Department with family courts and key stakeholders in the family law and child protection systems, including the hosting of a national collaboration meeting held in July 2011;
- recent literature about the interface,[6] and
- the considerable work that was being conducted by the Commonwealth Attorney-General's Department and the States and Territories to improve the interface between the federal family courts and the child welfare authorities.

4 The findings of Rhoades et al relating to family law professionals (although not involving Child Protection), seem applicable: 'A defining characteristic of the successful working relationships ...was a complementary services approach, in which practitioners regarded themselves as contributing different but equally valuable skills and expertise ...': Rhoades, H., Astor, H., and Sanson, A., 'A Study of Inter-Professional Relationships in a Changing Family Law System' (2009) 23 *Australian Journal of Family Law* 10-30, at 11.

5 This section is based on a draft prepared by the Attorney-General's Department, for which I am grateful.

6 See the list of references. Of particular note is the report of the Australian Law Reform Commission and the New South Wales Law Reform Commission, *Family Violence — A National Legal Response* (ALRC Report No 114, 2010).

Two of the recommendations in the Options Paper related to information-sharing Memorandums of Understanding and Protocols between family law courts and State and Territory child welfare authorities. These recommendations were as follows:

> **Recommendation 1** — Stakeholders in each jurisdiction should review the current Memorandums of Understanding and Protocols in place between their federal family courts and State and Territory child welfare authorities and amend them, or create new ones if required, with reference to the best practice framework drafted by the Commonwealth Attorney-General's Department.
>
> **Recommendation 2** — Memorandums of Understanding and Protocols should include provisions relating to procedures for dealing with Independent Children's Lawyers.

Recommendation 1 resulted from a proposal at the first national collaboration meeting, that the Commonwealth Attorney-General's Department would draft a 'best practice framework' for information-sharing Memorandums of Understanding. The recommendation reflected the general consensus amongst stakeholders that it would be useful if such agreements were reasonably consistent across jurisdictions, to streamline information-sharing practices between federal family courts and child welfare authorities (while also accommodating the particular needs, constraints and opportunities within each jurisdiction).

The Commonwealth Attorney-General's Department engaged me in April 2012 to provide advice and assistance in relation to the development of a 'best practice framework' for formal agreements to improve the sharing of information between the federal family law system and the state and territory child protection system. More specifically, I was asked to prepare a report that

- considers the impediments to information sharing and examines how Protocols or Memorandums of Understanding are intended to address those impediments,
- considers recommendations in current literature relating to the development of Protocols or Memorandums of Understanding,
- considers which existing practices and procedures encourage appropriate and effective information exchange,
- provides advice on the style, form and potential provisions for inclusion in a pro forma Protocol or Memorandums of Understanding, and
- includes guidance which may be provided to stakeholders on the development, implementation and mechanisms to support the ongoing use of Protocols or Memorandums of Understanding.

This Report

Accordingly, this report reviews the existing formal agreements and seeks to present ideas and drafts that might be useful to agencies as they review existing agreements or consider creating new ones.

It starts with the relevant legal framework (**Chapter 2**), and in particular federal and state laws that affect information-sharing (**Chapter 3**). These chapters provide the basis for suggestions that some of these laws unduly inhibit information-sharing, and might usefully be reconsidered **Chapter 4** describes a number of formal written information-sharing agreements between the family courts

Chapter 1

and child protection (and other parties). General issues about drafting such agreements are the subject of discussion and recommendations in **Chapter 5**, while **Chapter 6** deals with what appear to be the most important specific issues, making recommendations about how formal agreements might best address each issue. **Chapter 7**, prepared by the Attorney-General's Department, deals with mechanisms (other than formal agreements) to support co-ordination and information-sharing. These chapters underpin the **Model Agreement**, which is intended to assist in the formulation of such agreements, while of course leaving it to the parties to mould each agreement in the way that best meets their needs in the particular jurisdiction. The suggestions made in various chapters are collected in the **List of Recommendations**. Most of the measures recommended are consistent with the existing law, but two recommendations suggest reconsideration of legal provisions of particular relevance to information-sharing.

This report does not examine the Magellan Program, an interdisciplinary case management program that operates in many registries of the Family Court of Australia. That program — which does not apply in the Federal Magistrates Court — involves collaboration between the Court, Child Protection, Police and Legal Aid in cases involving the most vulnerable children. It has been favourably reviewed,[7] but it is beyond the scope of this report to examine it further, or to consider whether it should be extended — a matter that raises resource issues. The focus in this report is on information-sharing and collaboration involving all children's cases, in all the family courts.

Further progress

Further progress will not, of course, result from this Report alone. It will result from leadership from the top — the chief judicial officers, the chief executive officers, and the responsible state and federal Ministers. It will result, too, from actions by personnel at all levels that show initiative, trust of each other, and a common purpose. I hope this report will assist, but it can only do so if it supports a real commitment, at all levels, to provide a more effective and coherent response to the needs of children at risk. Ideally this report will soon be eclipsed, as arrangements are reviewed, modified and developed in a continuing enhancement of our ability to work together for children like Jack and Sophie.

Terminology

For convenience, this Report uses generic and non-technical terms where possible. Thus state child protection departments, however titled, will be 'Child Protection'. The Family Court of Australia, the Family Court of Western Australia and the Federal Magistrates Court will be 'the family courts', except where it is necessary to distinguish between them. 'Judge' will often be used as a generic term, including Federal Magistrates as well as Judges. 'Children's court' will be used for all state courts dealing with child protection matters, however designated. 'Legal Aid' will be used for state Legal Aid Commissions. Where a term is necessary to encompass courts and other bodies, the convenient term 'agency' will be used, even though it is not strictly accurate. 'State' will generally be used rather than the more cumbersome term 'state or territory'. Protocols and Memorandums of Understanding will normally be referred to as 'agreements'. Numbered headings

7 Daryl J. Higgins, 'Cooperation and Coordination: An evaluation of the Family Court of Australia's Magellan case management model' October 2007 (available on the website of the Family Court of Australia).

and paragraphs of text in existing agreements will generally be cited as 'paragraphs' ('Chapter' is avoided to avoid confusion with this report, and 'section' is avoided to avoid confusion with legislative provisions).

Acknowledgments

This report would not have been possible without much assistance, for which I am very grateful. First, I had the opportunity to work with dedicated professionals at the Commonwealth Attorney-General's Department, especially Tracy Ballantyne, Lisa Zehetner, and Sarah Ford. They were a pleasure to work with, supplying expert guidance, generous support and collegiality. Time limits meant that I had little opportunity to consult with professionals working in the field. But I learned a great deal from the literature and from the stakeholders' responses to the Department's Options Paper. This report also draws on ideas that have been canvassed in various private discussions and drafting proposals relating to information-sharing agreements. Finally, I am grateful to a number of people who found the time on short notice to provide helpful comments on drafts of parts of the report: Adele Byrne, Elizabeth Chisholm, Angela Filippello, Julie Jackson, Helen Rhoades and Nicholas Wilkinson. Of course I accept sole responsibility for the contents of the report.

Richard Chisholm
August 2012

The legal background

Introduction

Arrangements between the family courts and Child Protection relating to information-sharing take place against a legal background of some complexity. This chapter deals with general matters relating to the often-intersecting work of the family courts and Child Protection. Chapter 3 embarks on the more formidable task of reviewing the many state and federal laws that specifically impinge on information-sharing.

The starting point: parental responsibilities

The starting point is that the law treats parents as responsible for their children. Section 61C of the Family Law Act provides: 'Each of the parents of a child who is not 18 has parental responsibility for the child'. Various laws, both Commonwealth and state, support parents' responsibilities. For example, the law provides that normally the parents can choose the child's name, and this name will go on the birth certificate; parents are obliged to send the child to school; if another person takes the child from the parents, the law will normally require that the child be returned; in matters of contract and property parents will normally act on behalf of the child; and there are many others.

Who are 'parents'? The Family Law Act does not define the term, except to include adoptive parents, but the case law indicates that it means, at least approximately, the biological parents.[8] In law they are the 'parents', and — unless a court makes an order changing the legal situation — they alone have parental responsibilities. This is so whatever the circumstances; it is irrelevant whether they are married or have ever lived together, or even whether the child is living with one or both of them. Although grandparents and other relatives often play a large part in the care of children, and may act in the role of parents, in law they do not fall within the definition of 'parent' and do not have 'parental responsibility'.

Generally speaking, parents can delegate their parental responsibilities, for example when they leave a child in the temporary care of a baby sitter. In such circumstances, that person may legally do what is necessary to care for the child during that period.

Reallocating parental responsibilities in particular cases

The legal starting point — that parents have parental responsibilities — sometimes needs to be changed. The parents might die, or become incapable; they might fail to care for the child properly; they might separate and be unable to agree who should have the child.

The law provides for such situations not by creating rules about different situations, but by giving courts the power to make specific arrangements tailored to each child's situation. There are basically[9] two different ways in which this can be done: by family courts operating under the

8 *Donnell v Dovey* (2010) 237 FLR 53; 42 Fam LR 559; FLC ¶93-428; [2010] FamCAFC 15. It is not necessary here to explore the meaning of 'parent' in relation to children born as a result of artificial conception procedures.

9 This is a 'broad brush' account, and does not refer, for example, to the inherent (or '*parens patriae*') jurisdiction of the state Supreme Courts.

Commonwealth Family Law Act ('family law'), and by child protection departments and children's courts operating under state child protection laws ('child protection law').

The state child protection system

Child protection is mainly covered by state laws. At the most elementary level, the state child protection systems can be seen as a means whereby the state intervenes to protect children who are at risk from abuse or neglect, whether or not they are in the care of their parents. It is the fact that the child's needs are not being adequately met that provides the rationale for the intervention.

The state system consists of a department with resources enabling it to support families in difficulties, and also to investigate and intervene in cases of apparent abuse or neglect. Officers of the department can apply to the Children's Court for orders transferring the parents' responsibilities to other people such as foster parents, or limiting the parents' authority, as where a child is left in a parent's care but under departmental supervision.

The Children's Court can make such orders, however, only if it is satisfied that the child's needs require such actions. This essential requirement is expressed as the need for the Children's Court to make a finding that the child is, for example, 'in need of care and protection' (the terminology differs between the jurisdictions), having regard to the grounds set out in the legislation. It is an important feature of the system that the Children's Court cannot make orders unless it is satisfied that this threshold test has been met. Once the threshold is met, the children's court can make a range of orders: for example, the care of the child by a family member might be supervised, or the child might be placed with foster parents, or in the care of an organization. The department may provide financial and other support to foster parents and others who might have the care of the child.

The family law system

By contrast, the largely-federal[10] family law system has no investigatory body corresponding to the state child protection departments. It consists essentially of courts operating under the Family Law Act 1975 (Cth), mainly the Family Court of Australia and the Federal Magistrates Court ('the family courts').[11] The federal system is engaged when an applicant seeks an order, and in dealing with the application the court acts on the evidence produced by the parties (including a children's lawyer in some cases) having no investigative facility of its own. One rationale for the role of the family courts is that the parents, each of whom has equal parental responsibilities, are unable to agree, and it is necessary for a decision to be made by some third party, in this case the family court. There is no equivalent threshold test in the federal system: once an application is made seeking parenting orders, it must be determined on the basis of the child's best interests ('the paramount consideration').

10 The Family Court of Western Australia is a state court, and the legal aid commissions are state bodies.

11 State magistrates courts also exercise a limited jurisdiction in proceedings under the Family Law Act.

Chapter 2

Under the Family Law Act 1975, applications can be made to a family court for 'parenting orders'. These are, in substance, orders identifying with whom a child should live[12] or spend time,[13] and orders dealing with other aspects of 'parental responsibility' (such as who should have power to make decisions about such things as schooling, names, religion etc).

These provisions are not limited to children of a marriage, as they once were: today, jurisdiction is almost entirely based on provisions of the Family Law Act 1975 building on a reference of power from all of the states[14] in the 1980s. There are various related provisions, including provisions for injunctions, interim and final orders, location and recovery orders. The provisions governing the exercise of these powers are complex, especially since amendments of 1995 and 2006, but it remains the law that the courts must regard the best interests of the child as the paramount consideration.[15]

The substance of these powers has remained the same since the original version of the Family Law Act 1975, but the language was changed by amendments in 1995, and again in 2006.

The amendments of 1995[16] removed the previous terms 'guardianship', 'custody' and 'access'. The term 'guardianship' was replaced by 'parental responsibility' and 'access' by 'contact': in substance, the new terms had identical meaning. The new term 'residence', however, was significantly different from 'custody'. Whereas an order for custody under the previous law had given the person having custody certain decision-making rights over the child, the new term 'residence' meant only that the child was to live with the person, and it did not affect decision-making powers. Thus, if no order was made relating to parental responsibilities, but simply orders that the child should live with one parent and have contact with the other, each parent would, in law, retain exactly the same bundle of powers that were previously entailed by the concepts of guardianship and custody. This was a deliberate change, the intention being to encourage both parents to remain active and involved parents after family breakdown.

The amendments of 2006[17] retained the feature that orders about residence and contact were not to affect parental responsibility, but it removed the terms 'residence' and 'contact', and instead provided simply for the making of 'parenting orders'. The range of parenting orders was spelled out in more detail than formerly,[18] but continued to include all the matters previously contained under the old terms guardianship, custody and access (and under the terms that obtained between 1996 and 2006, namely 'parental responsibility', 'residence', and 'contact'). The amendments also introduced a presumption favouring equal shared parental responsibility,[19] and more detailed guidelines for determining the best interests of a child.[20]

12 Before 1996 called 'custody' — although a custody order included decision-making powers — then 'residence' until 2006, when the legislation gives it no particular name.
13 Before 1996 called 'access', then 'contact' until 2006, when the legislation gives it no particular name.
14 Except Western Australia, which has a state family court. See Family Law Act 1975 s 41.
15 Family Law Act 1975 s 60CA.
16 Family Law Reform Act 1995 (Cth).
17 Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth).
18 Section 64B.
19 Section 61DA.
20 Notably sections 60B, 60CC and 65DAA.

An application for a parenting order may be made by either or both of the child's parents; or the child; or a grandparent of the child; or 'any other person concerned with the care, welfare or development of the child'.[21] Although there might well be circumstances in which a state Child Protection officer could apply under this provision,[22] in practice when Child Protection gets involved in family law proceedings, it will normally do so by intervening in the proceedings, as we will see.

Dealing with the simultaneous operation of the state and federal systems: s 69ZK

Had there been no provisions dealing with this issue, by virtue of s 109 of the Constitution orders made by the federal courts would prevail over any inconsistent orders under the state system. However the Family Law Act (a federal Act) provides, in substance, that the state system will prevail: s 69ZK.[23]

There are two strands to the section. First, s 69ZK(1) says that when a child is under the care of a person under a (state) child welfare law, the family court *must not make an order* in relation to the child.

There are two qualifications to this restriction. First, the family court can make an order about the child if it is expressed to come into effect when the child ceases to be under such care. Thus the family court could make an order, for example, that if in the future the child ceases to be under state care, the child is then to live with a certain person. In practice, the family court would often be reluctant to make an order of that kind, since it would come into operation at an unknown time in the future, and in unknown circumstances. Normally any proceedings of the family court would be terminated or adjourned when the child is in care under the child welfare laws.

The second qualification is that the family court can make orders in relation to such a child if the (state) child welfare officer[24] has given written consent to the institution or continuation of the proceedings.

21 Section 65C.

22 The application of section 65C was also considered (although not in relation to Child Protection officers) in *Kam v MJR* (1998) 24 Fam LR 656; FLC 92-847; R v M (2002) FMCA Fam 279; *Re J and M: Residence Application* (2004) 32 FamLR 668; (2004) FMCAfam 656. See also *Faulkner and McPherson v Rugendyke; Department of Community Services (Intervener)* (1995) 19 Fam LR 507 (FC) (Director-General of the NSW Department of Community Services is a 'person'' to whom custody of a child could be ordered, where the Director-General had participated in the proceedings but through an oversight had not become a party).

23 There are reported decisions dealing with the effects of earlier versions of this provision, but the current wording resolves the issues that arose in those cases and it is unnecessary to discuss them.

24 The term 'child welfare officer' is defined in section 4 of the Family Law Act as 'a person who, because he or she holds, or performs the duties of, a prescribed office of the State or Territory, has responsibilities in relation to a child welfare law of the State or Territory' or 'a person authorised in writing by such a person for the purposes of Part VII' The Family Law Regulations 1984 identify each 'prescribed office' in the various states; for example in New South Wales, 'the offices of (i) Minister for Community Services, in relation to ... the Children and Young Persons (Care and Protection) Act 1998 (NSW)': Reg 12BA.

Chapter 2

The second strand of s 69ZK is to preserve the operation of the state system. Section 69ZK(2) provides:

(2) Nothing in this Act, and no decree under this Act, affects:

(a) the jurisdiction of a court, or the power of an authority, under a child welfare law to make an order, or to take any other action, by which a child is placed under the care (however described) of a person under a child welfare law; or

(b) any such order made or action taken; or

(c) the operation of a child welfare law in relation to a child.

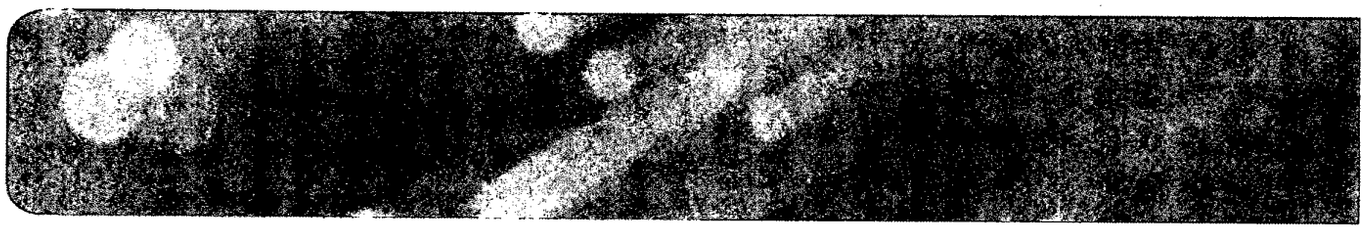
These two strands ensure that the operation of the federal system (the Family Law Act) cannot interfere with the operation of the state child welfare system. To put it another way, in the event of any overlapping or inconsistency, the state system prevails over the federal system.

Examples of the operation of the provision

The following hypothetical examples illustrate the operation of s 69ZK:

- After family court parenting orders placing a child with X, Child Protection brings proceedings in a Children's Court and obtains orders that the child should be removed from X and placed in the care of Y. The Children's Court order would prevail: s 69ZK(2).
- A family court has ordered that no further medical examinations should be made of a child without the court's permission. Child Protection makes arrangements, valid under the child welfare law, for a further medical examination. Despite being inconsistent with the family court order, the medical examination can be carried out, because the child welfare law prevails: s 69ZK(2).
- While proceedings in a family court are pending, Child Protection obtains Children's Court orders placing the child in care. Unless the Minister consents in writing to the family court proceedings, the family court cannot now make any orders relating to the child (even by consent of the parties) except orders that would come into force only when the child leaves care: s 69ZK(1).
- Child Protection obtains children's court orders by which a child is removed from a drug-addicted mother and placed in the department's care. The department places the child temporarily with the paternal grandmother, the father being ill. Later the father recovers, and Child Protection places the child with him, terminating the Children's Court orders, and advising him to obtain orders from the family court. The father starts Family Court proceedings and is granted residence. Some months later, however, with the father's consent, the family court makes orders returning the child to the mother. Child Protection, however, does not consider the mother a viable carer. It is open to Child Protection to take action under the Care and Protection Act to remove the child, despite the family court residence order in her favour.[25]

25 This example is based on a case study in which, however, the (Victorian) department did not subsequently intervene: Family law Council Report, Case Study 1 p 39. The Family Law Council Report suggests that there is a problem in such cases of the department withdrawing once there has been family court involvement. If so, that is not a problem of lack of legal power to do so.



- A family court makes a recovery order[26] in relation to a child. Then, before the order is acted upon, the child comes under the state child welfare system. The recovery order remains in force until the family court revokes it; but it cannot have any effect that is inconsistent with the operation of the child welfare law: s 69ZK(2). If, for example, the child is placed in the care of a foster parent under the child welfare law, the recovery order cannot be put into effect so as to remove the child from the care of the foster parent.
- Child Protection intervenes in a proceeding in a family court, arguing that X is an unsuitable carer. The family court disagrees, however, and orders that the child should live with X. Even though it is a party to the family court proceedings, it seems that Child Protection can use its authority under the state law to remove the child from X, notwithstanding the family court order: s 69ZK(2).

It should be emphasised that these are hypothetical examples, designed to illustrate the technical legal operation of the provisions. In such cases in practice, Child Protection would no doubt have regard to other factors, including the agreements between the family courts and Child Protection discussed in this report.

Intervention: sections 91B and 92A

Section 92A provides that certain persons are entitled to intervene in proceedings in which it has been alleged that a child has been abused or is at risk of abuse. One category is '(d) a prescribed child welfare authority', and this term is defined in s 4 to mean, in substance, a child welfare officer of the relevant state or territory. Section 91B provides that the family court can make an order requesting Child Protection to intervene. In that event Child Protection is entitled but not compelled[27] to intervene; if it does so, the Child Protection officer becomes a party to the proceedings, and has 'all the rights, duties and liabilities of a party', except a liability for costs.[28] Finally, of course Child Protection may (like any other person) apply for *leave* to intervene in *any* proceedings under the Act: s 92.

Thus, in short, Child Protection may apply for *leave* to intervene in *any* proceedings under the Act, and is *entitled* to intervene in family court cases where child abuse is alleged, and also where the family court has made an order under s 91B requesting it to intervene (a s 91B request').

There is no corresponding right for anyone in the family law system to intervene in Child Protection proceedings.[29]

26 That is, an order requiring a person to return the child, and authorising the police or others to assist if necessary: see Family Law Act 1975 ss 67Q — 67X.

27 *Secretary, Department of Health and Human Services v Ray and Others* (2010) 45 Fam LR 1.

28 The family court may not make a costs order against Child Protection when Child Protection has intervened following a s 91B request, and has acted in good faith: Family Law Act 1975 s 117(4A) (inserted by the Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011).

29 Presumably it would be open to a party in family courts proceedings, or to an Independent Children's Lawyer, to seek to become a party in children's court proceedings, but so far as I know this does not happen.

Laws affecting information sharing between the Family Courts and Child Protection

Introduction

This discussion deals with a somewhat tangled and technical subject, namely the operation of a number of Commonwealth and state laws that impinge directly on information-sharing between the family courts and Child Protection. These laws provide a framework within which information-sharing arrangements must operate.

The first general topic is the transmission of information from the family courts to Child Protection. This is explicitly dealt with by provisions requiring or encouraging people involved in family court proceedings to notify Child Protection, and provide relevant information, when there is an allegation of child abuse or ill-treatment in proceedings, or when a family law professional considers that a child might be at risk. The key provisions are s 67Z and 67ZA of the Family Law Act 1975, and these are examined in the first part of this discussion. The second part of the discussion deals with the question whether people involved in family court proceedings may, apart from those specific sections, provide information to Child Protection. The answer is, in essence, that there is nothing in the Family Law Act 1975 to prevent them from doing so (section 121, it will be submitted, is irrelevant). Nor is there anything specifically authorizing them to do so, however, and therefore people interested in providing information would need to consider their position under the general law.

The next general topic is the transmission of information from Child Protection to the family courts. We see first that through the mechanisms of subpoenas and orders under s 69ZW the family courts can require that certain material must be produced to the court, although there are special rules to protect the anonymity of people who notify Child Protection of children at risk.

Again, the second part of the discussion is more general: to what extent does the law — the state law — encourage or inhibit Child Protection from voluntarily providing information to the family courts? The answer turns out to be complex. In New South Wales the law, recently amended, encourages it. Elsewhere, there is no such encouragement, and, indeed, the provision of information might, in theory at least, violate certain laws, notably those forbidding the disclosure of the identity of notifiers, and those forbidding the disclosure of information obtained while working in child protection. In each case there are differences in the details, including differences in the exceptions. While every effort has been made to be as accurate and comprehensive as possible, given the limited time available for this report and the technical detail involved, there may be some errors and omissions in this section.

Although this report is not primarily about law reform, the review of laws in this chapter concludes with two recommendations that aspects of these laws might usefully be reconsidered.

Information to Child Protection accompanying child abuse notifications

Obligation on parties to file notice when child abuse alleged: s 67Z

Court's obligation to notify Child Protection if child abuse notice filed

If a party to proceedings under the Family Law Act or an Independent Children's Lawyer[30] alleges that a child has been abused or is at risk of being abused, that party *must* file a notice to that effect in the prescribed form (in this report referred to as a 'Child Abuse Notice'), and serve it on the person who is alleged to have abused the child, or from whom the child is alleged to be at risk of abuse. When such a Child Abuse Notice is filed, the 'Registry Manager'[31] of the family court is then required to notify a prescribed child welfare authority.[32]

Provision of information to Child Protection when notification is made

Section 67Z also provides, in substance, that when the Registry Manager notifies Child Protection, he or she 'may make such disclosures of other information as the person reasonably believes are necessary to enable the authority to properly manage the matter the subject of the notification'.[33] Although this is discretionary ('may'), the prescribed form for child abuse notices[34] *requires* information to be included relating to the alleged abuse and/or risk of abuse as well as details about the parties and the children involved. It also requires that any relevant parts of affidavits be identified. Thus, if the family court 'notifies' Child Protection by sending a copy of the notice,[35] and if the notice has been properly completed,[36] the notice itself will provide a considerable amount of material relevant to Child Protection,[37] apart from any other information the Registry Manager may choose to provide.

Complications when family violence involved

The application of s 67Z was expanded in June 2012, when the family violence amendments of 2011[38] came fully into force. The definition of 'abuse' was amended by adding what are now paragraphs (c) and (d), so that it now reads:

> ***abuse***, in relation to a child, means:
>
> (a) an assault, including a sexual assault, of the child; or

30 Strictly, an 'interested person', defined in s 67Z(4) as a party, an Independent Children's Lawyer, or a person prescribed by the Regulations.

31 The section defines the term to include, in the case of the Federal Magistrates Court, the 'principal officer' of the court: s 67Z(4)(c).

32 Section 67Z(3). Filing the s 67Z notice also requires the court to deal with interim or procedural issues as expeditiously as possible, and if appropriate within eight weeks: see s 67ZBB.

33 Section 67Z(6).

34 The prescribed form is set out in the Family Law Rules 2004, Schedule 2. The notice is entitled *Notice of Child Abuse or Family Violence* (although s 67Z deals only with child abuse, the prescribed form of notice serves more than one purpose).

35 Section 67Z requires only that the family court 'notify' Child Protection; it does not expressly say that the Notice itself should be sent to Child Protection (although that might be an ideal way of making the notification).

36 Anecdotal evidence suggests, unfortunately, that this is not always the case.

37 However since the Family Court of Australia's procedures (unlike those of the Federal Magistrates Court) do not generally permit an affidavit to be filed in the first instance, in some situations there may be little or no affidavit evidence available at the time of the notification.

38 Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth).

(b) a person (the *first person*) involving the child in a sexual activity with the first person or another person in which the child is used, directly or indirectly, as a sexual object by the first person or the other person, and where there is unequal power in the relationship between the child and the first person; or

(c) causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence; or

(d) serious neglect of the child.

The extent of the change is difficult to assess, but could be substantial. The scope of paragraph (d) will depend on what is considered 'serious' neglect. The scope of paragraph (c) is affected by the new definition of 'family violence' that was also inserted by the amendments of 2011. Although many children involved in family court proceedings might have been exposed to 'family violence', the term 'abuse' would apply — and the obligation to file the notice would arise — only if the child had been caused to suffer 'serious psychological harm'. Difficulties in applying the word 'serious', and in determining whether a child had been caused 'serious psychological harm' will presumably mean that in many situations it will be uncertain whether there is an obligation to file the notice. If litigants consider it safer to file the notice in cases of doubt, there will be a considerable increase in the numbers of notices filed, and a corresponding increase in notifications to Child Protection. A considerable number of such notifications, presumably, will involve circumstances that fall short of the fairly high threshold that the state laws require for Child Protection intervention.

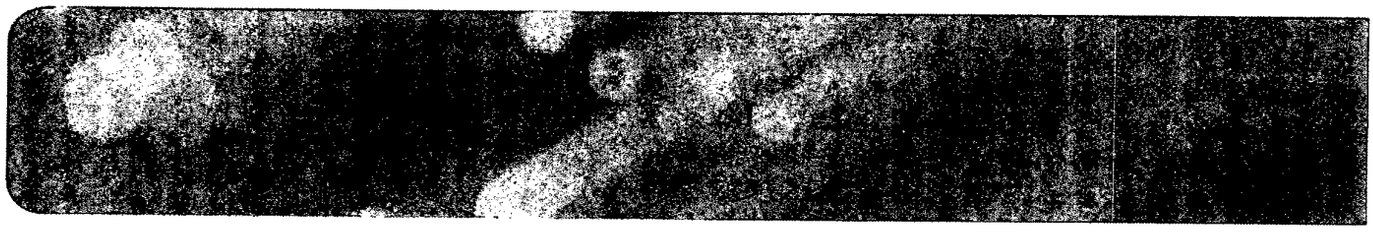
Another provision added in 2011 is s 67ZBA, which requires litigants to file a notice when they allege that there has been family violence or that there is a risk of family violence. Such notices, like s 67Z child abuse notices, also require the court to take prompt action, but do not create an obligation to notify Child Protection.

Although s 67Z and s 67ZBA deal with separate topics (child abuse and family violence respectively), the same form (Form 4, entitled 'Notice of Child Abuse or Family Violence') is prescribed for both sections. Also, the same behaviour can constitute both family violence and child abuse, especially now that the term 'abuse' has been expanded to include cases where children have suffered serious psychological harm by exposure to family violence. Section 67ZBA(3) provides, in effect, that if in particular circumstances family violence also constitutes child abuse, the person making the allegation does not have to file a notice both under s 67Z and also under s 67ZBA, but may file it under either section. If it is filed under s 67ZBA the court must notify Child Protection just as if it had been filed under s 67Z.

Summary

To sum up the main points (somewhat simplified):

- When there is an allegation of child abuse, a notice to that effect must be filed, and the court must notify Child Protection, whether or not the child abuse also involves family violence.
- If the notification takes the form of sending the child abuse notice to Child Protection, it should contain considerable information relevant to Child Protection's work.
- The court may add other information to assist Child Protection.
- The amendments of 2011 increase the situations that fall within 'child abuse'.



Family law professionals notifying of fears for child: s 67ZA

Where one of the specified persons in a family court has reasonable grounds for suspecting that a child has been abused or is at risk of being abused, that person *must* notify a prescribed child welfare authority of 'his or her suspicion and the basis for the suspicion'.[39] The persons specified[40] are Registrars and Deputy Registrars of the family courts; family consultants, family counsellors and family dispute resolutions practitioners, and arbitrators, and Independent Children's Lawyers.

Where the specified person has reasonable grounds to suspect that the child has been or is at risk of being ill treated, or 'has been exposed or subjected, or is at risk of being exposed or subjected, to behaviour which psychologically harms the child', the person *may* notify a prescribed child welfare authority of his or her suspicion and the basis for the suspicion.[41]

Thus, notification by a professional is mandatory in relation to the more serious sorts of risk to the child (*abuse*), and discretionary in relation to less serious risks (*ill treatment*).

The provisions for both voluntary and mandatory notification, and the supply of information, prevail over any other law or 'anything else' (including a contractual obligation).[42] Further, the person who makes the notification or provides the information in good faith 'is not liable in civil or criminal proceedings, and is not to be considered to have breached any professional ethics'.[43]

There is also provision for the notification or disclosure of information to be confidential. Although it is not made an offence to reveal the disclosure or notification,[44] there is a strong provision that it is inadmissible:[45]

> Evidence of a notification under subsection 67Z(3) or subsection 67ZA(2), (3) or (4), or a disclosure under subsection 67ZA(6), is not admissible in any court except where that evidence is given by the person who made the notification or disclosure.

There is no other stated exception to this rule of inadmissibility.[46] The rule applies to all courts (state and federal), and to any tribunal or other body concerned with professional ethics.

The inadmissibility relates to the notification or the disclosure, not to the *contents* of what is disclosed: of course there may be other admissible evidence of the abuse or risk that was the subject of the notification. If, for example, a hospital report were among the documents disclosed under s 67ZA(6), although evidence could not be given of the *disclosure* of the report, the hospital report itself might well be admissible.

39 Section 67ZA(2). The person may, but 'need not' make a notification 'if the person knows that the authority has previously been notified' of the matter: see s 67ZA(4).

40 Section 67ZA(1).

41 Section 67ZA(3).

42 Section 67ZB(1).

43 Section 67ZB(2)(relating to 67Z(3) and s 67ZA(2)); s 67ZB(3)(relating to good faith disclosure under s 67ZA(3) or (4), and good faith disclosures under s 67ZA(6).

44 In contrast to the state and territory Child Protection laws examined below.

45 Section 67ZB(4).

46 In contrast, again, with some state and territory provisions (examined below) that allow evidence to be given of a report or notification if a court gives leave for the evidence to be given.

Chapter 3

The obligation to notify suspected cases of abuse does not expressly include an obligation to provide supporting material, although the person must notify Child Protection of 'his or her suspicion and the basis for the suspicion'.[47] Importantly, however, notifiers under both s 67Z and 67ZA are *entitled* to provide information: the person 'may make such disclosures of other information as the person reasonably believes are necessary to enable the authority to properly manage the matter the subject of the notification'.[48]

Summary

Somewhat simplified, section 67ZA provides that certain professionals involved in family court proceedings must notify Child Protection if they suspect child abuse, and may do so if they suspect child ill-treatment. When doing so, they must indicate the nature of their suspicion and the basis for it, and they may provide other information to help Child Protection deal with the matter.

Voluntary provision of Information from family courts to child protection

Is there scope for the voluntary provision of information from the family courts to Child Protection (apart from notifications under s 67Z and 67ZA)?

It seems likely that most information flowing from family courts to Child Protection is provided under s 67Z and 67ZA, just discussed. The obligations or entitlements to make notifications and provide information under those sections are expressly made to prevail over any competing law. Thus, any information in this category may certainly be provided, without risk of legal liability, and evidence cannot be given of the notification or provision of the information.[49]

There may however be situations falling outside these provisions in which a person might consider it appropriate to provide information to Child Protection and wonder if there is anything in the Family Law Act that would prevent this. Lawyers representing the adult parties, for example, and experts who may have become involved in a case, might be minded to provide information to Child Protection although they are not covered by s 67Z or s 67ZA. They might consider, for example, that Child Protection should ideally have access to documents in their possession, or in the family court's file of a particular case. Such documents might be affidavits, reports, judgments, exhibits,[50] and transcripts of proceedings.

Because they fall outside the protection of s 67ZB, people in this position might well need to consider carefully whether disclosing the material could be a breach of contract, or of some state law, or of professional ethics.[51] It is beyond the task of this paper to explore such issues. The present discussion is limited to whether there is anything in the Family Law Act 1975 that would prevent the person from supplying such documents, or copies of them.

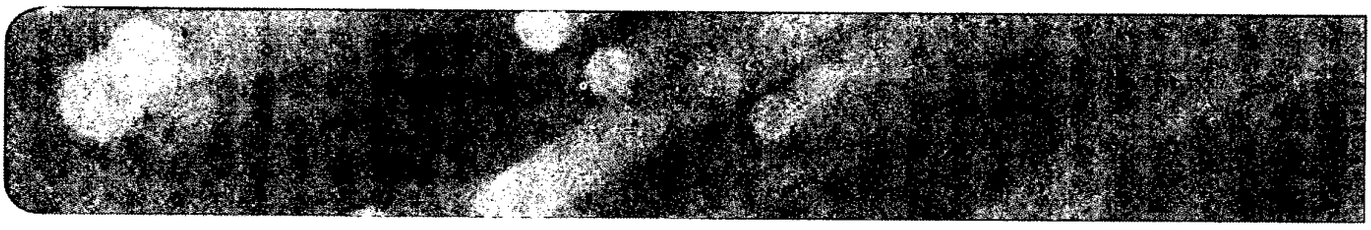
47 Section 67ZA(2).

48 Section 67ZA(6).

49 See s 67ZB, discussed above.

50 See r 24.14.

51 Or, perhaps, in breach of an implied undertaking not to disclose documents filed in court but not admitted into evidence: see *Hearne v Street* [2008] HCA 36 (6 August 2008).



Section 121 of the Family Law Act 1975 does not inhibit providing information to Child Protection

The answer seems to be no; but it is necessary to consider s 121, and, for completeness, certain rules about inspecting the court file and removing documents from the court.

The essential purpose of s 121 is to prevent the media from publishing to the public material that identify parties in family court proceedings. The substance of the section is the creation of a criminal offence: to publish or disseminate *to the public or to a section of the public* an account of proceedings that identifies a party or other person involved in a case.[52]

There are numerous exceptions and elaborations. But resort to them is unnecessary unless there is a publication or dissemination of the kind specified, namely *'to the public or to a section of the public'*. The case law indicates clearly that it would not include providing documents or copies of documents to a child protection officer or other person from that sector.[53] Such people are clearly not a 'section of the public': the communication — 'dissemination' to use the language of s 121 — is directed to individuals selected because they have a professional interest in it.[54]

Nevertheless, presumably to put the matter beyond doubt, the section spells out that providing documents to courts and other responsible agencies is not an offence. It specifically exempts *the communication, to persons concerned in proceedings in any court*, of any pleading, transcript of evidence or other document for use in connection with those proceedings.[55] And there are other such exemptions, for example communications to legal aid. But these detailed exemptions should not distract from the basic point, namely that none of these communications would constitute an offence anyway, because they are not communications to the public or a section of the public.

It is clear, therefore, that s 121 does not in any way inhibit family court people from providing information or documents to child protection people.

Rules about inspecting family court files

For completeness, it might be useful to add a brief comment about inspecting court files. If the provider does not already have the document, and needs to get it from the court file, Rule 24.13 of the Family Law Rules 2004 (Rule 2.08 of the Federal Magistrates Court Rules 2001) is applicable. It says, in substance, that the parties and their lawyers, and any Independent Children's Lawyer,[56] are entitled to 'search the court record relating to a case, and inspect and copy a document forming part of the court record'.[57] And the court can give permission to a person with a 'proper interest',

52 Section 121(1). Section 121(2) creates a similar offence, relating to court lists, but involves the words about a section of the public.

53 See *Marriage of Tingley* (1984) 10 Fam LR 707; FLC 91-588 (the transmission of documents to the Attorney-General or departmental officers is not a communication to the public or to a section of the public); *Marriage of Bateman and Patterson* (1981) 7 Fam LR 33; FLC 91-057; *Marriage of P & P* (1985) 9 Fam LR 1100 at 1113; FLC 91-605; *Marriage of Toric* (1981) 7 Fam LR 370; FLC 91-046.

54 Of course those people, too, are bound by s 121; but again, using the documents in the course of their work would not seem to involve disseminating them to a section of the public.

55 Section 121(9)(a).

56 The Attorney-General may also do so: Rule 24(1)(a).

57 It seems, however, that even the parties need the court's permission to have access to correspondence and transcripts: see (2) and (4).

Chapter 3

or a researcher, to do so.[58] (The Court needs to give permission for the *removal* of a document, but this rule does not apply to making a copy.[59])

Information from Child Protection to family courts: subpoenas and section 69ZW orders

This section considers the two ways in which the family courts can require Child Protection to provide information: by issuing a subpoena and by making an order under s 69ZW.[60]

Subpoenas

General

A family court can issue subpoenas to persons or bodies, including child protection agencies, requiring that they produce documents or attend for the purpose of giving evidence (although the provision of documents is the main concern for present purposes). Subpoenas must be obeyed, although the person can ask the court to set the subpoena aside. Subpoenas are issued by courts, in practice normally at a party's request (it is not necessary that the other party be present when a party applies for a subpoena to issue).[61] Broadly speaking the court will not set a subpoena aside unless it is unreasonable or has no proper forensic purpose. It will normally be treated as having a proper forensic purpose if it seeks documents that seem likely to be admissible in the court proceedings.

State legislation forbidding disclosure of notifications will be given effect in family court proceedings

As discussed below, state child protection legislation includes provisions to the effect that certain information, notably information that would reveal the identity of a person who notified Child Protection of suspected child abuse, must not be disclosed. If a family court issues a subpoena requiring production of such information, the question arises which law is to prevail.

The issue arose in *Halsen and Nasser* (2011).[62] The family court had issued a subpoena to Child Protection, on the application of an Independent Children's Lawyer, to produce 'All file notes, memoranda, correspondence or any other documents or writings in relation to the child...' Child Protection objected 'to any person having access to documents and parts of documents which contain notifications of abuse ... reports of suspected risk of harm or disclose some of the contents of such notifications or reports'.

58 The consent can be given on conditions, and guidelines govern when permission may be given: sub-rr (2A) and (3). are spelt out

59 Rule 24.12.

60 The Full Court has held that a request under s 91B that the department intervene cannot require Child Protection to do so:*'Secretary, Department of Health and Human Services v Ray and Others* (2010) 45 Fam LR 1. Requests under s 91B have been considered in Chapter 3.

61 Rule 15.17(3). The court itself can issue a subpoena, but doing so is somewhat uncommon.

62 *Halsen and Nasser* (2011) 44 Fam LR 248; (2010) FamCA 1065.

The state legislation provided:[63]

> 29. If, in relation to a child or young person or a class of children or young persons, a person makes a report in good faith to the Director-General or to a person who has the power or responsibility to protect the child ...
>
> (e) a person cannot be compelled in any proceedings to produce the report or a copy of or extract from it or to disclose or give evidence of any of its contents, ...

Johnston J held, following a High Court decision,[64] that as a result of section 79 of the Judiciary Act 1903 (Cth), s 29 of the state act applied to the proceedings in the family court, unless the Family Law Act 1975 was inconsistent with this.[65] His Honour noted that s 69ZW(3) (discussed below) prevented the disclosure of documents or information that include the identity of the person who made a notification. Although s 69ZW was not directly applicable — this being a case about a subpoena — his Honour considered that this, among other things, showed that the Family Law Act was not inconsistent with the state act.[66] Therefore s 29 of the state act applied in the proceedings, and the objection should be upheld.

The main contest in the case arose because the Independent Children's Lawyer questioned whether the documents did in fact fall within the protection of s 29. Child Protection, however, relied on a certificate to the effect that they did. They submitted that such a certificate was conclusive, relying on another provision of the state act, subsection 29(1A), which provided:

> (1A) A certificate purporting to be signed by the Director-General that a document relating to a child or young person or a class of children or young persons is a report to which this section applies is admissible in any proceedings and, in the absence of evidence to the contrary, is proof that the document is such a report.

The Independent Children's Lawyer's submissions were summarised by Johnston J as follows:

> simply on a reading of the description of the matters included in the schedule to the Director-General's certificate under s 29(1A) of the New South Wales Act it would appear that the documents the subject of the certificate included or encompassed documents of a broader nature than those which would only identify the reporter. It was submitted that the protection offered by s 29(1) of the New South Wales Act ought only apply to the actual information in a document relevant to identify the person reporting the matter to the Director-General and certainly not to the work product which flowed from the notification.
>
> It was further submitted that s 29(1A) presented as a real difficulty and frustration for the solicitor for the Independent Child Lawyer in trying to obtain all material relevant to what is in the best interests of the child. This is particularly because the only way that the reports the subject of protection by the Certificate could be inspected by the solicitor for the Independent Child Lawyer would be by leave of the Court pursuant to s 29(1)(f)(ii) of the New South Wales Act. Moreover, s 29(1A) of the New South Wales Act provides to the effect that the Court cannot grant such leave unless the Court is satisfied that the evidence is of critical importance in the

63 Children and Young Persons (Care and Protection) Act 1998 (NSW) s 29.

64 *Northern Territory of Australia and GPAO and Others* (1999) 196 CLR 553.

65 Paragraph 21.

66 Johnston J also followed S & R (2005) FamCA 379 (Coleman J) and *Department of Human Services and Brigham and Anor* (2010) FamCA 937 (Cohen J).

> proceedings and that failure to admit it would prejudice the proper administration of justice. It was submitted that the difficulty for the Independent Child Lawyer about this is that without being able to inspect the material referred to in the Certificate, she is unable to form a view about whether or not the material is of critical importance.

Child Protection's submissions were, as recorded in the judgment:

> ... the New South Wales Act is designed to be determinative of whether or not a report by a notifier is a report for the purposes of protection by operation of s 29 of the Act. It is said that any inquiry begins and ends with the certificate. It is also submitted that not only is a report or evidence of its contents inadmissible in proceedings but a person cannot be compelled to produce the report or an extract from it, or give evidence of its contents (s 29(1)(d)and(e)).
>
> It was also submitted that the Director-General agrees with the submission that if there was some work product which flowed from the report, that such work product could not properly be protected under s 29 and that the Director-General does not propose to use s 29 in a manner other than is necessary to protect the identity of notifiers.

Johnston J concluded, upholding the Child Protection argument:

> In my view the provisions of s 29(1A) of the New South Wales Act relating to the making of a certificate thereunder by the Director-General and related provisions are clear. There is a discretion given to the Director-General to protect the identity of persons who make reports to the Director-General's Department by the issue of a certificate identifying documents relating to children as being such reports in the manner provided under s 29(1A).

Finally, Johnston J applied s 29(2) of the state act, which provides that the court may grant leave that the material might be inspected, or admitted into evidence, if it is 'satisfied that the evidence is of critical importance in the proceedings and that failure to admit it would prejudice the proper administration of justice'. On the material before him, his Honour was not so satisfied, and thus the objection was upheld.

To conclude, there is authority to the effect that (there being nothing inconsistent in the Family Law Act) state laws preventing the disclosure of notifications of child abuse have effect in family court proceedings, and will therefore apply in connection with subpoenas and the admissibility of evidence. This conclusion also flows from 69ZK(2), discussed earlier, which provides that nothing in this Act, and no decree under this Act, affects 'the operation of a child welfare law in relation to a child'. While this clearly applies to state laws affecting *subpoenas*, family court orders under s 69ZW constitute a partial exception, as discussed in the following paragraphs.

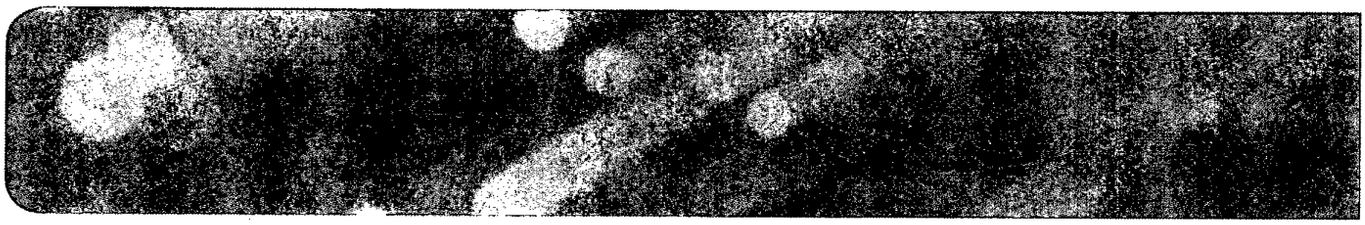
S 69ZW orders

The family court may require Child Protection to provide documents and information

Section s 69ZW provides, in substance, that the family courts can, in child-related proceedings, make orders requiring Child Protection[67] to provide the court with certain documents or information.[68] The word 'requiring' indicates that the order legally *obliges* Child Protection to

67 Literally a 'prescribed State or Territory agency' (which may include police).

68 The court must not rely on any such documents or information without admitting them into evidence: subs (5).



provide the documents or information; in contrast, for example, with s 91B, which provides for the court to 'request' Child Protection to intervene.

What documents or information must be produced to the court?

The documents are those specified in the court's order, and which fall within subsection (2), namely — to summarise — documents in the possession or control of the agency that record any notifications of suspected child abuse, agency assessments of such notifications, the findings or outcomes of those investigations, and 'any reports commissioned by the agency in the course of investigating a notification'. The information that may be required is information specified in the court order that is 'about' any of such notifications, assessments, findings, outcomes, or reports. (Subsection (3) contains an important exception, to be discussed shortly, relating to the identity of notifiers.)

An order under s 69ZW cannot require Child Protection to *prepare* a report for the purpose, although Child Protection may voluntarily do so.[69]

Section 69ZW prevails over any inconsistent state law

Subsection (4) provides that 'A law of a State or Territory has no effect to the extent that it would, apart from this subsection, hinder or prevent an agency complying with the order.'

This provision requires comment. Where a valid Commonwealth law is inconsistent with a state law, the Commonwealth law prevails.[70] As previously discussed, s 69ZK provides that the Family Law Act does not interfere with the operation of Child Protection laws. Section 69ZW(4), however, specifically provides, in effect, that in relation to orders made under it, the Commonwealth law *will* prevail over any inconsistent state law. Even if a state child welfare law purported to prevent an agency complying with a s 69ZW order, orthodox principles of statutory interpretation would suggest that the specific terms of s 69ZW(4) would not be read as subject to the more general protection of child welfare laws afforded by s 69ZK.

The court may allow inspection of documents produced under s 69ZW in the same way as subpoenaed documents

When documents are produced to the court under a subpoena, it is then open to the court to grant the parties leave to inspect them. Such leave may be conditional, and may apply to some parties only, or to some documents only. For example, a court may initially grant only the Independent Children's Lawyer leave to inspect documents — where, for example, they contain sensitive material. Again, a court may grant leave to the parties to inspect subpoenaed documents with the exception of documents that might reveal the identity of a notifier.

There has apparently been some suggestion that the position is different in relation to documents provided under s 69ZW. The apparent basis for this is s 69ZW(5), which provides:

(5) The court must admit into evidence any documents or information, provided in response to the order, on which the court intends to rely.

69 It is doubtful that a report prepared by Child Protection to assist the Family Court after receipt of a s 69ZW order would itself be covered by the section. If so, the supply of such a report would be a voluntary provision of information by Child Protection to the family courts, a topic discussed below.

70 Constitution s 109.

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The Explanatory Memorandum says in relation to this provision:

> 19. Subsection 69ZW(5) provides that the court must admit into evidence any documents or information provided in response to the order on which the court intends to rely. This ensures that where the court intends to rely on information it has received relating to an allegation of abuse or violence, the parties are aware of the information or allegation and have an opportunity to respond. This is in accordance with principles of natural justice.

The purpose of s 69ZW(5) seems to be to prevent the court from making findings about violence or abuse allegations without giving the parties an opportunity to respond. It would of course be equally a breach of procedural fairness for the court to rely on (draw inferences from) subpoenaed documents without giving the parties an opportunity to respond. Perhaps s 69ZW(5) was thought desirable to reassure people that that the new power requiring production of documents that might well contain opinions and prejudicial material would not be used unfairly. Be that as it may, there is nothing in s 69ZW(5) to prevent the court from giving parties leave to inspect such documents in the same way as it might give leave for them to inspect subpoenaed documents.

Whether s 69ZW(3) prevents the family court from requiring Child Protection to disclose the identity of notifiers

This chapter later examines state laws that seek to protect the anonymity of notifiers, in part by limiting the giving of evidence that would disclose their identity. Consistently with that policy, section 69ZW(3)(b) of the Family Law Act provides:

> Nothing in the order is to be taken to require the agency to provide the court with [...]
>
> (b) documents or information that include the identity of the person who made a notification.

Section 69ZW(3) limits the courts' power to require the production of documents that reveal notifiers' identities, rather than merely to require the courts to make it explicit when they do so.[71]

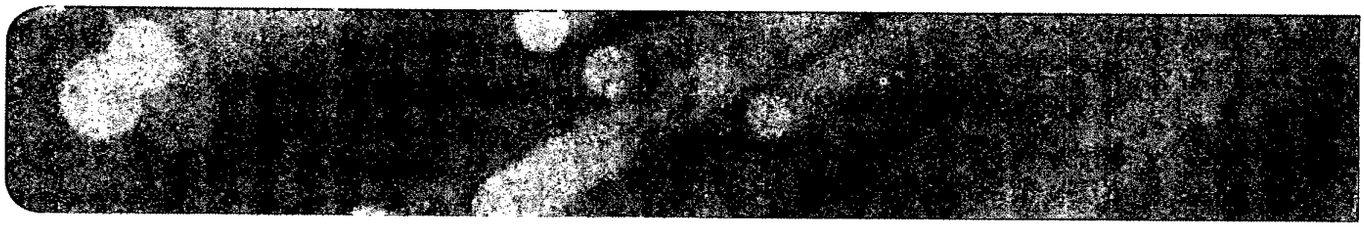
Restrictions on the family court disclosing the notifier's identity

Whereas subsections 69ZW(1)-(4) deal with the question what documents or information Child Protection must provide to the family court, subsections (6) and (7) deal with a different topic: they limit the extent to which *the court can disclose* a notifier's identity.

Subsection (6) requires, in substance, that unless the notifier consents, the court must not disclose the notifier's identity[72] unless it is satisfied that the identity is 'critically important to the proceedings and that failure to make the disclosure would prejudice the proper administration of justice'. Subsection (7) inserts a procedural fairness requirement: before disclosing the identity, the court must give the agency that provided the information an opportunity to be heard.

71 Department of Family and Community Services & Jordan and Ors [2012] FamCAFC 147.

72 Subsection (6) is not specifically limited to the court's disclosure of identifying material supplied under the section, but this is clearly the intention, given the wording of subsection (7) (which assumes that an agency provided the identity or information). Thus the limitation in s 69ZW(6) does not appear to limit the court's disclosure of a notifier's identity if that identity was revealed by other evidence.



Summary

The effect of s 69ZW may therefore be expressed briefly as follows.

Section 69ZW allows a family court to require Child Protection to provide documents and information relating to notifications of suspected child abuse and records of consequent assessments and reports. Such an order prevails over any inconsistent state legislation. The court cannot of course rely on any such documents unless they have been admitted into evidence: a general requirement made explicit by subsection (5).

The section limits the power, however. Subsection (3) prevents the court from requiring Child Protection to provide such material that identifies persons who have notified Child Protection of suspected child abuse, unless the notifier consents, or the court is satisfied (after hearing submissions from the agency that was required to produce the identifying material) that the person's identity is critically important to the proceedings, and that not disclosing it would 'prejudice the proper administration of justice'.

Child Protection voluntarily providing information to the family courts

Introduction

As is already apparent in this report, there is now widespread agreement that relevant information should be shared between Child Protection and the family courts.On matters other than information provided under subpoenas or s 69ZW orders (above), the relevant state laws[73] are surprisingly intricate. Remarkably, only in one jurisdiction, New South Wales, are there laws that clearly encourage the flow of information from Child Protection to the family courts. These important provisions are considered later. We first examine rules that have a potential to *inhibit* the flow of information. The provisions to be considered are those that

- make it an offence to disclose the identity of a notifier;
- make evidence of the notifier's identity inadmissible and preventing the compulsory production of documents that would identify a notifier; and
- make it an offence for Child Protection personnel to disclose information obtained at work.

The discussion will then turn to some more recent provisions in three jurisdictions designed to encourage information-sharing, although, as we shall see, only in New South Wales do those provisions explicitly include the family courts.

The offence of disclosing the identity of a notifer

It is a significant feature of the Child Protection legislation in the various states that it encourages people to notify Child Protection if they suspect that a child has been abused or is otherwise at risk. While there are differences, the general pattern is the same. In most jurisdictions,[74]

73 Unless otherwise specified, the state legislation to be cited in this discussion is: Children and Young Persons (Care and Protection) Act 1998 (NSW); Children, Youth and Families Act 2005 (Vic); Child Protection Act 1999 (Qld); Children's Protection Act 1993 (SA); Children and Community Services Act 2004 (WA); Children, Young Persons and Their Families Act 1997 (Tas); Children and Young People Act 2008 (ACT); Care and Protection of Children Act (NT).

74 The exception is Queensland.

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some professionals are *obliged* to report their reasonable suspicions that a child has been abused or is in need of protection:[75] — the 'mandatory reporting' laws.[76] Other people *may* notify Child Protection voluntarily.[77] All who make such notifications in good faith are protected against the possibility that an act of notification might attract civil or criminal liability, or be a breach of professional standards.[78] It is not necessary to examine the details of these provisions here.

Of more immediate relevance, there are also provisions designed to protect the anonymity of those who make such reports or notifications in good faith by making it an offence to disclose their identity, and by restricting the giving of evidence that would reveal their identity.

In all jurisdictions, it is an offence to disclose the identity of a person who makes a notification (or 'report') to the effect that they reasonably suspect that a child might be abused or otherwise at risk or in need of protection.[79] There are differences in the legislative language: the expression used in the previous sentence ('abused or otherwise at risk or in need of protection') is an attempt to state the general nature of the reports in question. The legislation refers not only to actually naming the notifier but also to disclosing information from which the notifier's identity might be inferred.[80]

There are exceptions to the offence, with some differences between the jurisdictions. The main exceptions may be summarised as follows:

- It is not an offence to disclose the identity in the course of administering the child protection legislation.[81]
- It is not an offence to disclose the identity when giving evidence in court. This exception is often[82] combined with guidelines to the effect that the court may grant such leave only if satisfied that the notifier's identity is critically important to the proceedings, and that not disclosing it would 'prejudice the proper administration of justice'.
- It is not an offence, in some jurisdictions,[83] to disclose the identity of a notifier who consents to the disclosure.

Implications: disclosing a notifier's identity to family court personnel (other than by way of evidence in court) may constitute an offence

The previous discussion showed how family court authorities have held that there is no relevant inconsistency between the Family Law Act and such provisions of state child protection legislation. Nothing in the Family Law Act nullifies the operation of these state provisions. Disclosing the identity of a notifier to family court personnel would constitute an offence under these state provisions, unless one of the exceptions applied. Disclosing the identity while giving evidence in

75 The language differs between jurisdictions.

76 Eg Vic s 184; NSW s 27.

77 Eg Vic ss 28, 29, 183.

78 Eg NSW s 29(1)(a)-(c); Qld s 22.

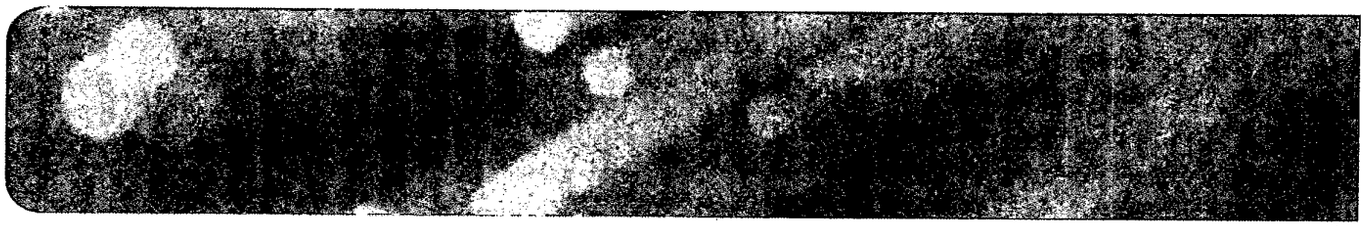
79 NSW s 29(1)(f); Vic s 41; Qld s 186(2).; SA s13(2); WA s 141(1) and in relation to sexual abuse s 124F; Tas s 16(2) (limited to Child Protection personnel); ACT s 857 ; NT s 150(1).

80 Eg NSW: '...the identity of the person who made the report, or information from which the identity of that person could be deduced, must not be disclosed'.

81 NSW s 29(1)(f)(i), 29(4), (4A); Vic s 41 ; Qld s 186 (2); SA s 13(2)(a); WA s 124F(2)(a); Tas s 16(2)(a); ACT ss 846-7; NT s 150(2)(c).

82 Not in Qld: s 186(1), (2)

83 Vic ss 41(2),190, 191; WA s 124(f)(2)(b) (in relation to sexual abuse); Tas s16(2)(b), NSW s 29(f)(i); SA s 13(2)(c).



family court proceedings would fall within one of the exceptions and therefore would not constitute an offence. And if the notifier consented, disclosing the identity to family court personnel would not be an offence in those state jurisdictions that create this exception.

The most basic exception is disclosing the notifier's identity in the course of administering the state child protection legislation, expressed in slightly different terms in the various state acts. In some circumstances, it might be arguable that disclosing the notifier's identity to family court personnel could fall within this exception, being an act done in the course of administering the state legislation. If collaboration with the family courts could be seen as an aspect of the administration of the state legislation, this might be a persuasive argument. However where the state act is silent on the questions of communication with the family courts, it would seem difficult to argue that making such communications would be done in the course of administering the state act, although in each case it would be necessary to consider the particular circumstances and the precise wording of the relevant state act.

The important point is that unless one of the exceptions set out in the relevant state child protection legislation applies, a person who discloses the identity of a notifier, or the notification (one needs to examine the precise language of each state act to determine the exact nature of the offence), may well have committed an offence under these state provisions. This is a significant matter to be considered in relation to information-sharing between Child Protection and the family courts.

Making evidence of the notifier's identity inadmissible and preventing the compulsory production of documents that would identify a notifier

Most jurisdictions restrict the extent to which evidence can be given of a notification, and of the notifier's identity.[84] Commonly, the rule is that such evidence cannot be given unless the court gives leave. Some states provide that such leave can be given only when the court is satisfied that the notifier's identity is of critical importance, and that preventing the evidence being given would lead to a miscarriage of justice.[85] Western Australia provides the least restrictive version — the disclosure can be made in administering the act, to the police, with the consent of the notifier, and where 'the disclosure is made by an officer for the purposes of a matter or proceedings relating to the child arising under the *Family Law Act 1975* of the Commonwealth Part VII or the *Family Court Act 1997* Part 5'.[86]

In some jurisdictions, the legislation also prevents the courts from requiring the relevant documents to be produced.[87]

These provisions are expressed to apply to all courts and tribunals. Thus they apply to the family courts, among others. As we have seen, there is family court authority to the effect that such provisions do indeed apply in family court proceedings, there being nothing inconsistent in the Family Law Act.

84 NSW s 29(1)(d) (report is not admissible, except in certain proceedings, including care proceedings and family court proceedings); Vic, s 190; Qld s 186(3); SA s 13 (3)-(5); WA s240; Tas s 16(2), (4); ACT Part 25.5; NT s 27(2).

85 NSW s 29(2); Qld s 186(4); Tas s 16(3), (4); NT s 27(2).

86 WA s 124F(2)(g).

87 NSW s 29(1)(e), (1A); WA ss 238, 239; NT s 27(2).

An offence for Child Protection personnel to disclose information obtained at work, except, eg, in the course of administering the act

In addition to the provisions just discussed relating to the identity of a notifier, there are provisions in all jurisdictions to the effect that child protection personnel must not disclose information obtained in administering the child protection laws other than in the course of doing so. There is considerable diversity, however, in the scope of such liability, and it is convenient to summarise the position in each jurisdiction.

New South Wales

It is an offence to disclose information obtained in the administration of the Act for other purposes, except in certain circumstances, notably with the consent of the person from whom the information was obtained or 'with other lawful excuse'.[88] Acting in accordance with the information-sharing provisions of Chapter 16A would obviously not involve this offence: doing so would be acting 'in connection with the administration or execution of this Act or the regulations',[89] and those provisions would provide a lawful excuse. These provisions, which may specifically authorise the disclosure of information to the family courts, are considered below.

Victoria

In it is an offence for the Secretary, and an 'authorised investigator' (in effect, Child Protection personnel) to disclose information obtained while administering the Act 'except as provided by this Part'.[90] It is difficult to find anything in the Part that would authorise the disclosure of information to the family courts.

Queensland

The offence may be committed by departmental officers and people to whom they give the information.[91] The exemptions are expressed as follows:

(a) except to perform functions under the Act;[92] or

(b) if 'the use, disclosure or giving of access is for purposes related to a child's protection or wellbeing',[93] or

(c) if the use relates to 'the executive's function of cooperating with government entities that have a function relating to the protection of children or that provide services to children in need of protection or their families'.[94]

Providing information to the family courts in a responsible way would clearly fall within paragraph (b) ('for purposes related to a child's protection or wellbeing') and it is not necessary to explore whether it would also fall within paragraph (c).

88 NSW s 254(1)(e).
89 Section 254(1)(b).
90 Vic ss ss 205 and 206; *Information Privacy Act 2000* (Vic).
91 Section 187(1), (2). There is a similar obligation on people to whom departmental officers give information: see s 188.
92 187(3)(a).
93 187(3)(b).
94 187(3)(c).

South Australia

The offence is not committed when the disclosure is 'required by law', or in the administration of the act, or is required by the employer.[95]

Western Australia

The offence is not committed when the disclosure is[96]

(a) for the purpose of, or in connection with, performing functions under this Act'; or [...]

(e) as required or allowed under this Act or another written law; or

(f) with the written consent of the Minister or person to whom the information relates; or

(g) in prescribed circumstances.

Disclosure pursuant to a subpoena issued by a family court, or pursuant to an order by a family courts (eg a s 69ZW order) would fall within paragraph (e), but, curiously, disclosure to the family courts would not otherwise fall comfortably within these paragraphs. A convenient solution to this problem would be for the Minister to give general consent to appropriate disclosures to the family courts, or, perhaps to prescribe such disclosures under paragraph (g).

Tasmania

The offence[97] is not committed if authorised or required by law, or in the administration of the Act, or to provide statistical information.[98]

ACT

The offence is not committed by a disclosure when administering the Act. Section 865 provides that an information holder must give protected information to a court or investigative entity if 'required' or 'authorised' to do so, by the act 'or another territory law'. An example appended to the section is the Family Court of Australia (and thus it appears that 'territory law' must include Commonwealth laws in force in the territory). It is clear, therefore, that the exemption applies to information disclosed when required or authorised by a family court. It does not appear to apply, however, to information given voluntarily to a family court unless the disclosure can be said to be 'authorised' by the legislation — unless (contrary to the view expressed in this paper) the family courts fall within the definition of 'information sharing entities', a matter considered below.

Northern Territory

The offence[99] is not committed if the disclosure is made when exercising a power or function under the Act,[100] or making a disclosure to a court or tribunal,[101] or is 'otherwise authorised or required by law'.[102]

95 SA s 58(3)(a).
96 Section 241(2).
97 Section 103(1).
98 Section103 (3).
99 Section 195. There is a similar provision relating to Part 3.3 (prevention of child deaths): s 221.
100 Section 195(2)(a).
101 Section 195(2)(b).
102 Section 27(2)(c).

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Discussion

It is difficult to imagine that in practice a person would be prosecuted under these provisions for making a disclosure in good faith to a family court. But taken literally the provisions would appear to criminalise some perfectly reasonable and responsible actions. Suppose, for example, that a Child Protection officer, in order to protect a child, voluntarily discloses, to an Independent Children's Lawyer or a member of the family court staff, matters indicating the child is at risk, those matters arising from investigations by Child Protection. The disclosure would seem to involve an offence in all jurisdictions except Queensland ('purposes related to a child's protection or wellbeing') and New South Wales (the information-sharing provisions of Chapter 16A, considered below).

The Law Reform Commissions' report made a number of recommendations[103] in this area, in particular the following:

> **Recommendation 30–4** — State and territory child protection legislation should not prevent child protection agencies from disclosing to federal family courts relevant information about children involved in federal family court proceedings in appropriate circumstances.
>
> **Recommendation 30–12** — State and territory child protection legislation should expressly authorise agencies to use or disclose personal information for the purpose of ensuring the safety of a child or young person.

Consistently with these recommendations, the concluding discussion in this chapter suggests that it would be appropriate for each jurisdiction to review its child protection law to ensure that it does not inhibit reasonable disclosures of information by Child Protection staff to appropriate persons associated with family court proceedings.

Information-sharing provisions of state legislation

Introduction

We turn from provisions that might inhibit the sharing of information to those that expressly encourage it. New South Wales, Tasmania the Australian Capital Territory and the Northern Territory have each enacted what might be conveniently called information-sharing provisions. They encourage information-sharing between various bodies involved with children.

These provisions are considered in this section. However only the New South Wales provisions[104] expressly include the family courts. Because of the special relevance of these provisions to the present Report, it will be convenient to deal with that state first, and in some detail.

103 See also recommendations 30-3, 30-9, 30-10 and 30-11.

104 Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009 No 13 (NSW) (Schedule 1.5, inserting Chapter 16A Exchange of information and co-ordination of services).

New South Wales

The nature and purpose of these provisions is well summarised in an explanatory note to the New South Wales legislation:

> [Chapter 16A — Exchange of Information and Co-ordination of Services] establishes a scheme for the sharing of information between certain agencies (primarily human services and justice or law enforcement agencies) relating to the safety, welfare or well-being of children and young persons. The scheme also requires these agencies to take reasonable steps to co-ordinate decision-making and delivery of services regarding children and young persons. Under the proposed scheme, agencies will be authorised to provide and receive information that would assist decision-making in relation to children's services or that would assist in the management of risks to children and young persons. The provision of information may also be requested by an agency and the agency that receives the request will be required to comply with it. Provision is made under the proposed scheme for the safeguarding of information that is shared and for the protection of persons from liability for providing information under the scheme.

The Act also sets out the objects and principles of the Chapter as follows:

245A Object and principles of Chapter

(1) The object of this Chapter is to facilitate the provision of services to children and young persons by agencies that have responsibilities relating to the safety, welfare or well-being of children and young persons:

(a) by authorising or requiring those agencies to provide, and by authorising those agencies to receive, information that is relevant to the provision of those services, while protecting the confidentiality of the information, and

(b) by requiring those agencies to take reasonable steps to co-ordinate the provision of those services with other such agencies.

(2) The principles underlying this Chapter are as follows:

(a) agencies that have responsibilities relating to the safety, welfare or well-being of children or young persons should be able to provide and receive information that promotes the safety, welfare or well-being of children or young persons,

(b) those agencies should work collaboratively in a way that respects each other's functions and expertise,

(c) each such agency should be able to communicate with each other agency so as to facilitate the provision of services to children and young persons and their families,

(d) because the safety, welfare and well-being of children and young persons are paramount:

(i) the need to provide services relating to the care and protection of children and young persons, and

(ii) the needs and interests of children and young persons, and of their families, in receiving those services,

take precedence over the protection of confidentiality or of an individual's privacy.

Chapter 3

No requirement imposed on Commonwealth bodies

'Prescribed body' is defined to include various agencies, including health, schools and police, Centrelink and the Commonwealth Department of Immigration and Multicultural and Indigenous Affairs.[105] Relevantly for present purposes, it expressly includes the Family Court of Australia, and the Federal Magistrates Court of Australia.

The provisions of the Chapter apply indifferently to all the prescribed bodies. However there is a provision to the effect that nothing in the Chapter 'is to be construed as imposing a requirement on' those courts or on the other Commonwealth bodies.[106] This is no doubt for constitutional reasons. In principle, however, it seems appropriate that all agencies involved have equal information-sharing responsibilities, and this might require amendment to the Family Law Act 1975.

It is reasonable to assume, however, that the courts would wish to co-operate fully with the information-sharing arrangements, and would wish to act, except perhaps in the most unusual circumstances, as if the provisions created the same obligations on them as they create on other agencies included in the information-sharing provisions. An acceptance of this responsibility would be an entirely appropriate part of any formal agreement.

Child Protection and family courts may provide information to the other

Child Protection may provide to the family courts information relating to the safety, welfare or well-being of a child if Child Protection reasonably believes that the provision of the information would assist the courts to make any decision or provide any service, relating to the child's safety welfare or well-being.[107] The information may be provided whether or not the family court has asked for it.[108] Similarly, the family courts may provide such information to Child Protection.

People who provide information in good faith under these provisions are protected from civil and criminal liability, and from any breach of ethical codes.[109]

Family courts may request information, and Child Protection may be obliged to provide it

The Chapter provides, in essence, that any of the prescribed bodies may request certain information from another, and, subject to qualifications, the second must provide that information.

However the symmetry is modified by a provision to the effect that no obligations are imposed on the family courts (or on other Commonwealth bodies). It is therefore necessary to consider requests from the family courts to Child Protection separately from requests from Child Protection to the family courts.

The family courts may request Child Protection to provide it with any information held by Child Protection that relates to the safety, welfare or well-being of a child, to assist the court to make a decision or provide a service relating to the child's safety, welfare or well-being.[110] On receiving such a request, Child Protection is 'required to comply' with it if reasonably believes, after being

105 Children and Young Persons (Care and Protection) Act 1998 (NSW) s 248; Children and Young Persons (Care and Protection) Regulation 2000, reg 7.
106 Section 245I.
107 Section 245C(1).
108 Section 245C(2).
109 Section 245G.
110 Section 245D(1), (2).

provided with sufficient information by the requesting agency to enable Child Protection to form that belief, that the information may assist the family court to make the decision of provide the service.[111] However it is not required to provide the information if it reasonably believes that doing so would

(a) prejudice the investigation of a contravention (or possible contravention) of a law in any particular case, or

(b) prejudice a coronial inquest or inquiry, or

(c) prejudice any care proceedings, or

(d) contravene any legal professional or client legal privilege, or

(e) enable the existence or identity of a confidential source of information in relation to the enforcement or administration of a law to be ascertained, or

(f) endanger a person's life or physical safety, or

(g) prejudice the effectiveness of a lawful method or procedure for preventing, detecting, investigating or dealing with a contravention (or possible contravention) of a law, or

(h) not be in the public interest.[112]

If it refuses a request, Child Protection must, at the time it notifies the court of its refusal, provide the court with reasons in writing for refusing the request.[113]

Child Protection may request information from family courts

Although the provisions about requesting information, and the obligation to provide it, are expressed to apply to all prescribed bodies alike, as already noted because of a provision to the effect that the chapter creates no obligation on Commonwealth bodies,[114] it appears that the family courts would not be strictly obliged to provide the information. On this and other aspects, however, as previously mentioned, the courts would presumably wish to comply with the provisions on a voluntary basis, and a commitment to this effect would be a suitable matter for inclusion in any agreement.

Obligation to co-ordinate decision-making and service delivery

In order to effectively meet its responsibilities in relation to the safety, welfare or well-being of children and young persons, Child Protection is required to take reasonable steps to co-ordinate decision-making and the delivery of services regarding children and young persons.[115] No similar legal obligation is created in relation to the family courts,[116] but again it is to be expected that they would wish to comply with the spirit of this provision.

111 Section 245D (3).
112 Section 245D (4).
113 Section 245D (5).
114 Section 245I.
115 Section 245E.
116 Section 245I.

Information to be used only in child's interests

Child Protection must not use information provided under these provisions for 'for any purpose that is not associated with the safety, welfare or well-being of the child'.[117] Again, while this provision does not strictly bind the courts,[118] they would no doubt wish to take the same approach.

Information-providers protected

People who provide information in good faith under these provisions are protected from civil and criminal liability, and from any breach of ethical codes.[119]

Provisions prevail over inconsistent laws

The provisions are expressed to prevail over any competing law that would prohibit or restrict the disclosure of information under them.[120]

No doubt this rule would not prevent the operation of a valid inconsistent Commonwealth law. In interpreting any such Commonwealth law, however, courts might be likely to favour interpretations that did not involve such inconsistencies.

Tasmania

The brief Tasmanian provisions[121] follow a similar pattern to those of New South Wales, with some differences. Child Protection and 'information-sharing entities' are each entitled to provide the other with information,[122] and are protected from liability when doing so.[123] Child Protection can require an information-sharing entity to provide information to Child Protection, but the reverse is not so: information-sharing entities cannot require Child Protection to provide them with information.

'Information-sharing entity' is defined to mean any of several nominated state bodies and individuals (notably in the areas of health, education and law enforcement).[124] It is clear that neither the family courts nor any other Commonwealth body is included in the definition. Other people and bodies can also to be included as 'Information-sharing entities' by way of designation by the Minister[125] or prescription in the regulations;[126] but the family courts have not been so included.

It follows that these Tasmanian information sharing provisions have no application to the family courts.

117 Section 245F.
118 Section 245I.
119 Section 245G.
120 Section 245H.
121 Children, Young Persons and Their Families Act 1997, Part 5A (Tas).
122 Section 53B(1), (3).
123 Section 53(4).
124 Sections 3 and 14.
125 Section 14(1)(l).
126 Section 3 (h).

Australian Capital Territory

Chapter 25 of the ACT Act has detailed provisions regulating the disclosure of information about children.[127] A broad description will suffice here.

The Explanatory Statement says of Chapter 25:

> ... The reforms set out in this chapter seek to improve the balance between the need for information sharing in protecting the interests of children and young people while still maintaining an appropriate level of privacy protection.
>
> Appropriate information sharing is necessary to:
>
> - Protect and promote the health, safety and wellbeing of all children and young people for whom there are concerns about possible abuse or neglect, or are in the Chief Executive's care or custody;
> - Develop proportionate interventions that are based on a holistic assessment of the child or young person's circumstances and level of risk;
> - Facilitate early intervention and practice for children and young people at risk in order to prevent, or reduce the likelihood of, increased statutory intervention; and
> - Facilitate regular inter-agency dialogue to protect and promote the best interests of children and young people.
>
> Stakeholders reported that individuals working within agencies are often hesitant to share information as there is some confusion regarding multi-layered privacy regulation at the Federal, State and Territory level. There are often large amounts of personal information collected about children and young people (and in some cases their families) who come into contact with child protection, youth justice, childcare or employment regulation service systems. [...] It is critical that information is collected, used and disclosed in appropriate circumstances and to appropriate persons.
>
> To encourage better information sharing practices between agencies, the Bill establishes criteria where protected (including sensitive) information can be shared between persons and agencies in particular circumstances. The framework will allow the Chief Executive to release protected information (including sensitive information) with, and request information from, relevant persons about children and young people who are subject to actions under the Act including children and young people who are (or may be) in need of care and protection, young offenders or children and young people in the criminal justice system, children who use child care services and children and young people engaged in employment. [...]

Key provisions of Chapter 25

The Act defines 'protected information' as, approximately, information obtained by Child Protection in the course of its work.[128] 'Sensitive information' means, approximately, the sort of information that is contained in reports about children in need of protection.[129] It is an offence to disclose

127 Children and Young People Act 2008 (ACT), Chapter 25.
128 Section 844.
129 Section 845.

protected information except under the Act, or with consent, or if under 'another law in force in the Territory' (which would include the Family Law Act 1975 (Cth).[130]

Information relevant to the health, safety or wellbeing of a child may be given by Child Protection to an information sharing entity, and vice-versa, with or without a request.[131] An information sharing entity must comply promptly with such a request by Child Protection.[132]

Whether the family courts are 'information sharing entities'

The relevance of Chapter 25 to the present topic depends on whether the family courts are 'information sharing entities'.

Under s 859, 'information-sharing entity' includes 'an entity established under a law of a State or the Commonwealth' that 'provides services to, or has contact with, the child [...] or his or her family'.

A family court would seem to fall within the words 'entity established under a law of the Commonwealth'. Can it be said that it 'provides services to' a child or his or her family'? The answer is not entirely clear. One would not normally think of a court providing services; rather its task is deciding disputes. On the whole, that seems a likely answer, even in the light of the more interventionist role of the court under Part VII, Div. 12A of the Family Law Act.

Could it be said that the court 'has contact with' the child? There is no doubt that court personnel, notably family consultants will normally have contact with the child, often involving interviews. And numerous court personnel will have contact with family members: registrars, court staff, and others. It seems a little odd to speak of a judge having 'contact' with a litigant or witness; on the other hand, court hearings involve face to face communications and would thus seem to fall within the ordinary meaning of 'contact'. It seems arguable, therefore, that the family courts could fall within the literal wording of the definition of 'information-sharing entity', essentially because they are arguably entities established under a Commonwealth law that have contact with children and their families.

The Explanatory Statement refers to various ways in which the term 'information sharing entity' is broader than the term 'defined entities' under the previous legislation. It makes no reference to family courts. It is arguable that if the family courts were intended to be included, this would be remarkable enough to have been mentioned in the Explanatory Memorandum. Another reason for doubting whether it was intended to include the Commonwealth family courts is that if they are included the legislation would purport to require them to provide information in some circumstances, and it would have been reasonable to expect some discussion of the constitutional validity of such a provision.

Although it is arguable that the family courts fall within the literal words of the relevant provisions, therefore, the context and history of the legislation makes it unlikely that it was intended to include them.

130 See sections 846, 847, 849.
131 See sections 858-862.
132 Section 862(2).

The Northern Territory

Information-sharing provisions came into effect in the Northern Territory on 1 July 2012.[133] Its purpose is stated as follows:

293A Object and underlying principle of Part

(1) The object of this Part is to ensure the safety and wellbeing of children by enabling particular persons and bodies having responsibilities for a child to request or give particular information about the child.

(2) For achieving that object, it is the underlying principle of this Part that rules about protecting confidentiality and privacy of individuals should not prevent the sharing of information for ensuring the safety and wellbeing of children.

As in the other information sharing legislation examined above, the key provisions are to the effect that an 'information sharing authority' may give to another such authority 'information that relates to the safety or wellbeing of a child';[134] and that if one authority requests such information from another, it must be provided,[135] with certain qualifications. Other provisions protect the information-provider,[136] and require the information to be used only for the purpose for which it was provided.[137]

For present purposes, the question is whether the legislation affects the family courts. The key term 'information sharing authority' is defined to include various individuals and agencies in such areas as policing, health and education, as well as the Department itself.[138] Of the various paragraphs listing such authorities, two require comment here.

First, the list includes 'a lawyer'.[139] On the face of it, this would include lawyers acting for parties in family court proceedings, as well as Independent Children's Lawyers. Thus, lawyers would be entitled to give information to the Department and other agencies, and to request if from them. There is no obvious reason to limit 'lawyer' to lawyers acting in particular roles. Thus, it seems, this provision would be of significant impact on lawyers in family law proceedings in the Northern Territory.

Does the list include the family courts? They are not expressly included, and, as in the case of the ACT, the question is whether they are implicitly included in one or more paragraphs. Those paragraphs include employees of 'an organisation that receives funding from the Commonwealth or Territory to provide a service, or perform a function, for or in connection with children'.[140] As in relation to the ACT legislation considered above, although the family courts might literally fall within these terms, it seems unlikely that it was intended to include them, and there is nothing in the Explanatory Statement to indicate an intention to do so. Similarly, the Report on which the

133 Part 5.1A, inserted into the Care and Protection Act by the Care and Protection of Children (Information Sharing) Amendment Act 2012.

134 Care and Protection Act NT, s 293D ('Giving information without request'). Providing information in accordance with this Part would be making a disclosure 'authorised by law', and thus would not be an offence under s 195: see subsection (2)(c).

135 Section 293E ("Giving information on request').

136 Section 293F.

137 Section 293G.

138 Section 293C.

139 Section 293C(1)(n).

140 Section 293C, paragraphs (e) and (g).

provisions are based[141] tends to use the term 'agencies and NGOs', and does not indicate that it was intended to include the family courts.

The better view, therefore, appears to be that the family courts are not included in the term 'information sharing authority'. On the other hand, as mentioned above, the inclusion of 'a lawyer' seems to entail significant information-sharing between Child Protection and lawyers in family court proceedings, notably Independent Children's Lawyers.

Conclusions on information-sharing laws of New South Wales, Tasmania, ACT and NT

The only state information-sharing legislation of clear relevance to the family courts is that of New South Wales. Those provisions, examined above, encourage and protect appropriate information-sharing between Child Protection and the family courts. The Tasmanian provisions are not of direct relevance because they do not include the family courts. The Northern Territory provisions do not appear to include the family courts, but do include lawyers, and may in that way play a significant part in information sharing between the family courts and cp in that Territory. The position under the ACT provisions is more arguable, but the view expressed in this report is that they do not include the family courts. If so, these provisions are relevant to the family courts only in New South Wales, and, to a lesser extent, in the Northern Territory.

Discussion and recommendations

It is convenient to start with the general law and then consider the impact of the specific laws discussed in this chapter.

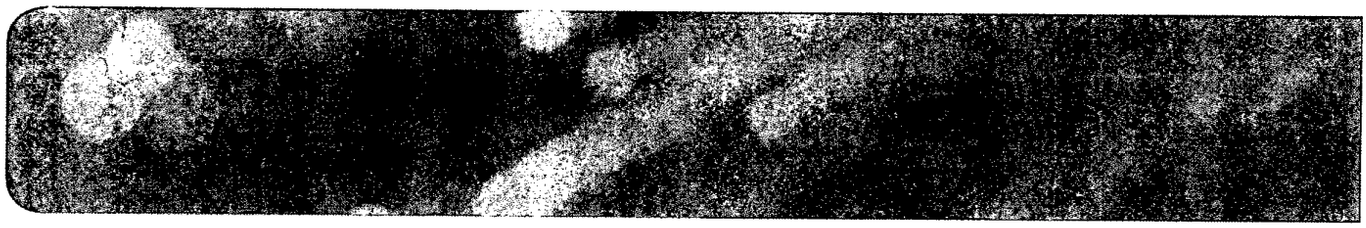
Under the general law, sharing information with another person is lawful and optional, unless some particular law provides otherwise. Depending on the circumstances, it may be unlawful (attracting civil or criminal liability) where, for example, the communication is defamatory, or a breach of contract, or involves the commission of an offence. It may also be a breach of professional ethics. It may also, in some circumstances, be required by law. The present discussion must be set against the background of the general law (including state and federal privacy laws).

The specific laws considered in this Part have a range of consequences. Some require information to be provided, some permit it, and some forbid it.

The law about the provision of information from the family courts to Child Protection is relatively straightforward. There is nothing in the Family Law Act 1975 that inhibits personnel associated with the family courts from providing information to Child Protection.[142] There are provisions that expressly permit the disclosure of such information, in connection with notifications to Child Protection under s 67Z or 67ZA, and protect those who supply it from any possible breach of other legal obligations. The provision of information outside those sections would be governed by the general law.

141 *Growing them Strong, Together: Promoting the safety and wellbeing of the Northern Territory's children*, Report of the Board of Inquiry into the Child Protection System in the Northern Territory 2010, Chapter 11 (cited in the Explanatory Statement).

142 As previously indicated, section 121 does not do so — it relates only to the transmission of material to the public or a section of the public.



The law about the provision of information from Child Protection to the family courts is more diverse and difficult to summarise. Only in New South Wales are there provisions that expressly encourage the transmission of information from Child Protection to the family courts. In other jurisdictions, the laws inhibits the transmission of information, although the ways in which it does so are varied and complex.

The provision of information is in some circumstances *required* by law, notably when a person is required to produce documents under a subpoena or a s 69ZW order, or is required to answer questions when giving evidence. These requirements arise under the Family Law Act 1975; there are no provisions of the state child protection legislation (except in New South Wales) that *require* information to be provided to the family courts.

The provision of information is in some circumstances *forbidden* by state child protection laws. First, as we have seen, there are provisions forbidding the disclosure of the identities of people who have made notifications of children at risk. The details vary between jurisdictions, but the main exception is that such disclosure may be made when a court requires that it be given in evidence. Although there may be some uncertainties in the law, broadly speaking the state laws' prohibition on disclosing the identities of notifiers is echoed and reinforced by similar provisions of the Family Law Act 1975.

Secondly, there are provisions forbidding the disclosure of information obtained while administering the child protection legislation. The details vary between jurisdictions, and it is possible that these laws are rarely enforced or even considered; but as we have seen there may be an inhibition, at least in theory, to the provision of important information from Child Protection to the family courts.

The laws reviewed in this section are inconsistent and sometimes uncertain in relation to information-sharing. The present Report is not a law reform report: its focus is on working within the present laws, and it has not been possible to examine the legal issues with the thoroughness that is needed to justify law reform. But it is obvious that, as the Law Reform Commissions recommended,[143] work needs to be done to improve state laws (other than in New South Wales) if they are to provide appropriate legal support for collaborative information sharing between the family courts and Child Protection. Most obviously, it would remove a possible problem if the offence of disclosing information obtained while administering the child protection laws (if it is to be retained at all)[144] were to be amended in all jurisdictions so that it clearly exempted Child Protection personnel and others who provided relevant information in good faith to appropriate personnel associated with family court proceedings. And it would assist very substantially if states would introduce legislation along the lines of that of New South Wales providing for information-sharing between Child Protection and the family courts. It would be useful, in this connection, for the federal and state authorities to consider whether, so that the resulting laws could impose information-sharing responsibilities equally on federal and state bodies, it might be appropriate to amend the Family Law Act 1975.

143 See above.

144 In many areas where confidentiality is important — for example family counselling under the Family Law Act 1975 — it has not been considered necessary to create an offence, as distinct from relying on professionalism and the fact that unreasonably breaching confidence would be in breach of the person's contractual and ethical obligations.

Chapter 3

Recommendation 1

State and territory governments should consider amending any laws that that might inhibit personnel of child protection departments from responsibly providing information to the Family Court of Australia, the Family Court of Western Australia and the Federal Magistrates Court ('the family courts') that would assist the courts in making decisions relating to children.

Recommendation 2

State and territory governments should consider passing legislation to promote information-sharing between the family courts and state and federal bodies and agencies having responsibility for the safety and welfare of children, including state child protection departments, such as New South Wales' *Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009 No 13* (Schedule 1.5, inserting Chapter 16A), and consult with their federal counterparts about any consequent amendments that might need to be made to the Family Law Act 1975.

An overview of existing Information-sharing Agreements

Introduction

At the time of writing, published formal agreements containing agreed understandings between the family courts and Child Protection, and sometimes between other agencies, exist in four states, New South Wales, Victoria, Queensland and Western Australia. There are nine agreements in total: five in New South Wales, two in Western Australia,[145] and one each in Victoria and Queensland. As we shall see, they are remarkably diverse: they differ not only on the substance of agreed measures, but also as to parties, as to names (some being entitled 'Memorandum of Understanding' and others 'Protocol'), and as to topics covered.

This Chapter presents a descriptive overview that will inform the general recommendations relating to agreements (Chapter 5) and the recommendations about the treatment of particular matters (Chapter 6). It reviews only formal agreements, not informal information-sharing arrangements.

Reviewing the existing agreements in each relevant jurisdiction

New South Wales

There are two separate documents, a Memorandum of Understanding and a Protocol, between the Family Court of Australia and Child Protection. Similarly, there is a Memorandum of Understanding and a separate Protocol between the Federal Magistrates Court and Child Protection. The Memorandums of Understanding contain mainly general matters, and the Protocols contain more specific material setting out what each agency has agreed to do. There is also a Memorandum of Understanding between Child Protection and the Legal Aid Commission of NSW, relating to Independent Children's Lawyers.

For convenience these five agreements will be referred to as follows:

- The Family Court/Child Protection MOU
- The Federal Magistrates Court/ Child Protection MOU
- The Family Court/Child Protection Protocol
- The Federal Magistrates Court/ Child Protection Protocol
- The Child Protection /Legal Aid MOU

The two Memorandums of Understanding are effectively identical.[146] The two Protocols are also nearly identical, the only two differences being that more detail is provided relating to the disclosure of information by Child Protection to the Federal Magistrates Court[147] than is given in the equivalent parts of the Protocol involving the Family Court;[148] and there is a section on

145 One of which is the agreement relating to family violence, described below.

146 The only differences are that the Federal Magistrates Court version omits a brief reference to Magellan that is found in the Family Court of Australia version; and, oddly, a formal clause to the effect that the Memorandum of Understanding commences upon both parties signing does not appear in the FMC version. This clause is also omitted from the Family Court Protocol.

147 The Federal Magistrates Court/ Child Protection MOU, at 4.3.3.

148 The Family Court/Child Protection MOU, at 4.3.3.

Magellan in the Family Court Protocol[149] that has no equivalent in the Protocol with the Federal Magistrates Court (which does not have a Magellan program).

The Memorandums of Understanding

The two Memorandums of Understanding[150] start with some introductory material, including objectives. They were established 'to facilitate contact [between Child Protection and the family courts] in order to ensure that a child's or young person's needs for protection are met'.[151] Under the heading 'Principles', they then summarise provisions of the two pieces of legislation dealing with objectives and general principles.[152] They then summarise the law relating to the jurisdiction of the family courts,[153] and the statutory responsibilities of Child Protection,[154] other agencies,[155] and the children's court.[156] Under the heading 'Disclosure of information' by the parties, they then set out or summarise various relevant legislative provisions of the state and federal legislation.[157]

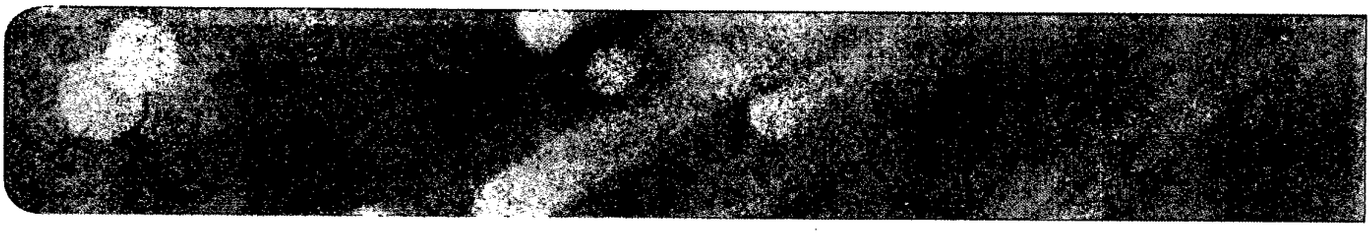
The next heading is 'Reports of risk of harm from [the family court] to [Child Protection]'.[158] Under this heading the agreements describe the law and the procedures that each agency will take, dealing in turn with s 91B requests,[159] notices of child abuse allegations,[160] mandatory and discretionary reporting by family court personnel,[161] and action by Child Protection following such notices or reports.[162]

Paragraph 9 deals with overlap of federal and state jurisdiction. It sets out principles for dealing with this issue,[163] and the matters relevant to Child Protection's choice of jurisdiction.[164] Finally the Memorandums of Understanding note that the parties have agreed to establish a Protocol 'to provide practical guidance' to staff of both parties about procedures, to assist cooperation and improve decision-making.

The New South Wales Memorandums of Understanding state that the family courts and Child Protection

> accept that the welfare and protection of children and young people at risk is better secured by a free flow of relevant information between them, where permitted by law. Similarly, courts are in a better position to make appropriate orders if they are fully aware of proceedings in other jurisdictions.[165]

149 The Family Court/Child Protection MOU, at 10.1 – 10.7.
150 The Family Court/Child Protection MOU, The Federal Magistrates Court/ Child Protection MOU.
151 Paragraph 1.1.1. The Introduction further says that 'Providing protection for a child or young person is a matter of paramount concern where allegations of child abuse or neglect are made, regardless of any disadvantage this may cause to an adult': 1.1.5.
152 Paragraph 2.
153 Paragraph 3.
154 Paragraph 4.
155 Paragraph 5.
156 Paragraph 6.
157 Paragraph 7.
158 Paragraph 8.
159 Paragraph 8.2.
160 Paragraph 8.3.
161 Paragraphs 8.4 – 8.5.
162 Paragraph 8.6.
163 Paragraph 9.1
164 Paragraph 9.2.
165 Paragraph 7.1.3. Accordingly, each agreement 'seeks to establish agreed procedures to ensure the exchange of information in appropriate cases where disclosure is otherwise lawful': 7.1.1.



The Memorandums of Understanding also state the following principles:[166]

9.1.2 ... it is necessary to recognise: [...]

(iii) that multiple hearings over prolonged periods of time in separate jurisdictions can be harmful to the child or young person and should where possible be minimised;

(iv) those parents have a right to have their disputes resolved expeditiously, efficiently and where possible within a single jurisdiction;

(v) that neither the Children's Court nor [the family court] should be used as a de facto court of appeal one from the other.

The agreement between Legal Aid and Child Protection re-states the principles in the Memorandums of Understanding,[167] and is to be read in conjunction with them.[168]

The Protocols

The Protocols,[169] which are to be read in conjunction with the corresponding Memorandum of Understanding,[170] state that they have been established 'to facilitate co-operation and sharing of information and to clarify procedures [between the family court and Child Protection] in order to meet children's need for protection'.[171] Paragraph 2 deals with s 91B requests,[172] then notices of child abuse (Form 4),[173] and mandatory reports by court personnel.[174] Paragraph 3 deals mainly with the procedures that Child Protection will take in responding to a report or s 91B request.[175]

Paragraph 4 is headed 'Disclosure of information by [Child Protection] and [the family court]'. It first identifies the person in the family court to whom Child Protection should direct inquiries,[176] and then specifies the information that the family court may disclose to Child Protection so that Child Protection can deal with the report or request.[177] The next paragraph, 4.2, also deals with this topic. It first deals with discussions between the Child Protection officer and the reporter, discussing issues of confidentiality.[178] It then deals with Child Protection's response to a request from the Ombudsman.[179] It then explains that where no report has been made by an officer of the family court, Child Protection will need to make an application to search the court records.[180]

166 Paragraph 9.1.2. Similarly, the 'one court principle' is recognised in the Child Protection /Legal Aid MOU at paragraph 3.8.
167 The NSW Child Protection/Legal Aid MOU, paragraph 1.1, replicating the opening paragraph of the other Memorandums of Understanding.
168 Paragraph 1.2.
169 The Family Court/Child Protection Protocol and the Federal Magistrates Court/ Child Protection Protocol.
170 Paragraph 1.2.
171 Paragraph 1.1.
172 Paragraph 2.1. In the first paragraph of paragraph 2, such requests are referred to as one of 'three types of reports of risk or harm'.
173 Paragraph 2.2.
174 Paragraph 2.3.
175 Paragraph 3.
176 Paragraph 4.1.4.
177 Paragraph 4.1.2.
178 Paragraph 4.2.1.
179 Paragraph 4.2.2.
180 Paragraph 4.2.3.

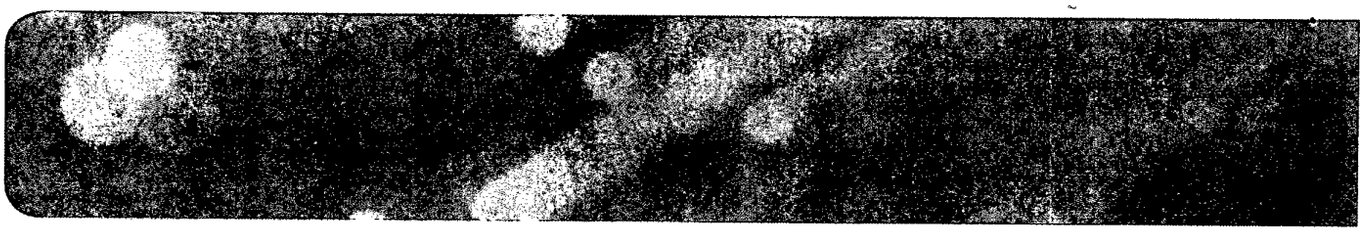
Paragraph 4.3 deals with Child Protection disclosing to the family court the status of any investigation it has made in relation to the child, what it proposes to do, and similar matters.[181] In relation to the Federal Magistrates Court it also deals with associated procedural matters,[182] but there is no equivalent discussion in the Protocol with the Family Court of Australia.

The Protocols go on to explain Case Conferences,[183] then deal with searching court records,[184] location orders[185] and recovery orders.[186]

The agreement between Child Protection and Legal Aid

New South Wales also has a Memorandum of Understanding between Child Protection and the Legal Aid Commission of NSW, relating to Independent Children's Lawyers.[187] Much of it repeats descriptions of the law and basic procedural matters that are contained in the main Memorandums of Understanding.[188] It has a summary of the role of Independent Children's Lawyers and the relevant provisions of the Family Law Act.[189] It recognises that the Independent Children's lawyer will require information from Child Protection and be in communication with Child Protection.[190] It refers to the 'one court principle' acknowledged in the Memorandums of Understanding[191], and says that Child Protection 'will wherever possible and appropriate, seek to intervene in any current family law proceedings rather than commence fresh proceedings in the State Children's Court'.[192] In paragraph 4 it deals with disclosures of information, embracing the desirability of a free flow of information,[193] and then setting out aspects of the law under the Child Protection legislation and the Privacy legislation,[194] and then law relevant to disclosures of information by the Independent Children's Lawyers to Child Protection.[195] Much of this material is similar to parts of the Memorandums of Understanding. Paragraph 5 deals with procedures between Child Protection and Independent Children's Lawyers relating to the exchange of information,[196] then with expert reports,[197] adjournments in cases where Child Protection is not a party,[198] and requests for affidavits by Child Protection officers at final hearings.[199]

181 Paragraphs 4.3.1, 4.3.2.
182 The Federal Magistrates Court/ Child Protection Protocol, Paragraph 4.3.3.
183 Paragraph 5.
184 Paragraph 6.
185 Paragraph 7.
186 Paragraph 8.
187 The Child Protection /Legal Aid MOU.
188 The Family Court/Child Protection MOU and 2 the Federal Magistrates Court/ Child Protection MOU.
189 Paragraph 3.
190 Paragraph 3.7.
191 This appears to be a reference to The Family Court/Child Protection MOU and the Federal Magistrates Court/ Child Protection MOU, paragraph 9.1.2, although the actual term 'one court principle' is not used there.
192 Paragraph 3.8.
193 Paragraph 4.1.3.
194 Paragraph 4.2.
195 Paragraph 4.3.
196 Paragraphs 5.1, 5.2.
197 Paragraph 5.3.
198 Paragraph 5.4.
199 Paragraph 5.5.



Victoria

In Victoria there is a single agreement, entitled a 'Protocol' and dated 2011, between Child Protection, the Family Court of Australia, and the Federal Magistrates Court.[200] Some of this 48-page document sets out the relevant law[201] and contact details.[202] An earlier Memorandum of Understanding, dated April 1995, is set out as an appendix to the Protocol.

The Victorian agreement states that it was established 'to facilitate contact [between the parties] in order to ensure that a child's need for protection is met and to ensure the best possible outcomes for a child.'[203] It goes on to say that it 'does not replace the requirement for open and collaborative relationships between each at the operational level',[204] and that the parties 'are committed to providing the highest level of service. Working together will ensure professional, sensitive and well-targeted responses to those children and young people who are at significant risk of harm'.

Under the heading 'information Exchange', the Victorian agreement identifies the following 'principles that underlie the exchange of information' between the parties:

10.1.1 Any action or decision taken by [Child Protection], the Family Court of Australia or the Federal Magistrates Court in relation to a child will be based on the best interests of the child, recognising that the best interests of the child are the paramount consideration.

10.1.2 The best interests of a child are better secured by the exchange of relevant information between those concerned with the child and family.

10.1.3 Courts are in a better position to make appropriate orders if they are fully aware of proceedings in other jurisdictions.

10.1.4 Information exchange must always be subject to any privacy and confidentiality obligations in relevant legislation with which the parties must comply.

The more substantive parts deal with notifications and referral of cases from the family courts to Child Protection and the action to be taken by Child Protection,[205] with information exchange between the parties,[206] establishing the appropriate court to deal with matters,[207] Child Protection's response to the family courts on receiving a report,[208] some matters relating to non-compliance with court orders,[209] and inspection and copying of Child Protection material subpoenaed by the family courts.[210]

200 *Protocol between the Department of Human Services* [Victoria], the *Family Court of Australia and the Federal Magistrates Court*, May 2011 [unsigned].
201 Notably paragraphs 2 – 7; Appendices 2 and 3.
202 Appendices 4 and 5.
203 Paragraph 1.1.
204 Paragraph 1.4.
205 Paragraphs 7 – 9; pp 13-17.
206 Paragraph 10, pp 18-20.
207 Paragraph 11, pp 21-22.
208 Paragraph 12, p 22.
209 Paragraph 13, p 23.
210 Paragraph 14, pp 24-25.

Chapter 4

Queensland

Queensland, like Victoria, has a single 'Protocol' between both of the family courts and Child Protection.[211] The Protocol was established 'to facilitate cooperation and sharing of information and to clarify procedures'.[212] As in the case of some other agreements, the document summarises the legislation and the roles of the agencies who are the parties. The main substantive parts deal with the exchange of information,[213] the disclosure of information to Child Protection[214] (including a section on Magellan[215]), disclosure of information to the family courts (including subpoenas, s 69ZW orders, and intervention by Child Protection),[216] the involvement of Child Protection in family law proceedings,[217] and the relationship between the Independent Children's Lawyer and Child Protection.[218]

In Queensland, the agreement 'seeks to establish agreed procedures to ensure the exchange of information in appropriate cases where disclosure is otherwise lawful'.[219] Its stated objectives are:[220]

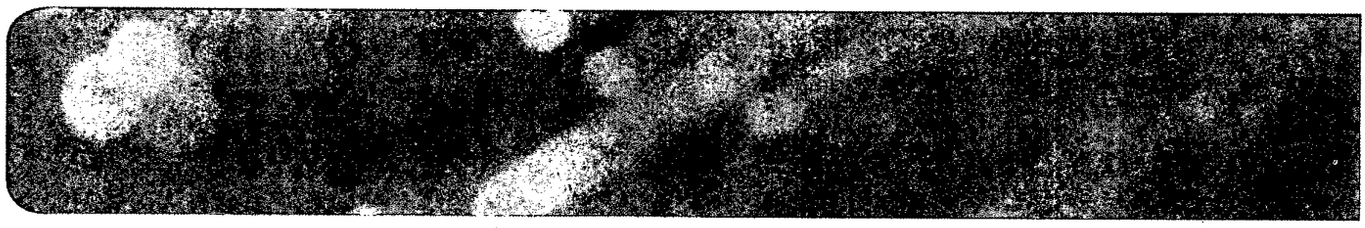
(1) To assist both the Department and the Courts to fulfil their primary roles and responsibilities in order to ensure that a child's welfare and best interests including their protective needs are recognised and met;

(2) To promote cooperation, consistency and guidance in dealings between the Courts and the Department; and

(3) To facilitate contact and the exchange of relevant information between the agencies.

The agreement contains some additional principles relating to Independent Children's Lawyers.[221] It makes provision for Child Protection to provide documents 'in recognition of the special role of the Independent Children's Lawyer',[222] and contains an acknowledgment that, although in different contexts, both the Independent Children's Lawyer and Child Protection must 'act in the best interests of the child in order to meet the child's protective needs'. The flow of information 'will assist this common goal to be met.'[223]

211 *Protocol between the Department of Child Safety Queensland, the Family Court of Australia and the Federal Magistrates Court of Australia* (signed and dated 11 October 2007.
212 Page 4.
213 Paragraph 4, pp 9-10.
214 Paragraph 5, pp 11-17.
215 Paragraph 5.5, p 15.
216 Paragraph 6, pp 18-22.
217 Paragraph 7, pp 23-26.
218 Paragraph 8, pp 27-30.
219 Page 9.
220 Paragraph 1.1.
221 Paragraph 8.
222 Paragraph 8.2.
223 Id.



Western Australia

The Western Australian Agreement

Western Australia has a Memorandum of Understanding between the Family Court of Western Australia, Child Protection, and Legal Aid Western Australia (dated 2008).[224] The substantive parts of the WA agreement appear under the heading 'Procedures' in Paragraph 2.[225] The procedures in Paragraph 2 deal with the referral of clients from Child Protection to the court,[226] exchange of information prior to an ex parte hearing of a recovery order application,[227] pre-section 69ZW procedures,[228] procedures following the filing of a Form 4 Notice of Risk of Abuse,[229] collaborative case discussions,[230] providing copies of orders to Child Protection as required by s 68P,[231] and interstate child welfare authorities.[232]

The Western Australian agreement states:

1.2.1 The parties recognise that they share the same aim in the fulfilment of their duties: to provide the best possible outcomes for children.

1.2.2 It is acknowledged that as far as is practicable, and permissible under the relevant statutory provisions, the parties should share and exchange information and resources in individual cases where to do so would assist in achieving this aim.

1.2.3 The parties have undertaken significant consultations in order to develop effective, practical and efficient procedures to facilitate appropriate sharing of information.

The separate Western Australian Family Violence Agreement

Western Australia also has a separate agreement relating to family violence (here called the WA Family Violence Agreement').[233] It does not involve Child Protection, and in that sense is not directly the subject of this Report. However it contains provisions that are of considerable interest in the present context. This agreement, entitled 'Information sharing Protocols in matters involving family Violence', is dated 2009 and is made between five parties: the Family Court of Western Australia, the Magistrates Court of Western Australia, the Department of the Attorney-General, the Department of Corrective Services, and Legal Aid.

224 *Memorandum of Understanding between the Family Court of Australia, the Department for Child Protection and Legal Aid Western Australia* (Signed, Revised June 2008)(The WA FCA/Child Protection/Legal Aid MOU').

225 Paragraph 3 briefly provides for the use of electronic means of information exchange.

226 Paragraph 2.1.

227 Paragraph 2.2,

228 Paragraph 2.3.

229 Paragraph 2.4.

230 Paragraph 2.5.

231 Paragraph 2.6 .

232 Paragraph 2.7.

233 *Information Sharing Protocols between the Family Court of Western Australia, Magistrates Court of Western Australia, Department of the Attorney General, Department of Corrective Services, Legal Aid Western Australia in matters involving family violence* (Signed February 2009). Despite the title, the document thereafter refers to itself as 'this Memorandum of Understanding'.

Chapter 4

The agreement, as its title indicates, focuses on information-sharing in matters involving family violence.[234] It deals with exchange of information between courts in general,[235] and then to somewhat specific situations: the exchange of information 'when an offender is being case managed in the Family Violence Court and is a party to a parenting case in the FCWA';[236] and family violence service workers and the FCWA.[237] Attachment A of the Western Australian agreement is an information sheet for family violence workers.

Matters covered in existing agreements: an overview

This section seeks to identify briefly the matters covered in existing agreements, particularly the general principles stated in the agreements.

As already mentioned a great deal of the agreements is devoted to setting out legal principles, and to a lesser extent describing the ordinary processes of each agency in relation to particular matters.[238] The present focus, however, is on measures the agencies have agreed to take as a result of the agreement. What the agreements say about particular measures, such as s 91B requests, is reviewed in Chapter 6 in connection with particular topics; what follows is therefore an overview.

Taking collaborative or information-sharing steps beyond the legislative requirements or the agency's ordinary practice

In some ways these provisions represent the substance of Understandings. Some examples:

- Under the New South Wales Memorandum of Understanding, for example, the family court will forward copies of orders, reasons for judgments and other documents to Child Protection when making a s 91B request;[239] and Child Protection will advise the family court of its reasons for declining to intervene.[240] And under the Protocol, the family court's Manager of Court Counselling can be invited to Child Protection case conferences.[241]
- Western Australia has detailed and practical provisions for the exchange of information when the family court is asked to make a recovery order.[242] Also, Child Protection agrees to provide written information to the family court in connection with s 67Z and s 67ZA notifications.[243]
- In Queensland, following a s 67Z or s 67ZA notification, Child Protection will provide the family court with specified information that will help it consider whether to make a s 91B request.[244]

234 The agreement states, perhaps unnecessarily, that it is not intended to replace the 2008 Memorandum of Understanding. See at paragraph 1.0.

235 Paragraph 2.

236 Paragraph 3.

237 Paragraph 4.

238 Provisions of the New South Wales Memorandum of Understanding stating that Child Protection will deal with s 67Z notifications and s 91B requests as reports that a child or young person is at risk of harm under the provisions of the state legislation (eg paragraph 8.6.1) appear to fall into this category. A more obvious example is the New South Wales Protocols, paragraph 3.2.

239 Paragraph 8.2.2.

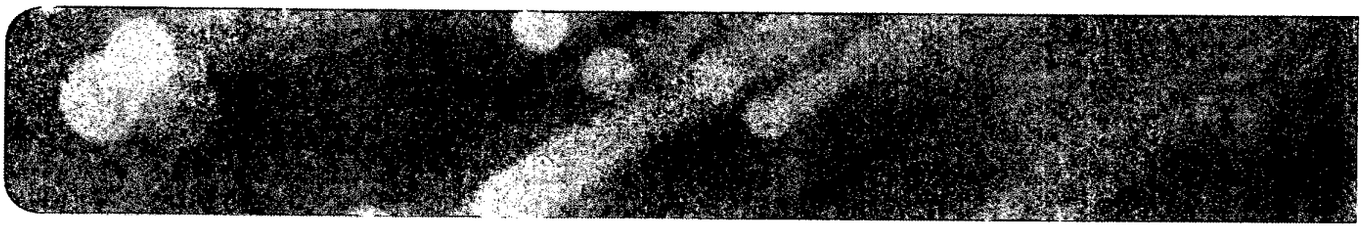
240 Paragraph 8.2.5. See also the Protocols, at 3.3, providing for a 'Feedback to Reporters Letter', and paragraph 3.4, and the FMC-Child Protection Protocol at paragraph 4.3.3..

241 New South Wales Protocol, paragraph 5.3. Western Australia has a more detailed provision on this topic: paragraph 2.5.

242 Paragraph 2.2.

243 Paragraph 2.4.1.

244 Paragraph 5.4



Facilitating communication

The agreements often specify the persons in each agency who are to be involved in notification, consultation and information-sharing.[245]

Setting timeframes for actions

The agreements set out timeframes for some actions, often providing that the agency will indicate if greater time is needed, and the reasons for this.[246]

Recognition that agreements will need to be reviewed

Some agreements note or make provision for review and possible future amendment, and for the resolution of disputes.[247]

Agreed principles

All agreements contain some stated principles to guide the intended future conduct of the parties.[248] The main topics and themes may be summarised as follows.

- Information sharing
- Collaboration generally
- Children's interests
- The 'one court' principle

Information sharing

All agreements involve a commitment to information-sharing. Indeed, it seems fair to say that this is their primary objective.

While the terminology varies, it seems clear that the intention is to commit each party to share information where to do so is lawful, relevant (or 'important') to the other party, and reasonably practicable. A phrase such as 'effective, practical and efficient procedures to facilitate appropriate sharing of information'[249] probably captures the intention in all the agreements.

245 For example, the New South Wales MOUs indicate that notifications under s 67Z are to be directed to the department's Helpline. Other examples include Western Australia, paragraphs 2.1.2, 2.1.3.

246 For example, the New South Wales MOUs set out the time Child Protection will normally require to respond to a s 91B request: 8.2.5. See also Queensland, paragraph 5.4.

247 Eg New South Wales MOU, paragraph 10.2, 11; Western Australia, paragraph 1.4

248 In this discussion, 'principles' does not refer to legislative principles governing the work of the family courts or Child Protection, even though such principles are summarised in some agreements eg NSW.

249 The WA FCA/Child Protection/Legal Aid MOU.

Chapter 4

Collaboration generally

The agreements refer to collaboration in terms than are not limited to information-sharing. Some agreements explicitly refer to case conferences that might involve officers from more than one agency.[250] The Victorian agreement notes that it 'does not replace the requirement for open and collaborative relationships between each at the operational level'.[251] The purpose of this brief comment is no doubt to avoid any suggestion that the agreement would preclude additional collaboration.

Children's interests

Several agreements specifically refer to children's interests, although in significantly different terms.[252] New South Wales at first focuses on children's needs for *protection*, but also refers to the '*welfare and* protection of children and young people at risk'.[253] Victoria's opening statement is wider than protection, speaking of a childs 'need for protection' and ensuring 'the best possible outcomes for a child'. Queensland's is similar, but reverses the order: the parties are to fulfil their primary responsibilities 'to ensure that a child's welfare and best interests including their protective needs are recognised and met'. Western Australia uses a wider expression, 'to provide the best possible outcomes' for children.

The 'one court' principle

The principles stated in New South Wales[254] expressly address the disadvantages of multiple hearings in different jurisdictions, and one court sitting as a de facto court of appeal over the other. These statements reflect what has been called the 'one court' principle.[255] Although there is no equivalent statement in the other agreements, it appears to be entirely consistent with the spirit of other principles and measures in agreements. Thus, for example, it will be easier to avoid multiple hearings in different jurisdictions if courts are fully aware of proceedings in other jurisdictions, and if information is exchanged so they have what information is available.

250 The WA FCA/Child Protection/Legal Aid MOU, paragraph 2.5; The NSW FCA/Child Protection MOU and the NSW FMC/Child Protection MOU, paragraph 5.

251 Vic Child Protection/FCA/FMC Protocol, paragraph 1.4.

252 See the discussion in Kylie Beckhouse and Pat Fitzgerald 'Confidentiality and Intersection between the child protection process and the family law — Challenges and Solutions' (unpublished, c. 2011).

253 Emphasis added.

254 The NSW FCA/Child Protection MOU and the NSW FMC/Child Protection MOU, paragraph 9.1.2

255 The term is used in the NSW Child Protection/Legal Aid MOU, paragraph 3.8.

Drafting Information-sharing Agreements: general issues

Introduction

This Chapter discusses some general issues relating to formal agreements, including what general principles they might usefully state. The intention is to make suggestions that might assist the parties drafting or revising agreements. Chapter 6 deals with specific problems, and what agreements might usefully say about them.

It is apparent from the previous parts of this report that while the Family Law Act and state child protection legislation contain some specific provisions relevant to information-sharing, there is little in the way of general guidelines or principles on the subject applicable to the family courts. This is surprising, since modern legislation tends to favour the formulation of guidelines and principles. Thus the Family Law Act sets out detailed objects, principles and guidelines relating to making parenting orders,[256] tells counsellors what they have to say in counselling sessions,[257] spells out the role of Independent Children's Lawyers,[258] sets out principles to guide the court in using its power under the 'less adversarial' approach to children's cases,[259] and so on. But it contains no principles or guidelines dealing with the sharing of between the family courts and Child Protection. Similarly, generally speaking state child protection laws do not much deal with information-sharing between Child Protection and the family courts.[260]

Despite this, it has been recognised for some time that because Child Protection and the family courts are often both involved with particular families, collaborative information-sharing is essential to reduce the risk of tragic errors in decisions about children, and to avoid duplication and increase efficiency in the work of the family courts and Child Protection, and other agencies, notably Independent Children's Lawyers. Formal agreements between the family courts and Child Protection and Legal Aid can make an important contribution to such collaboration.

Purposes, parties, and readership

The starting point appears to be to indentify three closely related questions:

- What purposes will the agreement serve?
- Who are to be the parties?
- Who is going to read it and apply it?

256 Eg sections 60B, 60CC.
257 Section 60D.
258 Section 68LA.
259 Section 69ZN.
260 As seen in Chapter 3, although three jurisdictions have in recent times inserted detailed information-sharing principles into their child protection legislation, these provisions expressly include the family courts only in New South Wales.

Purposes

Stating agreed information-sharing principles and procedures

The basic purpose of formal agreements appears to be to set out principles and procedures agreed by the parties relating to information-sharing. These principles and procedures relate to the way each Party will exercise the powers they have under the relevant laws.[261]

It is of course possible for the parties to deal with information-sharing informally, and this may have distinct advantages, notably flexibility. In smaller centres especially, the parties might consider that there is no need for a formal agreement. But there are a number of powerful reasons for having formal agreements. They establish principles and procedures in a form that is clear, public and authoritative and should command respect. With a formal agreement, the stated principles and procedures should survive the departure of the individuals who set them up. Further, the process of formulating an agreement should require the parties to think through issues that might otherwise have been left unresolved. The relative advantages of formality and informality will no doubt be considered in each jurisdiction, but there are strong arguments in favour of a formal agreement.

Recommendation 3

In jurisdictions where they currently rely on informal arrangements, the family courts, the state or territory child protection departments ('Child Protection') and the Legal Aid Commission ('Legal Aid') are encouraged to consider carefully the possible advantages of having a formal information-sharing agreement ('agreement').

Educational purposes best achieved in other ways

Substantial portions of many existing agreements do not set out what the parties have agreed, but simply provide information about the law and, to a lesser extent, describe existing procedures within each agency. It is obvious that the intention is to inform personnel in each agency about the other agency.

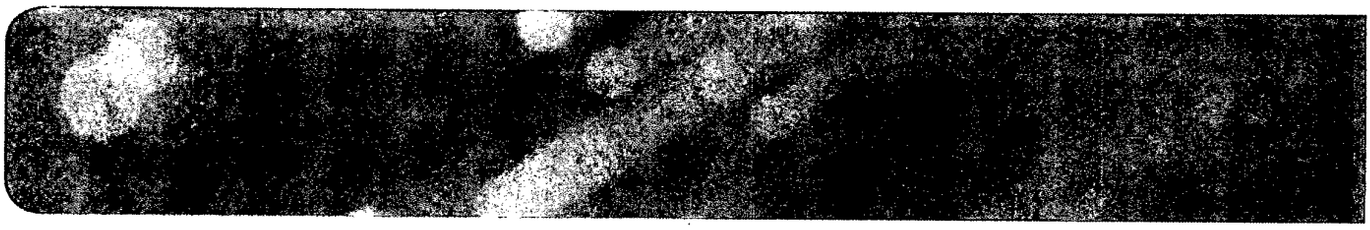
Providing such information is indeed an important task.[262] Collaboration about information-sharing and other things will obviously be assisted if personnel in each agency understand as much as possible about the other: what its legislation says, and how it goes about the task of discharging its legislative function.

Including this sort of information in the body of agreements, however, makes them lengthy documents, and makes it difficult for busy people to quickly identify what the agreements require them to do. It is important, therefore, that information about the law and the work of agencies should be provided by means other than incorporation into agreements. It makes sense for each agency to assist the other by providing summaries of its own laws and procedures,[263] and, ideally offering training in these matters. Ideally, the provision of such information could be combined

261 Agreements do not, and probably could not, provide legal authorisation for actions.

262 As recognised in the Law Reform Commissions' Report, Recommendation 30–14, that Australian, state and territory governments should develop guidelines to assist agencies and organisations working in the family violence and child protection systems to better understand the rules relating to the sharing of information.

263 Much of information already in some agreements would be suitable for this task.



with cross-sector training for family law and child protection personnel, as happens in some locations.[264] It may well be desirable to embrace the importance of training in the agreement, as does the Western Australian agreement.[265]

To summarise, it would greatly assist those using agreements if the material setting out the existing law were removed. The agreements would be shorter, and it would be easier for the readers, especially when their time is limited, to see quickly what principles and procedures have been agreed. Other educational measures should be taken to ensure that personnel in each agency would have ready access to the information about the other agency as they read and apply the agreement.

Conclusion: focus agreements on basic purpose

The discussion so far assumes that the basic purpose of agreements appears to be to set out principles and procedures agreed by the parties relating to information-sharing and associated procedural matters.[266] If so, it might be advantageous to focus agreements clearly on this purpose.[267] Thus agreements need not specify internal procedures of the family courts or Child Protection unless such procedures are significant to the other agency.[268]

Recommendation 4

The content of agreements should relate to their basic purpose, for example to set out principles and procedures agreed by the parties relating to information-sharing and associated procedural matters. Agreements should not be used to state or summarise the law or describe the procedures ordinarily used by the parties.

Parties

If the above analysis is accepted, the parties will be limited to agencies that have agreed to principles and procedures relating to information-sharing and associated procedural matters. Consistently with this, in existing agreements the usual parties are the family courts and Child Protection, and sometimes Legal Aid. It is probably desirable to keep the number of parties fairly small, since multiple parties would presumably make it more difficult to draft agreements, and, especially, to amend them from time to time. There are obvious merits in including Legal Aid, since Independent Children's Lawyers play a vital part in information-sharing.

264 Helen Rhoades, Hilary Astor and Ann Sanson, 'A Study of Inter-Professional Relationships in a Changing Family Law System' (2009) 23 *Australian Journal of Family Law* 10-30.

265 '1.3.2 The parties agree that this MOU will be distributed to all relevant members of their respective organisations and information and training will be provided as required to ensure the workability of the matters contained herein'.

266 This is consistent with the usual meaning of 'Memorandum of Understanding'. The Victorian Government website, for example, says 'A Memorandum of Understanding (MOU) can be an effective and flexible tool for documenting the common intent of two or more government parties or between government and non-government parties'.

267 It might of course be appropriate to deal also with matters relating to the agreement itself, such as its amendment.

268 On this approach, for example, in relation to s 69ZW orders there would perhaps be no need to include a provision to the effect that the family court 'shall forward the documents to the Subpoena Section to be held in separate folders to be brought up to Court at the next hearing date': WA 2.3.2.3.

Chapter 5

Some existing agreements combine the Family Court of Australia and the Federal Magistrates Court, while others are between Child Protection and each of these courts separately. There would seem to be a mix of advantages and disadvantages here. A single agreement has the virtue of simplicity, and the agreed principles and procedures would perhaps gain force by including both courts. On the other hand a single agreement would have to deal separately with areas in which the courts differ, most obviously Magellan. This is very much a matter to be considered in each jurisdiction.

Recommendation 5

The parties to agreements should normally be (1) one or more of the family courts (2) the child protection department of the relevant state or territory, and (3) the Legal Aid Commission of the relevant state or territory.

Agreements and the exercise of judicial discretion

Some of the decisions that relate to information-sharing will be made by judges: for example, in making orders under s 69ZW. There are obvious advantages if such decisions, as well as decisions made by other personnel, are consistent with principles and practices outlined in the agreements.

Judges, however, must apply the law. It would be contrary to the separation of powers for anything external to control their decisions. To what extent, then, can agreements deal with judicial decisions that are relevant to information-sharing?

It is important in this connection to say something about the basis on which judges make decisions. In relation to making parenting orders, judges must base their decisions on the best interests of the child, having regard to the statutory guidelines for determining this.[269] However when it comes to making orders about procedural matters, there is greater flexibility. The principle that the child's best interest must be the paramount consideration does not strictly apply.[270] Of course, since the proceedings are essentially about the child's best interests, those interests will be of enormous importance. But the fact that they are not the 'paramount consideration' is significant.

Take, for example, a situation in which a party asks that a case be expedited. If the court treated the best interests of the particular child in that case as paramount, the case would almost inevitably be expedited. But this would defeat the purpose of identifying those cases whose urgency sets them above other cases. In deciding whether to expedite a case, the court needs to consider not only the particular child's best interests, but the sensible management of the court lists, and the interests of other people, especially other children who might be prejudiced by additional delay if the current case were allowed to jump the queue by being expedited. Thus, in making procedural decisions, judges generally have more flexibility than if the law required them to treat the best interests of the particular child as paramount.

269 Section 60CA.

270 See, eg, *In the Marriage of Bennett* (2001) 28 Fam LR 231; (2001) FLC 93-088; *B v B* (Re Jurisdiction) (2003) 31 Fam LR 7.

Having regard to this, although it is not possible for a formal agreement to *control* judges' decisions, in relation to making procedural orders, it is legally open to judges to have regard to such agreements. Suppose, for example, an agreement to which a family court is a party says that the family courts will normally allow Child Protection a certain time to respond to s 69ZW orders. It would be quite proper for judges to take that into account when considering how much time to allow in a particular case. More generally, in exercising discretionary powers on relevant procedural matters, judges can properly consider measures that both agencies have agreed upon, knowing that adhering to them seems likely to be to the general advantage of children and families. Of course, ultimately the judge must be free to determine each matter as he or she sees fit, having regard to any statutory guidelines, and, in relation to procedural matters, to the overarching objective of achieving justice.

Recommendation 6

The drafting of agreements, and any education or training relating to them, should acknowledge that although agreements cannot alter the law or interfere with the exercise of jurisdiction by the courts, it might be proper in some circumstances for judicial officers to have regard to the terms of agreements.

Nomenclature and drafting matters

The jurisdictions sometimes use 'Protocol', and sometimes 'Memorandum of Understanding'. The latter is clumsier, but better expresses the fact that the document records an agreement between the parties. Neither term of itself actually indicates the subject matter of the agreements. It seems preferable to give them a simpler title that refers to the subject-matter, namely 'Information-Sharing Agreement Between [the parties]'.[271]

Recommendation 7

Agreements should be entitled 'Information-sharing Agreement between [the parties]' rather than 'Protocol' or 'Memorandum of Understanding'.

Little needs to be said about matters of style and drafting. First, obviously, the document should be as simple and clear as possible, and should be written in a way that is suitable for the intended readership, notably personnel of the agencies and others in the family law system, such as legal practitioners, and family consultants. Since it is intended for personnel in the different agencies, there would be advantage in avoiding legal or technical terms that would be familiar in one agency but not the other. It might be helpful as these agreements are being drafted to include a process in which those who will use them have a chance to read a draft and make comments.

271 If the word 'agreement' is thought likely to suggest some form of legally enforceable contract — which is not intended — perhaps 'Information-Sharing Understanding' could be substituted.

Chapter 5

An important question in drafting agreements is the level of generality. The inclusion of detail can be helpful; on the other hand if the detail relates to matters that change frequently (such as people's telephone numbers) the agreement will rapidly date, and may need tiresome revisions. The appropriate level of generality will need to be considered in relation to each topic.

Next, the drafting should reflect the purpose of each provision. Is it intended to set out what people should do? Some provisions of existing agreements state what parties 'may' do. For example, the Queensland agreement provides that the Independent Children's Lawyer 'may' be invited to attend the children's court as a friend of the court; Child Protection 'may' ask the Independent Children's Lawyer to seek leave to release a copy of an assessment report to Child Protection; the Independent Children's Lawyer 'may' ask Child Protection to seek the children's courts' leave for the release of such reports held by it. What is the significance of such provisions? The word 'may' presumably indicates that they do not create any obligations. Nor would they authorise personnel to do anything that they were not already authorised to do. Perhaps the intention is to draw the attention of the parties to options that arise in particular situations, and, perhaps to encourage them to think about exercising those options. In relation to such provisions, it might be helpful if those drafting agreements consider whether it is intended to create guidelines, for example by indicating that a particular action will normally be appropriate. If so, the wording might need to be adjusted. If on the other hand the intention is merely to set out what steps personnel are legal entitled to take, drafters might consider whether such matters might be better dealt with in educational material rather than in the agreement itself.

Recommendation 8

Agreements should be expressed simply and clearly, and in a way suited to the intended readership.

Principles

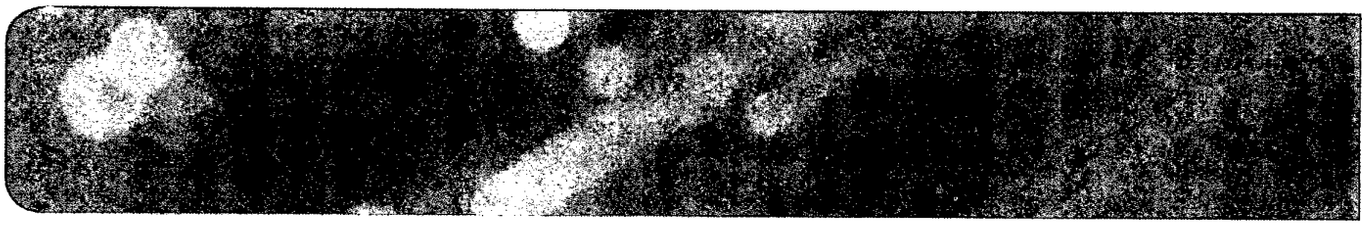
Statements of agreed principles form a valuable part of agreements. It is of course for the parties in each case to formulate the principles they embrace. The following paragraphs seek to identify some themes that might be included, and discuss how they might be formulated.

A commitment to information-sharing

A commitment to information-sharing is the most obvious principle — on the face of it, the central plank of any agreement. It appears, in different formulations, in all the existing agreements.[272] In substance, the parties generally commit themselves to use effective, practical and efficient procedures[273] to share information with the other parties, where the information appears relevant to another party and where providing it is lawful and reasonably practicable. It is obviously desirable that agreements should state such a principle.

272 New South Wales Memorandums of Understanding, paragraph 7.1.3; Victoria, paragraph 10.1.2; Queensland, paragraph 1.1; Western Australia, paragraphs 1.2.1 – 1.2.3.

273 This wording derives from the WA agreement, paragraph 1.2.



Recommendation 9

Agreements should include words to the effect that the parties commit themselves to use effective, practical and efficient procedures to share information with the other parties, where the information appears relevant to another party and where providing it is lawful and reasonably practicable.

Collaboration

The agreements sometimes refer to collaboration in terms than are not limited to information-sharing. Some agreements, for example, explicitly refer to case conferences that might involve officers from more than one agency.[274] The formulation of principles of this type will depend on what specific measures have been agreed, a topic considered in Chapter 6.

Recommendation 10

Agreements should state that parties are committed to a co-operative working relationship, and refer to the value of such co-operation.

Establishing lines of communication

An important function of agreements is to establish lines of communication, indicating what person or department the other agencies should contact in relation to information-sharing. Agreements frequently deal with this issue in relation to particular matters — specifying, for example, the person to whom notices of suspected child abuse should be sent.[275] It might also be desirable that agreements identify a person or body having overall responsibility for information-sharing between that body and the other agencies. That would remove one of the possible obstacles to information-sharing, namely ignorance about who should be contacted in the other agency.

Recommendation 11

Agreements should specify which person or body in each agency is to be responsible for information-sharing.

274 The WA agreement, paragraph 2.5; The NSW Memorandums of agreement, paragraph 5.

275 Thus the New South Wales Protocols specify that such notices be sent to the DoCS Helpline: 2.3.2.

Chapter 5

Children's interests

Several agreements specifically refer to children's interests, although as we have seen they do so in significantly different terms.[276] Some formulations focus on protective needs, some on interests generally, and some seek to combine the two.

The differences probably reflect differences between the Family Law Act and the state child protection legislation. A focus on children's need for protection is central in Child Protection because it is the threshold for intervention (although once the matter is before the children's courts, children's other needs and interests are also relevant to the order that the children's court will make). In family law there is no equivalent threshold requirement, and the Family Law Act 1975 thus refers more generally to children's best interests (which of course include children's need for protection)[277] as the 'paramount consideration'.[278] The different formulations between the state child protection legislation and the family law legislation pose an obvious difficulty in phrasing any reference to the child's interest in an agreement, and it is understandable that different choices have been made in different states.[279]

One solution to this problem would be not to refer to children's interests at all. There would be no logical problem about this. The agreement could usefully record an agreed commitment to information-sharing, which would assist both parties in carrying out their (overlapping but different) statutory obligations. It would not have to state what those statutory obligations are.

On the other hand, parties might reasonably consider that the agreement should in some way refer to children's interests, since presumably all such agreements reflect a shared concern to promote children's rights and interests. Leaving out the children might feel like omitting the bride and groom from a wedding ceremony. A possible way of doing this might be to use language that is deliberately different from either the formulation in the Family Law Act 1975 or the formulation in the relevant state legislation. This would remove any suggestion of compromising the statutory obligations of any party.

Recommendation 12

If agreements refer to promoting the interests of children, they should avoid using the language of the relevant state or federal legislation but instead refer, for example, to 'working together to produce the best possible outcomes for children'.

276 276 See the discussion in Fitzgerald and Beckhouse in 'Confidentiality and Intersection between the Child Protection Process and the Family Law — Challenges and Solutions' (unpublished, c 2012). The authors argue that the formulation should not be limited to children's protective needs.

277 Section 60CC(2)(b), and s 60CC(2A).

278 Section 60CA.

279 For example the 'objects' of the New South Wales Act are, in part, to provide that children receive 'such care and protection as is necessary for their safety, welfare and well-being, having regard to the capacity of their parents or other persons responsible for them': Children and Young Persons (Care and Protection) Act 1998 (NSW), s 8.

The 'one court' principle

It is a common theme among existing agreements that every effort should be made to avoid multiple hearings in different jurisdictions, and, in particular, one court sitting as a de facto court of appeal over the other.[280] Such statements embody what has been called the 'one court' principle.[281] Obviously, it will be easier to avoid multiple hearings in different jurisdictions if courts are fully aware of proceedings in other jurisdictions, and if information is exchanged so each has what information is available. Another idea that could be incorporated into the 'one court' principle is that the court should be the most appropriate for the particular family.

The Child Protection/Legal Aid agreement in New South Wales speaks of the 'one court' principle in a specific form, namely that Child Protection 'will, whenever possible and appropriate, seek to intervene in any current family law proceedings rather than commence fresh proceedings in the State Children's Court'.[282] This formulation deals at once with two separate matters: the desirability of having only one court involved with each child (or each family) and the question *which* court that should be. Such an approach seems possible, however, only when the parties agree both on the general desirability of one court and on the particular mechanism for achieving it. A preferable approach, arguably, would be to state the one court principle, and then deal separately with any agreed way of achieving it.

If such a principle is agreed, the question will then be what practical measures the parties will take to put it into practice, and how an agreement might express those measures. The details will no doubt depend on many factors and may differ between different jurisdictions. The practical measures will include issues relating to intervention by Child Protection in family court proceedings. The essential task, however, is probably to ensure that each party informs the other about its involvement with particular families and children, and that there is a well-understood process to enable them to consult about which court is most suitable in each case.

Recommendation 13

Agreements should include a commitment to the 'one court principle', that so far as possible decisions about a particular child should be made by only one court, namely the court that is most appropriate in the circumstances.

Encouraging collaboration beyond the matters specified

The Victorian agreement notes that it 'does not replace the requirement for open and collaborative relationships between each at the operational level'.[283] The purpose of this comment is presumably to avoid the risk that specific measures in the agreement might be seen as exhaustively stating what collaboration should exist. There seems merit in such a provision, encouraging parties to act in open and collaborative ways, in which they may agree on measures additional to those specified in the agreement.

280 For example the NSW Memorandums of agreement, paragraph 9.1.2

281 The term is used in the NSW Child Protection/Legal Aid Agreement, paragraph 3.8.

282 Paragraph 3.8.

283 The Victorian agreement, paragraph 1.4.

Recommendation 14

Agreements should encourage parties to act in open and collaborative ways, in which they may agree on measures additional to those specified in the agreement.

Stating a party's positions on particular issues

Some agreements contain passages that do not set out what the parties agree to do, but state each party's position on some issue. Thus the WA agreement, dealing with s 69ZW orders, states each party's position in turn.[284] Child Protection 'seeks to produce to the Court any information that may assist the Court to make the most informed decision regarding the welfare of a child, subject to its statutory obligations regarding disclosure and its general policy regarding the privacy of files. Also, Child Protection is 'concerned to minimise resource implications in complying with such orders'. The family court 'seeks to receive such information in the most efficient manner minimizing resource implications and utilizing the assistance of Family Consultants and Independent Children's Lawyers when appointed. The Court accepts that only documents that are in existence should be the subject of such orders'. Such statement might be useful, especially on topics of particular difficulty. Ideally, however, it seems preferable that agreements state principles that are agreed between all the parties.

Recommendation 15

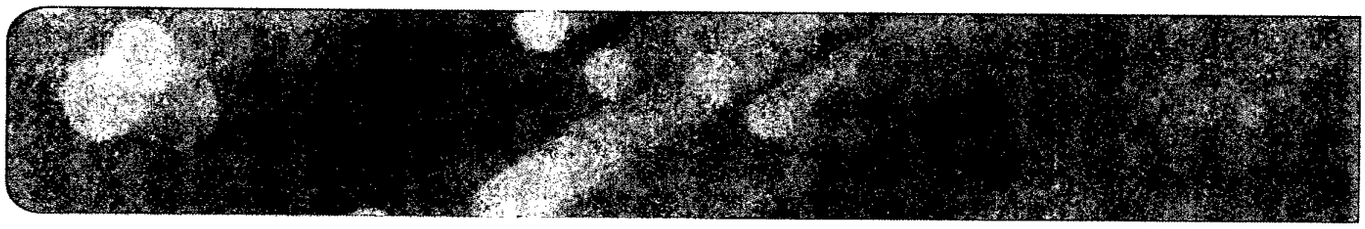
So far as possible, agreements should state principles that are agreed between all the parties, rather than stating the position of particular parties on particular issues.

Implementation, review and amendment

The parties will wish to prevent the agreement from slipping from view as the initial energy associated with it is diverted to other priorities, and, perhaps, as the key personnel move on. It is important, too, that any difficulties relating to the agreement be identified and dealt with, perhaps by amending the agreement, rather than cause the agreement to be disregarded. This might be achieved if, for example, the parties

- ensure that the agreement is prominently displayed in a form readily available to all personnel, for example by having a conspicuous presence in an organisation's Intranet, as well as to be public (for example by inclusion on the public websites of the relevant agencies);
- designate individuals to have responsibility for implementing the agreement, attending to any problems or disputes that arise in its administration, and recommending amendments as necessary;
- ensure that the agreement is given appropriate attention in all staff training and supervision; and
- provide for periodic reviews of the agreement.

284 See the discussion of s 69ZW orders in Chapter 6.



Recommendation 16

Parties should ensure the effective implementation of the agreement by such measures as

- ensuring that it is prominently published so that it is readily available for the parties' personnel and others affected by it, such as legal practitioners and family counsellors;
- designating individuals to have responsibility for implementing the agreement, attending to any problems or disputes that arise in its administration, and recommending amendments as necessary;
- ensuring that the agreement is given appropriate attention in all staff training and supervision; and
- providing for periodic reviews of the agreement after a period, and any necessary amendment.

Possible extensions

While this Report considers mainly Child Protection and the family courts, it might be useful in the future — and consistent with the 'village' concept introduced in Chapter 1 — to consider the benefits of information-sharing arrangements that involve the family courts and other bodies, such as health, police, and magistrates courts. Such developments in relation to family violence are considered at the end of Chapter 6.

Drafting Information-sharing Agreements: particular issues

Introduction

This chapter considers a number of specific matters, mainly by reference to the relevant provisions of the Family Law Act 1975. The discussion will normally introduce the issue, discuss the relevant recommendations in the Attorney-General's Department Options Paper, the responses of the stakeholders, and the way the issue is treated in existing agreements and conclude with recommendations about how the topic might best be treated in an agreement. The legal background was set out in Chapters 2 and 3. Issues of a general nature relating to drafting agreements were considered in Chapter 5. The substance of the recommendations will be reflected in the 'Model Agreement'.

The family courts notifying Child Protection of suspected child abuse: sections 67Z and 67ZA

Introduction

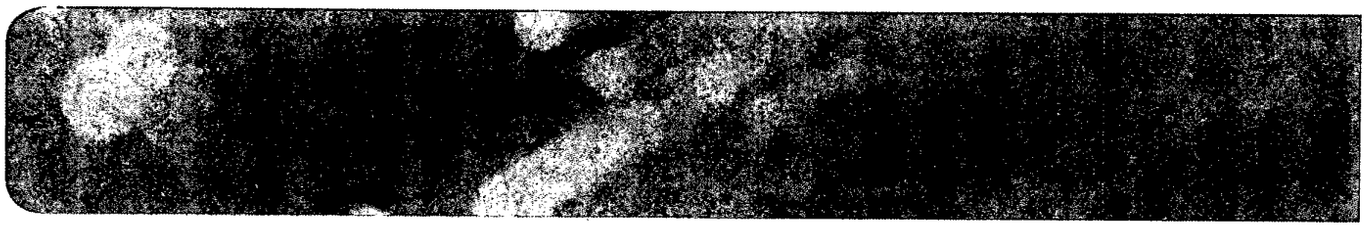
The provisions of s 67Z and 67ZA were summarised in Chapter 3.[285] The distinctive feature of the procedure under s 67Z is that the obligation on the family courts to notify Child Protection arises automatically when a party or Independent Children's Lawyer files a certain document. As the New South Wales Protocol points out, the s 67Z notice does not involve any judgment by anyone associated with the family court that the allegation is true, or is likely to be true, but simply provides a method of alerting Child Protection to 'the fact that the allegation has been made'.[286] The parties' obligation to file the notice, and the court's obligation to send it to Child Protection, applies whether or not the parties are legally represented.

Thus, notification under s 67Z may often be mandatory in circumstances that would not lead Child Protection to investigate. Most obviously, the notice must be sent when the allegation is that the child '*has been abused* or is at risk of being abused'. Child Protection's focus is on the need to intervene to deal with *present* risks, not on past abuse as such. Even where a risk of abuse is alleged, the level of risk might fall below the threshold for Child Protection intervention. Further, the allegation might be precise or vague; it might or might not be supported by other evidence; it might or might not involve the degree of seriousness that Child Protection would require in order to justify investigating the matter. The prescribed Notice of Child Abuse, if properly completed, will provide information about the parties and the child, as well as details of any Independent Children's Lawyer, and a description of any acts or omissions alleged to constitute child abuse, or the risk of child abuse, details about the alleged abuser, as well as the orders sought in the proceedings, and reference to relevant paragraphs of affidavit evidence. It should therefore provide much useful information, although it does not have the date of the next hearing, and the relevant affidavits may not have been filed, especially in cases in the Family Court of Australia,[287] and in practice the form may not always be fully completed. Thus while the form should provide much of the essential

285 As mentioned in Chapter Three, s 67ZBA(3) adds nothing.

286 NSW Protocol, paragraph 2.2.4.

287 The Family Law Rules 2004, in contrast to those of the Federal Magistrates Court, do not provide for the filing of an affidavit in the initial stages of proceedings.



information, in practice the information may not always be sufficient to enable Child Protection to investigate it efficiently.

It follows that notices under s 67Z will be sent to Child Protection in some cases that do not require their intervention, as well as some cases that do. This problem is well recognized.

Section 67ZA, by contrast, requires certain family court professionals to notify Child Protection of suspected child abuse, and permits them to notify Child Protection of suspected ill-treatment, together with such other information as the person reasonably believes is 'necessary to enable the authority to properly manage the matter'. In contrast to the situation under s 67Z, under this section a family court professional has formed a concern for a child. On the other hand, like s 67Z, notifications might be made in circumstances where there is evidence of *past* abuse but no concern about present risk, and again the degree of risk that warrants notification under s 67ZA might fall short of what state legislation requires for Child Protection intervention. For convenience, notices under both sections — and under s 67ZBA(3) — will be referred to here as 'Child Abuse Notices'.

The Family Law Act 1975 also provides that when making a notification under s 67Z and under s 67ZA, the Registry Manager '*may* make such disclosures of other information as [the Registry Manager] reasonably believes are necessary to enable the authority to properly manage the matter the subject of the notification'.[288] In relation to both s 67Z and s 67ZA, notifications and provision of information are protected, and inadmissible.[289]

Nothing in the Family Law Act requires Child Protection to advise the family court of action taken in response to s 67Z notices and associated information; nor is there any statutory requirement that the family court keep Child Protection advised of developments.

It is apparent that a satisfactory sharing of information between the family courts and Child Protection following Child Abuse Notices under s 67Z and 67ZA requires more than mere compliance with the legislation.

The Options paper and responses from stakeholders

The Options Paper relevantly recommended that State and Territory child welfare authorities should work with the federal family courts to develop guidelines and templates for their responses to Child Abuse Notices.[290]

Child welfare authorities have advised Attorney-General's Department that the completion of Child Abuse Notices by parties and their lawyers is sometimes inadequate and the document itself does not provide agencies with enough information in order to understand the nature of the allegations. On occasions, family court registries provide them with all relevant affidavits: these can be voluminous, making it difficult or impossible for Child Protection to process them efficiently.

Stakeholder responses indicated general support for the development of guidelines and templates. They noted in particular that the Magellan report template has assisted in streamlining the process and in encouraging consistency of information provided in response to requests, and that

288 Emphasis added.

289 See s 67ZB. There is a subtle difference:: there is protection for all notifications under s 67Z (subsection 67ZB(2)), but only for notifications *in good faith* under s 67ZA (s67ZB(3).

290 Recommendation 4.

guidelines and templates could significantly reduce the workload for child welfare authorities in responding to requests for information from the family courts.

Treatment in existing agreements

A number of agreements deal with Child Abuse Notices, in somewhat different ways.

As we will see, some provisions relate to such matters as whether a matter has been investigated, or what court orders have been made, as distinct from matters relating to the facts of the case, such as information about the child, assessment reports, and so on. For convenience, the first will be called 'process information' and the second 'case-specific factual information'.

New South Wales

The New South Wales MOUs deal in turn with notices under s 67, mandatory notices under s 67ZA (abuse) and discretionary notices under s 67ZA (ill-treatment). Apart from stating the law, they provide:

- Section 67Z notices are to be sent to the Helpline, with a pro forma letter; and it is noted that the form will include the next date on which the matter is listed.[291]
- Section 67ZA notices, both mandatory and discretionary, are to be sent to the Helpline in writing, and Child Protection is to be informed of the next date on which the matter is listed.[292]
- Child Protection is to 'deal with a report from [the family court] as a report that a child or young person is at risk of harm under the provisions of the Care and Protection Act',[293] and will make such investigations and assessments as it 'considers necessary to determine whether the child or young person is currently at risk of harm'.[294]
- During any investigation and assessment by Child Protection, the family court is to keep Child Protection informed about orders made and proceedings concluded.[295]

The significant addition[296] made by the Protocols is:

- Child Protection will provide written advice about the steps it proposes to take, and, if it is not to intervene or commence children's court proceedings, it will 'advise whether it has any other information in relation to the child or any of the parties to the proceedings relevant to its investigative functions'. [297]

291 Paragraphs 8.3.1 – 8.3.3.

292 Paragraphs 8.4.2; 8.5.2. In urgent mandatory cases, initially by phone (paragraph 8.4.2), although curiously that provision does not apply to discretionary notices: paragraph 8.5.2.

293 Paragraph 8.6.1. See also Protocol, paragraph 3.2.

294 Paragraph 8.6.2.

295 Paragraph 8.6.3. See also the Protocol, paragraph 2.3.2 (Child Protection to be informed of the next date, if any, that the matter is to be listed).

296 Most of the paragraphs of the Protocols relating to this topic repeat, in substance, what is in the MOUs. The New South Wales Protocols provide that Child Protection will advise the relevant Community Services Centre (CSC) or Joint Investigative Response Team (JIRT), and to advise the family court, by means of a 'Feedback to Reporter's Letter': paragraph 3.3. The steps described include obtaining and analysing information, and giving 'written advice to [the family court] of any action [Child Protection] has taken or intends to take as a result of the secondary assessment of the case': paragraph 3.4.3 The Protocol goes on to deal with the time Child Protection will need to prepare its response (these passages relate both to notices under s 67Z and 67ZA and requests to intervene under s 91B): paragraphs 3.4, 3.5 (3.4 refers to 'the report or request for intervention').

297 Protocols, paragraph 3.5.

All this mainly relates to what is referred to in this report as 'process information'. The Legal Aid Protocol contains provisions dealing with situations in which an Independent Children's Lawyer is a notifier under s 67ZA (discussed elsewhere).

Victoria

Paragraph 8, entitled 'Procedures for referring cases of suspected child abuse and neglect to the Department of Human Services' (as well as summarising the law) sets a timeframe for responding to notifications under s 67Z and 67ZA, and also to s 91B requests. The family courts will wherever possible set a return date that allows Child Protection 'sufficient time to adequately respond.'[298] Child Protection 'will usually require a minimum of 21 days to prepare its response in the form of a letter'.[299] If there is inadequate time to prepare a response in time for the next hearing date, Child Protection 'will notify the Court as soon as practicable, prior to the next court date'.[300] If Child Protection believes an adjournment is necessary, it will fax a request for an adjournment to the registry manager, who will notify Child Protection by telephone or fax of the outcome of their request.[301] The registry manager will also advise the other parties if an adjournment is requested.[302]

Paragraph 9 sets out actions to be taken by Child Protection on receipt of a Child Abuse Notice or a s 91B request. Child Protection will acknowledge receipt to the person who made the notification,[303] and seek certain specified information, such as details about the family members, and reasons for concern about the child.[304] It will then make a determination and perhaps conduct an investigation, according to its legislation and practice guidelines.[305]

There is then a provision that 'if a notification is made by an employee of' the family court, the person who made the notification 'has a continuing responsibility to advise the relevant child protection practitioner of any information that may have a bearing on the protection of the child, including any new facts and circumstances that have arisen since the person made the notification'.[306]

Paragraph 10, 'Information Exchange', sets out principles[307] and then deals in turn with Child Protection access to information held by the family courts[308] and access by the family courts to information held by Child Protection.[309] The principles, already noted in Chapter 3, are in substance[310] that children's best interests 'are better secured by the exchange of relevant

298 Paragraph 8.4.1.
299 Paragraph 8.4.2.
300 Id.
301 Paragraph 8.4.3.
302 Id.
303 Paragraph 9.4.
304 Paragraph 9.1. If the child is over 17, Child Protection will notify the family court that it will not take action, and inform the court of any information it has in which the court may be interested: paragraph 9.2.
305 Paragraph 9.5.
306 Paragraph 9.6. This does not strictly fall within the heading of 9, which speaks of actions by Child Protection.
307 Paragraph 10.1.
308 Paragraph 10.2.
309 Paragraph 10.3.
310 Paragraph 10.1 notes that the family courts apply the 'paramount consideration' principle, and 10.3 refers to the need to comply with laws on privacy and confidentiality.

information between those concerned with the child and family',[311] and that 'Courts are in a better position to make appropriate orders if they are fully aware of proceedings in other jurisdictions'.[312]

Paragraph 10.2, dealing with Child Protection's access to the family courts' information, may be summarised as follows. Child Protection officers should discover as much information as they can from family members,[313] but may obtain[314] from the family courts information about the family court proceedings (which registry, what orders have been made and are sought, status of proceedings and dates for future appearance, names of lawyers and any Independent Children's Lawyer, and of any Family Consultant, and copies of relevant orders and affidavits).[315]

Paragraph 10.3 deals with the family courts' access to the Child Protection information. If there are family court proceedings, relating to a child, and the Court 'becomes aware that there is, or has been, protective involvement' by Child Protection, it may obtain specified information from Child Protection, namely whether a notification has been received in respect of the child; the name of the allocated Child Protection practitioner; the status of any investigation, including whether any allegation of abuse or neglect has been substantiated; and whether any children's court proceedings are pending, and if so what orders have been made or are being sought.[316] The information may be given by telephone; it must be handled sensitively and in accordance with legislation relating to privacy and confidentiality.[317]

As in the case of the New South Wales provisions, these provisions relate mainly to 'process information'. Case-specific factual information is dealt with in other paragraphs, in connection with s 69ZW orders and subpoenas, and is considered later in this report.[318]

Queensland

The effective[319] provisions of the Queensland agreement may be summarised as follows.

Information by a staff member under s 67ZA is to be provided to a particular unit in Child Protection in a way that indicates the next return date for the court proceedings.[320] The family court will wherever possible set a next return date that will allow Child Protection at least 42 days to respond,[321] and will provide to a unit in Child Protection (Data Management)[322] a copy of the Child Abuse Notice (in the case of s 67Z) or information provided by the member of court personnel (in the case of s 67ZA), together with process information — details of the case (name of child, parents etc), any orders made by the court, and the next return date.[323] The agreement includes a pro forma.

311 Paragraph 10.1.2.
312 Paragraph 10.1.3.
313 Paragraph 10.2.1.
314 Telephone may be used: paragraph 10.2.3. That paragraph also notes the need to comply with laws on privacy and confidentiality.
315 Paragraph 10.2.2. The Agreement notes in 10.2.3 that such requests may require referral to the relevant judge.
316 Paragraphs 10.3.1, 10.3.2.
317 Paragraphs 10.3.3, 10.3.4.
318 Paragraph 12 sets out the various options open to Child Protection but does not include any information-sharing provisions.
319 Paragraph 5.2 and the early parts of paragraph 5.3 state the law.
320 The Child Safety Service Centre closest to where the child lives: paragraph paragraph 5.3,
321 Paragraph 5.4
322 Strictly, 'the Manager, Data Management Services'.
323 Paragraph 5.4. Copies are to be kept by the Registry Manager in a central register. Data Management is to send the documents to the Child Safety Service Centre closest to where the child lives.

The agreement then notes that Child Protection will deal with the notification in accordance with the legislation and its 'policy and thresholds'.[324] It 'may' record the information as a notification and may investigate or take other action. It may also obtain further information from the family court, and this may include seeking permission to search court files.[325] The agreement notes that the information may not meet the legislative threshold, but may form part of information that leads to further investigation or assessment. To help the family court consider whether a s 91B request is necessary, within 42 days of receiving the information, Child Protection[326] may notify the court whether it has relevant information relating to the child, details of any current child protection orders, whether or not Child Protection will investigate the matter, or has assessed the child as being in need of care and protection, and whether ongoing intervention is required to assist the family to meet the child's protective needs, and if so what intervention is proposed.

Western Australia

The provisions of the Western Australia agreement relating to s 67Z and s 67ZA notifications may be summarised as follows.

When forwarding notices under either section, the family court will also forward 'such information or evidence filed in relation to the allegations contained in the Notification as is considered appropriate to assist [Child Protection] in their consideration of the Notification'.[327] This is a significant measure, providing that the court will supply such case-specific factual information to Child Protection (the legislation only saying that it 'may' do so).[328]

Child Protection agrees to provide 'a written report in relation to the allegations' to the court within 6 weeks, or if that is not possible will advise the court of the time frame required. Again, this involves a commitment beyond legislative requirements. The agreement does not specify the contents of the report, and in particular, whether it would include case-specific factual information as well as 'process' information.[329] The agreement does not explicitly indicate that there will be a report in response to (discretionary) reports of *ill-treatment* (as distinct from abuse) under s 67ZA.

The agreement then has provisions obviously intended to ensure that such reports are provided only in situations where they are appropriate:[330]

(1) There will be a report where the notice alleges child abuse or risk of child abuse, but not (unless the court so requests) where it alleges only family violence.

(2) Child Protection may elect to provide a report in any situation if it considers it necessary.

(3) The family court may however indicate that no report is required, and in this connection will consider information that may be available from other sources.

(4) The family court will also consider refraining from making s 69ZW orders where a report will be received from Child Protection unless the information is required on an urgent basis.

324 Paragraph 5.4 at page 13.
325 Paragraph 5.4 at page 14.
326 Strictly, 'The Manager, Child Safety Service Centre'.
327 Paragraph 2.4.2.
328 Family Law Act s 67ZA(6).
329 The first sentence of paragraph 4.7 perhaps implies that the reports will contain such factual information.
330 Paragraphs 2.4.3 – 2.4.7.

Summary of treatment in agreements

In general, in relation to sections 67Z and 67ZA notifications the agreements provide:

- that Child Protection will treat the notifications as requiring the same response as other notifications of children at risk; and
- that after a notification[331] each party will keep the other supplied with 'process information' (information about measures taken and to be taken, as distinct from case-specific factual information). This is valuable for both parties, and an advance on the legislation, which does not require Child Protection to respond at all to these notifications. It can be said that the agreements are valuable in treating the notices as the start of a dialogue between the court and Child Protection, involving the sharing of information about what is happening in each.

The agreements also provide time frames, and indicate the particular bodies or departments that will be involved in seeking or providing the process information.

There is less in the way of sharing case-specific factual information, however, especially from Child Protection to the family courts. In Western Australia and Victoria, there is an explicit commitment for the exchange of case-specific factual information from the family courts to Child Protection. In Western Australia alone — depending on what is to be included in reports — there is provision for Child Protection to supply such information to the family courts. In Queensland, Child Protection is to inform the family courts *whether it has such information*, to assist the courts consider whether to request intervention under s 91B.

With these exceptions, the agreements provide only for the exchange of *process information* following notices under s 67Z and 67ZA, leaving any provision of case-specific factual information from Child Protection to the family courts to be done under the legal compulsion of subpoenas or s 69ZW orders (considered below).

Discussion and recommendations

It is clearly appropriate that agreements should treat these notifications as the commencement of a dialogue, or process of information-sharing, between the family courts and Child Protection. The existing agreements, discussed above, provide a valuable guide to what should be included.

331 And in Victoria, whenever the family court learns that Child Protection has been involved:

Recommendation 17

Agreements should treat notifications under s 67Z and 67ZA as the commencement of a process of information-sharing between the family courts and Child Protection, and should therefore set out in relation to these notifications (unless the matter is covered elsewhere in the agreement):

- the person or body to whom notifications should be made and the manner of continuing communication between the parties and the persons to be involved;
- what information the family courts will provide when they send Child Protection Child Abuse notifications;
- a commitment by Child Protection to advise the family court of steps it proposes to take, and the time frame for providing such advice;
- a commitment by both parties to keep the other advised of significant developments;
- a commitment by both parties to provide the other with relevant information about the child and family (to the extent that this is not covered elsewhere in the agreement); and
- measures by which each party seeks to minimise unnecessary use of resources by the other.

The family courts requiring information: subpoenas and Section 69ZW orders

Introduction

Subpoenas and orders under s 69ZW and are in effect alternative measures by which the family courts can obtain information from Child Protection. The legal situation has been discussed in Chapter 3. To summarise:

- Both subpoenas and s 69ZW orders are court orders requiring the named person to provide the documents indicated. They are binding unless the court is persuaded to set a subpoena aside or discharge a s 69ZW order.
- However, neither subpoenas nor s 69ZW orders can normally require the disclosure of documents that would identify those who have notified Child Protection of suspected child abuse ('notifiers').[332] This is the result of Family Law Act and state child welfare laws that protect the anonymity of notifiers. As indicated in Chapters 2 and 3, to the extent that there is any inconsistency between the Family Law Act and state child welfare laws, as a result of s 69ZK the state law would prevail, although the Family Law Act would prevail in the case of an order under s 69ZW.
- Section 69ZW orders are made by a judge after determining that the orders should be made. Although subpoenas can be issued at the initiative of the court itself, they are more commonly issued routinely at the request of parties or Independent Children's Lawyers.

332 The limited exceptions and qualifications to this proposition are considered in Chapter 3.

- Subpoenas normally involve the recipient receiving 'conduct money' to cover or mitigate the costs of compliance. Section 69ZW orders do not.

There is an obvious need for agreed procedures in relation to s 69ZW orders and subpoenas, for example to prevent Child Protection being required to produce the same documents more than once.

The Options Paper and responses from stakeholders

The Options Paper made the following recommendations:

> **Recommendation 3** — The Family Court of Australia and the Federal Magistrates Court of Australia should consider:
>
> - making section 69ZW orders as early as possible in proceedings, if deemed appropriate, and
> - including guidance as to the timings for the making of section 69ZW orders and for the making of "targeted" section 69ZW orders in the Judicial Benchbook.
>
> **Recommendation 4** — State and Territory child welfare authorities should work with the federal family courts to develop guidelines and templates for their responses to section 69ZW orders, Form 4's, subpoenas and Magellan reports.[333]

In response to the Options Paper, stakeholders raised a number of concerns in relation to the use of section 69ZW. In particular:

- They can be just as resource-intensive as subpoenas.
- They are often issued more frequently than subpoenas and with shorter timeframes to provide responses.
- No conduct money is paid for compliance with these orders by state and territory agencies, in contrast to subpoenas where it is paid.
- Responding to the issuing of subpoenas and section 69ZW orders can result in a duplication of resources by the agency.
- Some orders are 'targeted' whereas others are not.
- Responses provided by child welfare authorities to section 69ZW orders vary significantly.

The position of Child Protection in New South Wales, as set out in its response to the Options Paper, was as follows:

> Although Community Services has developed precedents in order to streamline responses to s 69ZW orders, responding to them — in increasing numbers — is nonetheless resource-intensive. Where it is requested, Community Services' current practice is to provide the court with the relevant documents from the child protection file but with redactions to protect the identity of persons who reported the child protection concerns. This requires an officer to go through the file carefully to identify the relevant documents and then redact any information that identifies or may identify the reporter.

333 A similar recommendation was made in the ALRC/NSWLRC Report: Recommendation 30-5: 'Federal family courts and state and territory child protection agencies should develop protocols for (a) dealing with requests for documents and information under s 69ZW of the Family Law Act 1975 and (b) for responding to subpoenas issued by federal family courts'.

> If the full child protection file is required then a subpoena will need to issue. It is frequently the case that Community Services is called on to respond to both a s 69ZW order and a subpoena. This requires a duplication of effort, given the documents produced in response to a subpoena for the file will include documents that would be provided in response to a s 69ZW order. Thus from Community Services' perspective, it would be preferable that only a subpoena issue in the majority of cases, and that s 69ZW orders be reserved for those cases where the court requires information as a matter of urgency because an interim hearing on the child protection issues is to take place. Community Services would not like to see s 69ZW orders made as a matter of course in all matters where child protection concerns have been raised.
>
> [Amendments to the child protection laws] now permit child protection reports to be admissible in family law proceedings. This has essentially overcome previous problems in obtaining information under subpoena about reports and investigations. Consequently, in practice, no additional information is provided under s 67ZW than would be provided in response to a subpoena.
>
> Community Services agrees that when considering whether a s 69ZW order is appropriate, pre-section 69ZW order procedures (to determine what information the child protection agency has) are useful. In this regard, Community Services has an MOU with NSW Legal Aid which makes provision for the Independent Children's Lawyer to contact Community Services to discuss, among other things, what involvement Community Services has, or has had, with the family, what information the Agency holds, and whether there is to be any urgent interim hearing where information from Community Services may be needed and subpoenas issued.
>
> Community Services supports including guidance to judicial officers in the Benchbook about when s 69ZW orders may be appropriate, and to target them more closely. One of the factors that the courts should consider is whether the information may, or has been obtained, under subpoena.

The Federal Magistrates Court noted its concerns as follows:

> It is agreed that if a s 69ZW order is considered appropriate, it should be made as early in the proceedings as possible. It is also agreed that the order will be easier to comply with if directed as specific information sought. However, the recommendations need to be considered in the context of all the various provisions in the FLA aimed at facilitating information sharing. Reliance upon s 69ZW orders will be affected to a large extent by how well other information sharing provisions are working. If subpoenas are issued and responded to in a timely manner, for example, there should be less need for orders under s 69ZW. Responses by child welfare authorities to Form 4 notices and requests for them to intervene vary enormously. Sometimes the response, or lack of response, will impact on whether a s 69ZW order should be made.

The Family Court of Australia made the following comments:

> [...] There is general agreement that the effective use of s69ZW would minimize workload both for the Court and the CPA. It is suggested that it would limit what the Court has to fax through to the Department and eliminate unnecessary reading by the CPA recipient. Given that CPA have a workload issue in responding to subpoena, this procedure may obviate the need for them to issue — or they could be issued with leave only. [...]

Chapter 6

Issues relating to subpoenas and s 69ZW orders have significant resource implications, as indicated in stakeholder responses. In the various jurisdictions there are differing practices relating to subpoenas and s 69ZW orders, and differing views about which method is preferable.

Treatment in existing agreements

Subpoenas

Subpoenas are the subject of provisions in three agreements, New South Wales, Victoria and Queensland.

In *New South Wales* the topic is addressed in the agreement between Child Protection and Legal Aid. In non-Magellan cases in which Child Protection is not a party, if the Independent Children's Lawyer requires information the 'first step' will be the issuing of a subpoena for the Child Protection file.[334] If the Independent Children's Lawyer considers it necessary to issue urgent subpoenas, he or she will advise the Child Protection legal officer so that the response 'can be coordinated'.[335]

The *Victorian* agreement refers to the child welfare legislation protecting the anonymity of notifiers, and sets out detailed procedures in this connection, specifying, for example, that the identity of notifiers will be disclosed only in documents placed in a sealed envelope marked 'Not to be opened except at the direction of the judge, federal magistrate or registrar'. The agreement proceeds as follows:

14.2.4 The Department of Human Services must place a written warning inside the front of the file advising that if, while perusing a file, a party becomes aware that reporter details or information that may lead to the identification of a reporter remains on the file, that party is responsible for advising the registry manager who, in turn, will notify the Court.

14.2.5 The Court will then refer the file to the Department of Human Services regional child protection manager for further vetting.

14.2.6 Subject to the following provisions, the Court will ensure that all file inspections are carried out under full supervision by the registry manager or their nominee.

14.2.7 A party or their legal representative will not be permitted to photocopy any documents provided by the department unless an order to do so is obtained from the relevant court. In addition, the Department of Human Services regional Child Protection practitioner named as the contact officer on the proforma letter attached to the front of the file must be advised in writing by that party or their legal representative that such an order will be sought at least three business days prior to the date on which it is proposed that the order will be made. The party, or their legal representative, must file an affidavit deposing to the fact that this advice has been provided to the Child Protection practitioner.

The agreement provides that a party or legal representative who wishes to inspect the material in the sealed envelope must write to Child Protection, providing a copy of the application, and 'must then complete an affidavit indicating that this procedure has been complied with'.[336] It continues

334 Paragraph 5.2.4.
335 Paragraph 5.2..2.
336 Paragraph 14.2.8.

by providing that those parts of the Family Law Rules and the Federal Magistrates Court Rules that relate to the administrative release and photocopying of subpoenaed material 'will not apply to subpoenas served on [Child Protection]'.[337] The agreement also says that Child Protection is entitled to be legally represented when such applications are heard, and that Child Protection 'may object to the production of documents requested under a subpoena in court if it is considered that certain information in the documents, other than the identity of a person making a report, should not be revealed'.[338]

The Victorian agreement also refers to timelines.[339] Child Protection 'requires a minimum of seven days within which to comply with a subpoena'. If a subpoena is served less than seven days before the date on which Child Protection is required to produce documents, Child Protection 'will endeavour to comply, but will not be expected to comply', but will fax a letter to the court to advise that it is unable to comply and to indicate a date by which the documents will be produced.

The *Queensland* agreement sets out relevant aspects of law, especially relevant requirements of the child welfare legislation.[340] Apart from summarizing the law, it provides that Child Protection will remove any reference to a notifier's identity from documents produced under a subpoena,[341] and that the Registry Manager of the family court will ensure that all file inspections of the subpoenaed material are 'carried out under supervision and that photocopying of case file material does not occur unless ordered by the Court'.[342]

Section 69ZW orders

The only agreements that contain significant[343] provisions about s 69ZW orders are the *Western Australian* agreement and the New South Wales Protocol between Child Protection and Legal Aid (relating to Independent Children's Lawyers). The *New South Wales Protocol*, which provides for information-sharing between the Independent Children's Lawyer and Child Protection, is discussed below in connections with Independent Children's Lawyers.

The *Western Australian* agreement is of particular interest. Before dealing with s 69ZW orders[344] it provides for 'Pre-s69ZW orders', which authorise a Family Consultant or Independent Children's Lawyer to obtain information about Child Protection's involvement. It is appropriate to set out the relevant passages in full:

337 Paragraph 14.2.9.

338 Paragraph 14.2.10. To the extent that some of the provisions of these Victorian and Queensland provisions purport to change the law, their operation may be problematical.

339 Paragraph 14.3.

340 Paragraph 6.4.

341 Paragraph 6.4, at p 20.

342 Paragraph 6.4, at p 21.

343 The Victorian Agreement merely states the law: paragraph 10.4. After explaining the law, the Queensland Agreement deals only with a narrow issue relating to section 69ZW orders, namely what is to happen to the documents that were produced when the proceedings have been completed. The answer is that they should be returned if at the time of production Child Protection so requested. Otherwise they are to be destroyed, except that if they had been admitted into evidence they must be retained until the end of the time for appeal. See paragraph 6.3. The topic is under consideration in South Australia.

344 In Western Australia the designation of these orders indicates the sections of the Family Law Act 1975 and the Family Court Act WA: 's 69ZW (FLA) / s202K (FCA)'. For convenience, this Report will shorten the title to s 69ZW.

2.3.1 Pre-s69ZW orders

2.3.1.1 [Child Protection] seeks to produce to the Court any information that may assist the Court to make the most informed decision regarding the welfare of a child, subject to its statutory obligations regarding disclosure and its general policy regarding the privacy of files. [Child Protection] is also concerned to minimize resource implications in complying with such orders.

2.3.1.2 The Court seeks to receive such information in the most efficient manner minimizing resource implications and utilizing the assistance of Family Consultants and Independent Children's Lawyers when appointed. The Court accepts that only documents that are in existence should be the subject of such orders.

2.3.1.3 When the Court is aware that [Child Protection] has information that may assist in a particular case, a "pre-s69ZW/202K" order may be made in the following terms:

"The Family Consultant, or if not available the Independent Children's Lawyer, be requested to liaise with [Child Protection] to ascertain the existence of any relevant documentation in relation to this case, and the officers of [Child Protection] be authorised to provide information relating to such documentation including but not limited to the following:

(i) whether [Child Protection] have a file in relation to the matter

(ii) the date that the file was opened

(iii) the most recent intervention by [Child Protection] in relation to the matter

(iv) the current status of any ongoing interventions by [Child Protection]

(v) the estimated time frame for the completion of those interventions; and

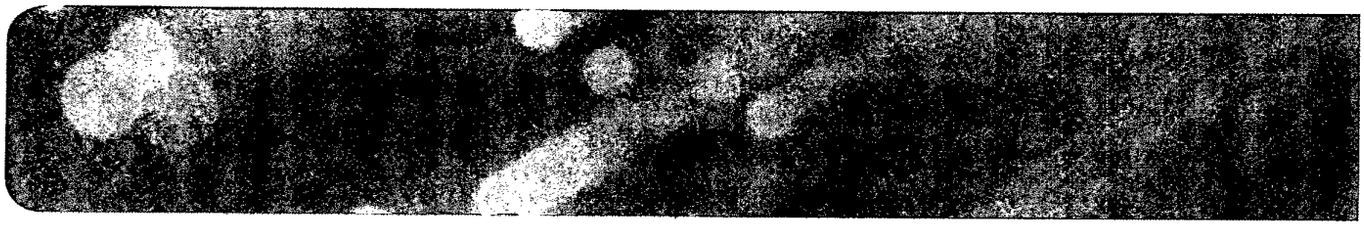
(vi) to the extent practicable, the nature of the documents on the [Child Protection] file."

2.3.1.4 The above information will be obtained by the Family Consultant or Independent Children's Lawyer telephoning the District Office of [Child Protection] in which the child primarily resides unless otherwise advised by [Child Protection].

2.3.1.5 A copy of the relevant order is to be faxed by the Family Consultant or Independent Children's Lawyer to the appropriate [Child Protection] office.

2.3.1.6 [Child Protection] will authorise the release of such information upon an enquiry made under paragraph 2.3.1.4.

2.3.1.7 Upon receipt of such information, the Family Consultant or Independent Children's Lawyer will report to the Court, at the next hearing date, and appropriate orders made for the production of such documents or information as is appropriate given the information.



2.3.2 Section 69ZW orders

2.3.2.1 The form of such an order may be as follows:

"Pursuant to s69ZW of the Family Law Act 1975 / s202K of the Family Court Act 1997 the Department for Child Protection provide the court with the documents or information specified hereunder:

(i) [...specify documents or information required]

it being noted that it has been disclosed in these proceedings that the following person/s have notified [Child Protection] of concerns in relation to the childlren:

(i) [...state names of known notifiers ...]"

2.3.2.2 Upon receipt of such order, [Child Protection] will provide the documents (or copies thereof) to the Court, and the Court shall forward the documents to the Subpoena Section to be held in separate folders to be brought up to Court at the next hearing date.

2.3.2.3 The court acknowledges that this procedure should not be used when the entirety of the [Child Protection] file is sought.

2.3.2.4 It is acknowledged that both [Child Protection] and the Court have their own statutory responsibilities [...] in relation to disclosing the identity of notifiers in each particular case.

2.3.2.5 Any documents relied upon by the court must be admitted into evidence. Any documents not relied upon are to be returned to [Child Protection], or if they are copies, destroyed when the matter is finalized.

To summarise, the Western Australian agreement suggests suitable wording for section 69ZW orders, and facilitates the making of 'pre-section 69ZW orders'. The intention is that an Independent Children's Lawyer or Family Consultant can identify relevant reports and other documents that have already been prepared, and so that s 69ZW orders can specify the documents to be produced, thereby assisting those to whom the order is directed and limiting the need to issue subpoenas in relation to documents or files.

Discussion and recommendations

Agreements on this topic can usefully deal with various matters associated with responses to subpoenas and s 69ZW orders. Such provisions would be designed to assist appropriate responses that would allow the relevant documents to be produced with minimum inconvenience and cost.

Agreements can also affect the issuing of subpoenas and the making of s 69ZW orders. As to the making of s 69ZW orders, although these orders must be made according to law, which cannot be fettered by an agreement, as discussed in Chapter 5 judges may take provisions of agreements into account in exercising their discretion. It should be fruitful, therefore, for agreements to deal with this topic. And — consistently with Attorney-General's Department's recommendation 3, above — the family courts might take internal measures to support provisions of the agreement, such as the preparation of pro forma orders.

Chapter 6

The issuing of subpoenas raises different issues. There would appear to be no difficulty in relation to subpoenas sought by Independent Children's Lawyers. If Legal Aid is a party to agreements, as proposed in this report, Independent Children's Lawyers would no doubt act in accordance with them. Parties, however, especially when unrepresented, might not be aware of agreements and, not being parties to them, might not be inclined to comply with them. In relation to subpoenas issued at the request of parties, therefore, it might be desirable if the family courts consider whether by practice directions or otherwise they might seek to ensure that as far as possible subpoenas are issued against Child Protection only in appropriate circumstances.

Agreements can also state agreed principles relating to subpoenas and s 69ZW orders. What principles need to be stated in this part of an agreement will depend on what principles of general application have already been stated in the agreement. It might be useful to indicate principles that are particularly relevant to subpoenas and s 69ZW orders, but if the parties have already committed themselves to information-sharing, it may not be necessary to re-state that commitment in connection with this topic.

It seems clear that preliminary discussions at an early stage of the family courts' involvement have the potential to clarify the situation, and thereby save time and resources and help to have the relevant information reach the court promptly. Agreements can usefully facilitate the family courts and Child Protection taking steps to establish informal measures that might sometimes avoid the need for orders and/or subpoenas, and might ensure that any such orders are limited to existing documents of relevance to the proceedings. They might create a setting in which Child Protection has the maximum possible time to prepare for such orders or subpoenas, and the court has important information at an early stage. (The New South Wales Protocol between Child Protection and Legal Aid, considered below, has constructive provisions about the role of Independent Children's Lawyers in this connection). The *Western Australia* agreement, in providing for 'pre-s69ZW' orders, raises the question whether court orders might assist early inquiries about what relevant documents Child Protection holds. The Western Australia 'Pre-s69ZW' orders involve two components. First, the order is a *request* to the family consultant or Independent Children's Lawyer to liaise with Child Protection and obtain certain information. Although such a request does not seem to create any new powers or legal obligations, in practice it would be a significant step: those officers would of course seek to comply with such a request and no doubt Child Protection would seek to cooperate with them, considering that the officer would be making their inquiries at the court's request. Also, being an order on the court's record, it would be obvious that it would be inappropriate for parties to seek s 69W orders or issue subpoenas covering the same ground.

The second component is to *authorise* Child Protection officers to provide information. In jurisdictions other than Western Australia, however, such authorisation would appear to be outside the powers of the family courts. For other jurisdictions, then, the question is whether it would be desirable to provide in an agreement for the family courts to make orders *requesting* officers of the court, and officers of Child Protection (acting within their ordinary powers and subject to any legislative restrictions), to liaise so that the court could be told, in essence, the extent of Child Protection's involvement with the family.

The different practices and preferences in the various Australian jurisdictions make it inappropriate to formulate specific recommendations about the relative benefits of subpoenas and s 69ZW orders and the value of preliminary investigations, and whether such investigations would be assisted by a

'pre-s 69ZW' orders. However it is clear that agreements can play an important part in formulating the preferred approach in particular locations. Agreements can deal with such matters as which persons or bodies in the family courts and in Child Protection will normally be involved in s 69ZW orders and/or subpoenas, the manner in which orders will be communicated to Child Protection, eg by email or fax to a specified officer, and measures to minimise delay and duplication of effort. Some provisions of the Model Agreement may assist.

Recommendation 18

Agreements should formulate preferred approaches in each jurisdiction relating to subpoenas and s 69ZW orders and relating to preliminary inquiries and the possible use of 'pre-s 69ZW orders'.

Recommendation 19

Agreements should set out in relation to subpoenas and s 69ZW orders (and, if appropriate, preliminary inquiries and 'pre-s 69ZW' orders) agreed arrangements relating to lines of communication, standard procedures, time frames for responses, and measures to minimise delay and duplication of effort.

Child Protection intervening in Family court proceedings: section 91B

Introduction

As noted in Chapter 2, section 91B provides, in substance, that the court may request Child Protection to intervene; if it does, it is deemed to be a party to the proceedings.

The application of this section has proved problematical. Family Courts, confronted by difficult cases where no available option seems likely to be in the child's interests, may find it disappointing and frustrating when Child Protection declines to intervene. Child Protection, however, needs to make appropriate use of its own limited resources, and must comply with its own legislation, which might require a high threshold for intervention. It may decide in some cases that it is more appropriate to maintain a watching position, or provide supportive services, or take children's court proceedings, than to intervene in the family court proceedings. And, of course, each body will be assessing the situation on the basis of information available to it at the time: that information might be quite different.

In the course of the Attorney-General's Department consultation, stakeholders expressed a number of concerns about the current use of section 91B, notably the following:

- Orders under section 91B are handled differently between and within jurisdictions.
- Section 91B orders are, at times, inappropriately used as a means of obtaining information early in proceedings.

- Family courts are thought to be more formal and intimidating than children's / youth courts, and as a result, some child welfare officers require additional support when intervening in family law proceedings.
- Child welfare authorities receive notifications that section 91B orders have been made without sufficient information in relation to the reasons why the Court is requesting their intervention.
- Requests for intervention under section 91B are frequently met with refusal.

It is obvious, therefore, that there is considerable scope for an agreement to identify common principles and agreed measures that might alleviate this difficult problem and help to avoid misunderstanding and duplication of efforts.

The Options Paper and responses from stakeholders

In its Options Paper, Attorney-General's Department made the following recommendation:

> **Recommendation 11** — The Family Court of Australia and the Federal Magistrates Court should consider:
>
> (a) limiting the use of section 91B orders to cases where the court determines that neither parent is a viable carer, and
>
> (b) providing a checklist to State and Territory child welfare authorities simultaneously with any section 91B order providing information as to why the court views it as important for the child welfare authority to intervene.

Stakeholders provided helpful responses to this recommendation, and they are discussed in the following paragraphs.

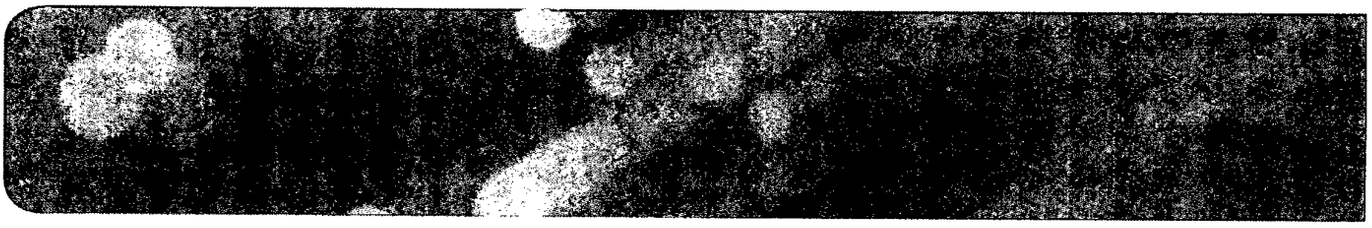
Checklist of reasons for requesting intervention

First, there was general stakeholder support for a checklist to be provided to state and territory child welfare authorities articulating the reasons the intervention is sought by the court to help Child Protection identify the issues.

It is indeed important that Child Protection should understand the reasons for making a s 91B order. Although it is ultimately a matter for the judge to consider the most appropriate content of an order and any accompanying reasons, checklists or similar measures developed in the family courts might assist, and an agreement could usefully encourage this.

Notation on orders

Some stakeholders suggested that consideration could be given to including a notation on the orders, because there might be a suggestion of pre-judgment if a Judge provided information through a checklist. It is however difficult to see that it makes any difference whether reasons for making the order are expressed in one form or another. The author of a notation on the Orders would presumably be the judge, and any suggestion of pre-judgment might attach equally to a notation as to a separate document setting out reasons for the order.



Accompanying orders giving Child Protection access to family court file, reports, etc

Some stakeholders suggested that in order for a child welfare authority to assess a request for intervention under section 91B, the family courts should also make orders giving child welfare authorities access to relevant information on the court file such as expert reports. This seems a sound proposal.

Suggested re-wording of recommendation relating to a viable carer

Some concerns were expressed in relation to the specific wording of Recommendations 11(a) and 12. In particular, it was noted that a family court may not form a clear view that neither parent is a viable carer until the end of proceedings. To overcome this concern, it was proposed that these recommendations should be reworded to state that section 91B orders are to be used where the court 'is of the view that neither parent *may* be a viable carer.' This point has been taken into consideration in the Model Agreement.

Relevant provisions of existing agreements

There are provisions relating to s 91B requests in agreements in New South Wales and Victoria. They may be summarised as follows.

New South Wales

The two Memorandums of agreement deal with the subject in Paragraph 8.2. The relevant provisions[345] may be summarised as follows.

First, there are two acknowledgements, in effect, that s 91B orders are not made lightly.[346]

Second, there is provision for the family court to provide Child Protection with information when making a s 91B order: a copy of any orders, reasons for judgment (if available) and, where appropriate, relevant affidavit material, and information about the next date the matter is listed.[347]

Third, after obtaining as much information as possible from the court, and analyzing it having regard to the child welfare legislation and its own procedures, Child Protection will give written advice to the Court of any action it has taken or intends to take. If it does not propose to intervene or to commence care proceedings,[348] Child Protection will advise the court of the reasons for the decision not to intervene and also advise whether it has 'any other information in relation to the child or any of the parties to the proceedings relevant to its investigative functions under the Care and Protection Act'.[349]

345 Paragraph 8.2.1 and the last sentence of 8.2.2 only state the law.

346 Paragraph 8.2.3 says that the order 'indicates that the Court requires some involvement by [Child Protection]', and 8.2.4 refers to Child Protection giving 'due recognition' to the request. See also the Protocols, paragraph 3.2. The separate New South Wales Agreement between Legal Aid and Child Protection says that the MOU 'includes an acknowledgement of the 'one court' principle, that [Child Protection] will, wherever possible and appropriate, seek to intervene in any current family law proceedings rather than commence fresh proceedings in the State Children's Court'. It is difficult, however, to find anything in the MOU to that effect.

347 Paragraph 8.2.2.

348 The wording of paragraph 8.2.5 appears to mean that Child Protection is not obliged to give the family court any reasons for a decision to commence children's court proceedings rather than intervening in the family court proceedings.

349 Paragraph 8.2.5. The last eleven words appear to indicate that Child Protection would not necessarily provide the court with all available information it has that might assist the court.

Fourth, there are provisions about time. The family court 'notes' that Child Protection will usually need a minimum of 28 days to prepare its response,[350] and if a response is required[351] by a certain date and further time is needed, Child Protection will advise the Court in writing accordingly.

The two New South Wales Protocols repeat some of these provisions, but add the following detail:

- When making the s 91B request, the family court 'should consider ordering[352] the delivery of any relevant [Child Protection] file to the Court prior to the next listing of the matter', which will 'normally' be about 6 weeks later.
- Child Protection's internal procedures are described in more detail.[353]
- During any Child Protection investigation, the family courts will provide Child Protection with orders made, and whether any proceedings have concluded.[354]
- The judicial officer making the s 91B request should consider whether it is appropriate to make a specific order granting Child Protection leave to inspect the court file.[355]

Victoria

The Victorian agreement provides that the registry manager of the family court shall promptly notify the appropriate Child Protection regional office of the request and the next court date, and 'shall promptly provide necessary and relevant information from the court file, including affidavit material', to enable Child Protection to respond appropriately to that request.[356]

The agreement also sets out provisions relating to time. They may be summarized as follows:[357]

- Wherever possible, the Court will set a return date that allows Child Protection 'sufficient time to adequately respond to the request'.
- Child Protection 'will usually require a minimum of 21 days to prepare its response'. If there is inadequate time to prepare a response in time for the next hearing date, Child Protection 'will notify the Court as soon as practicable, prior to the next court date'.
- If Child Protection believes an adjournment is necessary, it will fax a request for an adjournment to the registry manager, who will advise the other parties of the request and notify Child Protection by telephone or fax of the outcome of their request.
- Generally the Court will not determine the case until it receives Child Protection's response to the s 91B request, and if it does determine the case before receiving the response, it will 'advise [Child Protection] accordingly.

350 The Protocols, while repeating this, also say that Child Protection will 'use its best endeavours' to provide a response within 42 days: paragraph 3.5.

351 Strictly, the s 91B order does not permit the family court to 'require' Child Protection to do anything — it is only a request.

352 Presumably 'ordering' refers to issuing subpoenas or making s 69ZW orders.

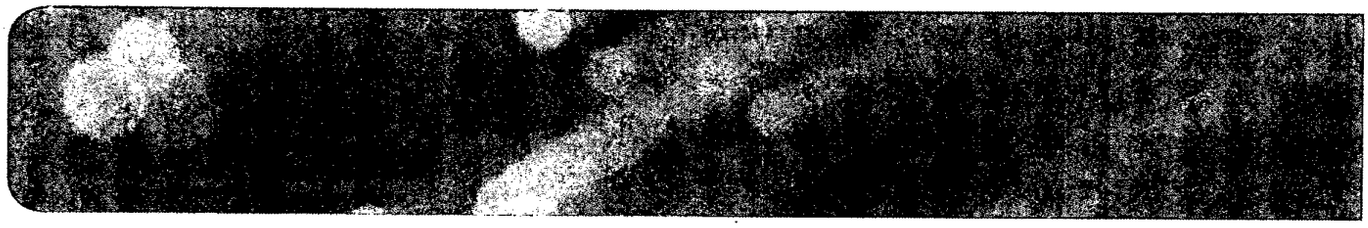
353 Paragraphs 3.3, 3.4.

354 Protocols, paragraph 3.6.

355 The Protocol adds that if there is no such order, Child Protection may seek leave from a Deputy Registrar to search the relevant family court records before determining whether to intervene: paragraph 3.7.

356 Paragraph 8.1.

357 Paragraph 8.4.



Queensland

After summarising the law,[358] the agreement provides that the Court will consider[359] making an order under s 91B in circumstances where:

- allegations of harm or risk of harm have been made by one of the parties in the proceedings; or
- a specified staff member of the Family Court or Federal Magistrates Court personnel provides information to the Department under s 67ZA; or
- there is some evidence of the prior involvement of the Department with the child and the child's family; or
- an Independent Children's Lawyer has been appointed for the child.

The agreement then provides in some detail that as soon as possible after making the order the court will notify Child Protection, providing such details as the names of the child and parents and whether an Independent Children's Lawyer has been appointed, and will 'briefly outline the basis' for making the request, and (to enable Child Protection to respond appropriately) invite Child Protection to search and take copies of relevant documents on the court file.[360]

The agreement then specifies internal procedures to be adopted by Child Protection — for example, the Manager, Court Services Unit will communicate with the Manager of the Child Safety Service Centre, and the Independent Children's Lawyer.

The agreement then provides that within 42 days, Child Protection will notify the court[361] in writing:

- whether or not the Department intends to intervene in the proceedings at that stage; and
- in order to assist the Court to assess whether a subpoena should be issued to the Department:
  - whether there has been any previous Departmental involvement with the child and the child's family;
  - whether there are any current child protection orders for the child and if so, the type of order and when it ceases;
  - any other relevant information that the Department may be able to provide at this stage.

Discussion and recommendations

Section 91B is an unusual provision. The court makes an 'order', but the order involves making a request. The Act itself says nothing about what should happen when such a request is made, and says nothing about information-sharing. It is obvious, however, that in cases where the family courts requests Child Protection to intervene, the children involved are likely to benefit from information-sharing and collaboration between the court and Child Protection. How can agreements contribute?

358 Paragraph 7.3.

359 It is not clear if these are intended to be necessary or sufficient conditions for the making of a s 91B order. It would seem unlikely that the parties would have agreed that the mere appointment of an Independent Children's Lawyer, for example, or any prior involvement by Child Protection, makes a s 91B request appropriate.

360 Paragraph 7.3.

361 The Agreement also contains a pro-forma letter of response to a s 91B request.

Chapter 6

Ensuring that s 91B orders are made appropriately

First, agreements might have something to say about the circumstances in which such orders should be made.

It is apparent that Child Protection would like to be assured that s 91B requests are not made inappropriately, so that Child Protection will not spend their limited resources on fruitless work necessary to respond to the request. For their part, the family courts would like to be assured that Child Protection gives s 91B requests careful consideration. How can an agreement assist?

The making of a s 91B order is a judicial determination, governed by the Family Law Act 1975. No agreement can or should attempt to control the making of such orders. However an agreement could indicate the circumstances in which Child Protection would be likely to respond favourably to an order. This would be something that the judge could properly consider when considering whether to make such an order.[362]

An order under s 91B does not seek information; it simply requests Child Protection to intervene in the family court proceedings. Such an order seems inappropriate if what the family court seeks is information held by Child Protection. Such information can be obtained by other mechanisms: subpoenas, s 69ZW orders, and requests for the voluntary supply of information. Intervention involves a significant use of resources by Child Protection, and s 91B orders should not be made for a purpose that can more easily be achieved by simpler and cheaper means. The question in each case is, therefore, what might be achieved by Child Protection *becoming a party to the proceedings*.

One possible answer is that the family court would be assisted by having Child Protection conduct investigations, lead evidence, and make submissions about the proceedings. But this would be true in a vast number of cases, and thus this answer would place Child Protection in the position of an investigatory agency assisting the court. Despite the value this would have for the court, it would divert Child Protection from its statutory obligations. Recommendations have been made elsewhere that family courts should be equipped with some investigatory support,[363] but they have not been taken up, and the law currently provides that the court has no such support. It must rely on the evidence and argument provided by the parties (including any Independent Children's Lawyer), with the assistance of family consultants. In the absence of legislative change, it does not seem reasonable to expect Child Protection to intervene in family court proceedings *merely because that would assist the court*. It follows that the fact that the family court would be assisted if Child Protection intervenes is not of itself a sufficient reason for Child Protection to intervene, or for the request to be made.

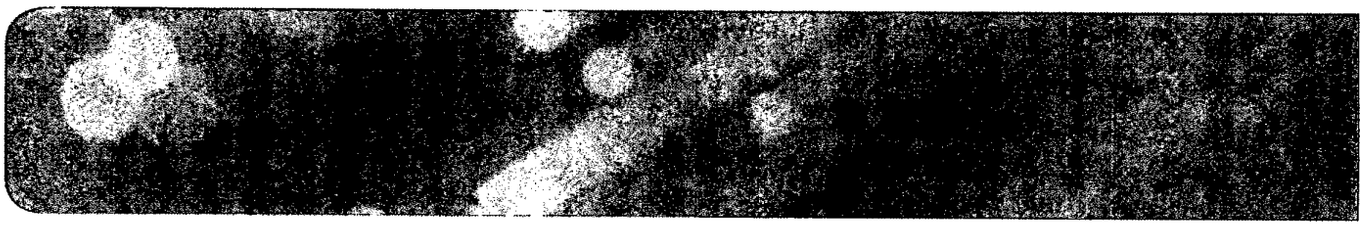
There is however considerable support for a more specific basis for intervention, in cases where unless Child Protection intervenes, it appears that the court might be[364] *unable to make any order that would protect the child from risk of abuse or harm*. This would be the situation if it appears that child might well be at risk in the care of *any* of the parties involved in the family court proceedings, or, as it is often expressed, where there is no 'viable carer'.[365]

362 See the discussion in Chapter 5.

363 Family Law Council, *Family Law and Child Protection: Final Report* (2002).

364 This terminology is used because, of course, the court will be considering making a s 91B order at a stage of the proceedings when the evidence is incomplete.

365 A well-known example is *Secretary, Department of Health and Human Services v Ray and Others* (2010) 45 Fam LR 1.



This problem would not be solved by the court having access to information held by Child Protection. It would only be solved if the court were able to make an order placing the child in the care of Child Protection. Child Protection could then use its resources to find and support some other placement for the child, for example in foster care. Such an outcome could only be achieved if Child Protection were a party to the proceedings.

On this analysis, an agreement might usefully indicate that Child Protection would be inclined to consider intervention where, for example, the family court indicated that there appeared to be no viable carer for the child. In this situation, especially if the risk to the child passed the threshold indicated in the state child protection legislation, Child Protection might agree that intervention should be considered. Child Protection would also want to consider other matters, such as whether the apparent risk to the child fell within the guidelines for intervention set by the relevant state legislation, and whether intervention would be preferable to proceeding in the children's court. It might be expected that Child Protection would be more favourably disposed to intervene if the family court's order, and the reasons for it, indicated, in particular, the court's concern that there might be no viable carer for the child, and that the child would be likely to be at serious risk if placed in the care of any of the parties seeking such care.

Other matters

Agreements can also assist in other ways. They can specify the mechanics of the orders, for example identifying to whom they will be sent, and providing pro forma orders and communications.

Agreements could provide for the family courts and Child Protection to share what is here called 'process information' in connection with these orders. As some existing agreements illustrate, they could provide for the court to give Child Protection information about the case and about the state of proceedings in the court; and for Child Protection to have access to the court's file and/or relevant documents. Similarly they could provide for Child Protection to advise the family court about its intentions — whether Child Protection will intervene, or support family members, or commence or continue proceedings in the children's court, or take no action.

Agreements could also provide for Child Protection to share with the family court information that might be relevant to the family courts, such as assessments and reports. What agreements might say about this will depend on other information-sharing provisions of the agreement. Other provisions might mean that in cases where both the Child Protection and the family courts are involved, there will be information-sharing arrangements in place. If so, it may not be necessary to repeat the information-sharing measures in connection with s 91B, but simply note that the arrangements will be applicable in such cases.

Recommendation 20

Agreements should include provisions to the effect that when making a s 91B request, unless there are reasons for not doing so, the family court will

- indicate that the court is concerned that a child is likely to be exposed to a serious risk of harm if Child Protection does not intervene (as, for example, where it appears that the court may be unable to place the child with a viable carer);
- indicate the nature of the risk and the reasons for such concern;
- indicate the reasons for believing that the risk would not be averted by Child Protection providing information to the court or contributing in other ways without intervening;
- ensure that Child Protection has been provided with copies of any orders made in the proceedings, and information about the next steps to be taken in the proceedings;
- take all other appropriate steps to ensure that Child Protection has appropriate access to any relevant information held by the family court (including making an order permitting Child Protection to inspect the Court file and make copies of relevant documents); and
- specify the person or body within the family court to whom Child Protection should respond, and with whom Child Protection should continue to communicate in relation to the matter.

Recommendation 21

Agreements should include provisions to the effect that the family courts will collaborate with Child Protection to develop check-lists or other such measures to assist judges to identify relevant matters when making s 91B orders, and to formulate them in a way that will assist Child Protection in considering the request.

Recommendation 22

Agreements should include provisions to the effect that on receipt of a s 91B request, Child Protection will

- promptly acknowledge receipt of the request, and indicate the person or body with whom the family court should thereafter communicate in relation to the matter;
- as soon as practicable, respond to the request by indicating
  - whether Child Protection intends to intervene in the proceedings;
  - what other steps if any Child Protection intends to take in relation to the matter;
  - if decisions remain to be made, what steps are being contemplated and when it is likely that such decisions will be made; and
  - what involvement, if any, Child Protection has had in relation to the child, and what information is held in relation to the matter; and
- if unable to respond within [specify time frame], advise the court of the reasons, and the time within which it will respond.

Other matters

It is apparent that agreements can include other useful statements relevant to s 91B orders.

Recommendation 23

To the extent that these matters are not dealt with elsewhere, Agreements should deal with the following matters in connection with s 91B requests:

- what information the family court will provide to Child Protection at the time of the order;
- the mechanics of communication between the family court and Child Protection following a s 91B request;
- how Child Protection is to inform the family court about its decision in relation to the s 91B request, and about any proposals for further action (eg taking children's court proceedings);
- how Child Protection and the family court will inform the other of any relevant information each holds; and
- the time within which Child Protection will normally respond to a s 91B order, and procedures to be adopted if Child Protection needs longer.

Child Protection Referring clients by to family courts

Introduction

Many of the provisions of formal agreements relate to actons taken under particular legislative provisions, such as making orders under s 69ZW, intervening in proceedings, or issuing subpoenas. The present topic relates, instead, to an informal action, namely Child Protection referring parents or other family members to the family courts, or, to put it another way, advising them that they may commence proceedings in a family court.

Such referrals are commonly made when Child Protection has investigated reported abuse or neglect, but finds that the child's needs are being met in the care of some family member, such as a grandparent, even though the child might have no parent able and willing to care for the child adequately. Because the child's needs are being met by the 'viable carer' (to use a convenient term), Child Protection might consider that an application to the children's court is not warranted — or might withdraw any current children's court proceedings — and instead suggest that the viable carer should secure his or her position by seeking the appropriate orders from a family court.

In such situations, Child Protection is likely to hold information that would be of real significance in the family court proceedings, and it is obviously a situation in which information-sharing is of great importance. This would also be true if, rather than referring the viable carer to the family courts, Child Protection simply becomes aware that the viable carer will be making an application in a family court. In Queensland, Child Protection has a practice of providing parents with a 'statement

of position' letter that will assist them in obtaining legal aid, although this letter does not normally come before the court.[366]

The issues

The Commissions drew attention to some dangers in this situation. The viable carer might not take the necessary action in the family courts (lacking, perhaps, the ability to conduct the case in person, or funds or legal aid eligibility), or might be unsuccessful in such proceedings; and as a result, there might be no enforceable order giving the viable carer the appropriate legal support in caring for the child.[367] The Commissions said there was a 'powerful case for child protection services to have more involvement in family court proceedings where they investigate allegations of child abuse and refer carers to family courts for orders.'[368]

Even where the viable carer does bring proceedings in the family court, it seems important, especially in the early stages, that those involved have access to any relevant information held by Child Protection. Such information might help the parties reach agreement, and might help the court make informed decisions at the interim stages, where lack of evidence is a common problem. It is particularly important that such information be available in connection with any application for legal aid, and in connection with the appointment and functioning of any Independent Children's Representatives.

Existing measures to respond to the problem

With the exception of the Western Australian Family Violence agreement, considered below, existing agreements between the family courts and Child Protection do not specifically address the situation now being considered, although some of the generally applicable information-sharing principles and procedures might be applicable.

The Western Australian Family Violence Agreement

The Western Australian Protocol between the family courts and the family violence courts may however provide a useful model. This has been described in Chapter 4.

The Attorney-General's Department has received the following advice about practice in Western Australia:

> The procedure in WA is that the [Child Protection] will notify the Court and [Legal Aid] if it has information in relation to a party which may be of use to the Court. The [family court] then seeks specific information in relation to the parties once an application is filed. [Child Protection] workers can also discuss options and processes to assist carers where the department has been involved, prior to an application being made, with the [Child Protection] worker based at the court.

366 http://www.communities.qld.gov.au/childsafety/child-safety-practice-manual/chapters/10-general/10-21-family-courts/what-ifs-responding-to-specific-family-court-matters.

367 Australian Law Reform Commission and the New South Wales Law Reform Commission, *Family Violence — A National Legal Response* (ALRC Report 114), paragraph 19.108.

368 Id., paragraph 19.135.

Providing written referrals and detailed information prior to an application being filed can be problematic for a number of reasons, including how and where the information is stored at the court.

Previous recommendations and stakeholder responses

The law reform commissions made the following recommendation:

> **Recommendation 19–3** — Where a child protection agency investigates child abuse, locates a viable and protective carer and refers that carer to a family court to apply for a parenting order, the agency should, in appropriate cases:
>
> (a) provide written information to a family court about the reasons for the referral;
>
> (b) [provide reports and other evidence; or
>
> (c) intervene in the proceedings.

In its Options Paper, the Attorney-General's Department supported the view of the commissions that the consequence of child welfare authorities not providing this support would be that some children are placed at risk'.[369] The Attorney-General's Department recommendation was similar to that of the Commissions.[370]

Stakeholders provided varied responses to the Options Paper. While some acknowledged that the current arrangements needed improving and that the recommendations would be useful, others noted concerns such as the potential resource implications for the state and territory child welfare authorities.

Discussion and recommendations

Information-sharing arrangements are of particular importance in situations where Child Protection refers a viable carer to a family court or is aware that a viable carer will be taking proceedings in relation to a family in which Child Protection has been involved. Child Protection may wish to know whether the viable carer has in fact taken such proceedings, and with what consequences. The family court will function best if the information held by Child Protection is available to it. Legal Aid has an important part to play in these situations, both in relation to applications for legal aid by parties to the proceeding, and in relation to the appointment and work of an Independent Children's Representatives.

It would be useful, in my view, if agreements provided specifically for information-sharing in these situations, or alternatively made it clear in the drafting of agreements that general information-sharing principles and procedures apply to these situations.

369 Paragraph 21.

370 '**Recommendation 7** When referring a viable carer to the federal family courts, State and Territory child welfare authorities should provide: (a) written information to those courts detailing the reasons for the referral, and (b) reports and other evidence. Further, State and Territory child welfare authorities should intervene in such family law proceedings, if appropriate.'

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Recommendation 24

Agreements should make it clear that information-sharing arrangements apply in circumstances where Child Protection, having been involved with a family, suggests that a person take proceedings in a family court.

Independent Children's Lawyers

Introduction

Independent Children's Lawyers are frequently appointed in the sorts of children's cases that involve risks to children, and involve Child Protection. They play an important part, especially in cases where at least one party is unrepresented. Their role is appropriately acknowledged by having Legal Aid a party to agreements, and having agreements make provision for Independent Children's Lawyers to be involved in information-sharing arrangements.

The Options Paper and responses from stakeholders

The Options Paper made the following recommendation:

> **Recommendation 2** — Memorandums of Understanding and Protocols should include provisions relating to procedures for dealing with Independent Children's Lawyers.

All stakeholders agreed with this recommendation. Their responses sometimes included further comments on the topic.

The *Family Law Council* suggested that the provisions of agreements should include information about the role of the Independent Children's Lawyer, and this should be linked with the current review of Independent Children's Lawyers.[371] While there can be no doubt of the value of ensuring that the Independent Children's Lawyer's role is understood, for the reasons given in Chapter 5, this subject would be better dealt with as an educational matter, by means other than setting it out in agreements.

The *Family Court of Australia* suggested that the Independent Children's Lawyer should be able to communicate with Child Protection in the same direct and independent manner as with single experts. Access to information and pathways should be clear and unambiguous. The Court also suggested that care is needed to ensure that the process relating to Independent Children's Lawyers does not 'impact on timely and transparent process between Child Protection and courts'. These important points are incorporated in the following discussion.

Legal Aid urged that Independent Children's Lawyers should be able to inspect Child Protection files. This important issue is also dealt with in the discussion below.

371 This refers to the review of Independent Children's Lawyers being conducted for the Attorney-General's Department by Dr Rae Kaspiew and colleagues at the Australian Institute of Family Studies.

One *Law Society* supported the recommendation, saying that in that jurisdiction Child Protection workers 'will generally not talk to lawyers, including Independent Children's Lawyers', and that this could mean in some cases that it is necessary for the Independent Children's Lawyer to interview the children more times than is desirable, when the same result could have been achieved by communication between the Independent Children's Lawyer and the case worker.[372] Communication between Child Protection and Independent Children's Lawyers is obviously of great importance and formal agreements should encourage it.

Treatment in existing Agreements

The role of Independent Children's Lawyers in information-sharing arrangements is specifically treated in agreements in New South Wales, Queensland, and Western Australia.

New South Wales

In New South Wales the agreements between the family courts and Child Protection do not deal with Independent Children's Lawyers. However New South Wales has a separate agreement between Legal Aid and Child Protection (to which the family courts are not parties). This agreement merits careful consideration.

The separate Legal Aid-Child Protection agreement states a number of general matters:

> 3.7 It is recognised that, for the Independent Children's Lawyer to properly fulfil his or her role in family law proceedings, the Independent Children's Lawyer will require information from, and need to be in communication with [Child Protection] in order to understand any child protection concerns held about the child and to present any evidence to the court about those concerns in an admissible form, particularly where [Child Protection] is not a party to the proceedings.
>
> 3.8 It is also recognised that at any time during the proceedings information may come to the attention of the Independent Children's Lawyer which raises the possibility of involvement by [Child Protection] either in investigating and responding to new concerns for the child or in considering court action by [Child Protection] such as intervention in the current proceedings or the commencement of care proceedings before a State Children's Court. In this regard, the Memorandum of Understanding between [Child Protection] and the Family Court of Australia includes an acknowledgement of the "one court principle", that [Child Protection] will, wherever possible and appropriate, seek to intervene in any current family law proceedings rather than commence fresh proceedings in the State Children's Court.

The agreement contains a detailed review of the law about disclosure of information,[373] which need not be reproduced here.

The agreement says that upon appointment[374] the Independent Children's Lawyer should write to Child Protection advising of his or her appointment, and in the letter or email

- draw attention to any Notice of Child Abuse, any s 91B order (requesting Child Protection to intervene) that has not yet been responded to, and any urgent interim hearing where information from Child Protection may be needed and subpoenas issued;

372 The Society's comments are an attachment to the response of the Family Law Section of the Law Council of Australia.
373 Especially in paragraph 4.
374 This is implicit rather than explicit.

- if the child is subject to care orders that may impact on the jurisdiction of the family court to make orders, seek information as to whether the consent of the Minister has been sought or given under S 69ZK;
- if [Child Protection] is known to be currently involved with the child, request information about whether Child Protection is conducting an investigation and if so when the investigation is likely to be concluded; and
- request information as to whether Child Protection proposes commencing care proceedings about the child.[375]

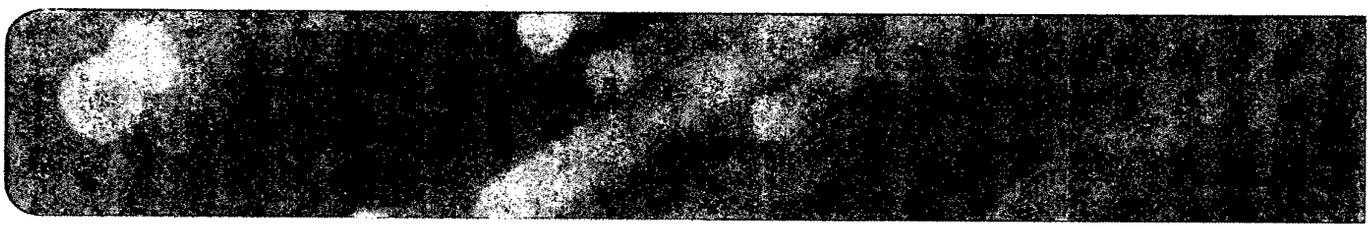
The agreement then sets out what Child Protection will do on receipt of such a letter or email. The matter will be allocated to a Child Protection lawyer, who will co-ordinate any future contacts between the Independent Children's Lawyer and Child Protection officers until either the proceedings have concluded or Child Protection becomes an independent party to the proceedings. It notes that 'the standard time frame for an initial acknowledgement from Child Protection in non-urgent matters will be 2 working days from the initial advice'.

The agreement then deals in turn with exchanges of information, expert reports, adjournments where Child Protection is not a party, and requests for affidavits from Child Protection officers at a final hearing.

In relation to *exchanges of information*, the provisions may be summarised thus. In urgent matters, Child Protection will advise the Independent Children's Lawyer if it holds any current concerns for the child, and the likely time frame for the completion of any current investigation; and will also arrange for a letter to the court advising on these matters.[376] The Independent Children's Lawyer will advise the Child Protection legal officer if urgent subpoenas are to be issued to Child Protection, so that the Child Protection response can be coordinated.[377] In non-urgent matters, where there has been a s 91B request, the legal officer will send the Independent Children's Lawyer a copy of Child Protection's response when it has been sent to the court.[378] It is then provided that if the Independent Children's Lawyer requires information from Child Protection the 'first step will be the issuing of a subpoena for the Child Protection file'.[379] There is then provision for the legal officer to facilitate communication between the Independent Children's Lawyer and the Child Protection caseworker where the Independent Children's Lawyer requires some briefing about Child Protection's concerns for the child.[380]

In relation to *expert reports*, it is noted that where Child Protection is not a party it will need a specific order releasing the report to it.[381] The Independent Children's Lawyer will seek orders for the release of expert reports to Child Protection where the Independent Children's Lawyer is seeking a s 91B order, or believes that it would be in the child's best interests, as well as any necessary orders for copies of other documents to be sent to Child Protection.[382]

375 Paragraph 5.1.2.
376 Paragraph 5.2.1.
377 Paragraph 5.2.2.
378 Paragraph 5.2.3.
379 Paragraph 5.2.4. This provision applies in non-Magellan cases in which Child Protection is not a party to the family court proceedings.
380 Paragraph 5.2.5.
381 Paragraph 5.3.1.
382 Paragraph 5.3.2.



In relation to *adjournments where Child Protection is not a party*, the legal officer is to invite the Independent Children's Lawyer to keep Child Protection informed about progress, and to alert Child Protection to any further concerns that might cause it to reconsider intervening;[383] and the legal officer may on occasions specifically request the Independent Children's Lawyer to keep Child Protection informed about the progress of the matter.[384]

Queensland

The Queensland agreement is between the two family courts and Child Protection. Although Legal Aid is not a party, the agreement makes provision for the relationship between the Independent Children's Lawyer and Child Protection.[385] The agreement provides in paragraph 8 that if the family court is aware that Child Protection has been involved with the child and family, 'an order under s 91B will usually be made at the same time as' an order appointing an Independent Children's Lawyer. On the making of such an order, the Independent Children's Lawyer 'may' inform Child Protection of their appointment by forwarding a copy of the Notice of Address for Service that they have filed in the family court.[386]

It is further provided that the Independent Children's Lawyer may request information from Child Protection when considering whether to apply for a s 91B order, and Child Protection may then advise the Independent Children's Lawyer whether Child Protection had any involvement with the family. Further provisions seek to prevent information from being supplied more than once.[387] The Independent Children's Lawyer is to examine the court file to see if Child Protection has already provided information. Where information has been provided, the court is to enable the Independent Children's Lawyer to inspect and take copies of documents provided by Child Protection.

The agreement further provides that 'in recognition of the special role of the Independent Children's Lawyer', apart from complying with a subpoena, Child Protection will photocopy relevant parts of the file and provide them to the Independent Children's Lawyer; or may alternatively prepare a report for this purpose (a report may be preferred when, for example, there are a number of relevant departmental files). These provisions are followed by an acknowledgment that both the Independent Children's Lawyer and Child Protection must 'act in in the best interests of the child in order to meet the child's protective needs'. The flow of information 'will assist this common goal to be met.' Finally, this part of the agreement says that Child Protection will take reasonable steps to inform the Independent Children's Lawyer of all 'SCAN AM' Team meetings, and may invite the Independent Children's Lawyer to attend such meetings, and other meetings relating to the child.

Next, the agreement has a provision that the Independent Children's Lawyer must not use such information other than for a purpose connected with the proceedings before the Court (which may include providing it to someone preparing a report for the court).[388]

383 Paragraph 5.4.1.

384 Paragraph 5.4.2.

385 Paragraph 8. The Agreement also provides that Child Protection 'may conduct further discussions' with the Independent Children's Lawyer in circumstances where there has also been a s 91B order and a subpoena issued; the Independent Children's Lawyer may be invited to attend discussions about the child and the family: 5.7.

386 Paragraph 8.1. The Agreement specifies that the notice is sent to the Manager, Court Services, who is then to forward it to the Manager of the Child Safety Service Centre closest to where the child resides.

387 The Independent Children's Lawyer is to 'take steps to avoid multiple requests for information or documentation from [Child Protection].'

388 Paragraph 8.3.

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The final part of this Paragraph deals with the possibility that there may be proceedings both in a family court and in the children's court.[389] It provides for Legal Aid to consider appointing one person to perform both roles. It also provides that the Independent Children's Lawyer may be invited to attend the children's court as a friend of the court. Child Protection may also ask the Independent Children's Lawyer to seek leave to release a copy of an assessment report to Child Protection; similarly, the Independent Children's Lawyer may ask Child Protection to seek the children's courts' leave for the release of such reports held by it.

Western Australia

The Western Australian Memorandum of Understanding between the family court, Child Protection, and Legal Aid notes that the parties share the same aim, namely to provide for the best possible outcomes for children, and acknowledges 'that as far as is practicable, and permissible under the relevant statutory provisions, the parties should share and exchange information and resources in individual cases where to do so would assist in achieving this aim.'[390]

Specific reference to the Independent Children's Lawyer occurs twice in this document. First, in relation to liaising between the family court and Child Protection in connection with 'pre-s69ZW' orders, the tasks are given to the Independent Children's Lawyer if the Family Consultant is not available.[391] Second, the Independent Children's Lawyer may also be involved in collaborative case discussions.[392]

Discussion and recommendations

The following discussion draws on existing agreements (just considered) as well as the literature and responses of stakeholders.

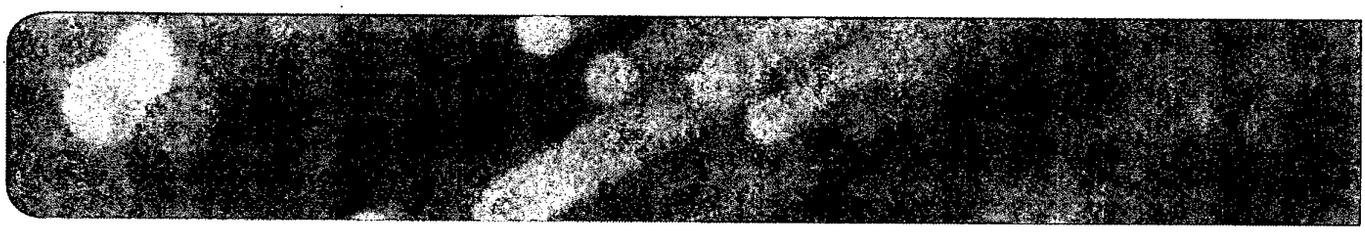
The role and significance of Independent Children's Lawyers

The importance of Independent Children's Lawyers, especially in cases where children might be at risk, can hardly be exaggerated.

First, Independent Children's Lawyers are frequently appointed in the sort of cases that involve Child Protection. As pointed out in the New South Wales agreement between Legal Aid and Child Protection:[393]

> An Independent Children's Lawyer is likely only to be appointed in cases where there are issues being raised in the proceedings about the safety, welfare or wellbeing of a child. It is therefore likely in such cases that [Child Protection] has received or will receive reports of risk of harm about the child and will therefore have records which may assist the Court and the Independent Children's Lawyer in their respective roles.

389 Paragraph 8.4.
390 Paragraphs 1.2.2, 1.2.3.
391 See paragraphs 2.3.1.3 – 2.3.1.7.
392 Paragraph 2.5.
393 Paragraph 5.1.1.



Second, the role of Independent Children's Lawyer in these cases is of great importance, especially where one or more parties are unrepresented. Like the family courts and Child Protection, they are independent of the parties. The role of the Independent Children's Lawyer is fairly well defined, as a result of explicit legislative provisions and published guidelines. It may differ in some respects from the role of lawyers representing children in children's courts, operating under state laws.

For present purposes it is enough to note that the Independent Children's Lawyer's task is to represent what the Independent Children's Lawyer believes are there child's best interests. Although not bound by the child's instructions in the way a lawyer for an adult client is bound, it is an important part of the Independent Children's Lawyer's task to make known to the court any views the child might have. The Independent Children's Lawyer, being independent of the parties, will normally lead independent evidence, including expert evidence, and will cross-examine witnesses and make submissions to the court.

Independent Children's Lawyers should be included in information-sharing arrangements and formal Agreements

It is vital that provision be made, in any information arrangements or formal agreements, for Independent Children's Lawyers to share information with the family courts and Child Protection.

In order to discharge their duties effectively, Independent Children's Lawyers will need access to any relevant material, notably information held by Child Protection. The guidelines for Independent Children's Lawyers provide that they are to 'arrange for the collation of all relevant and reasonably available evidence including expert evidence where appropriate, and otherwise ensure to the extent possible, that all evidence relevant to the best interests of the child and the considerations set out in section 60CC of the Family Law Act is before the Court'.[394] Equally, Independent Children's Lawyers may acquire information that will be of assistance to Child Protection, and it is therefore important that mechanisms be in place to enable such information to be shared with Child Protection.

At the same time, it is important to avoid a situation in which Child Protection receives multiple requests for the same information, and this is a topic that can be usefully covered in an agreement (as it is in Queensland).

Apart from information relevant to the child's best interests, it is important that Independent Children's Lawyers and Child Protection can collaborate, so that wise decisions can be made about intervention and about legal proceedings, and misunderstanding and duplication avoided. Independent Children's Lawyers, being legally independent of the parties and typically being experienced and committed family lawyers, also have a great deal of expertise and knowledge to contribute to collaborative decision-making in these cases, which often involve desperate situations for the children involved. Legal Aid, like the family courts and Child Protection, also involves a significant expenditure of public money.

There is an overwhelming argument, therefore, that Independent Children's Lawyers should be included in information-sharing arrangements; and this is the unanimous view of stakeholders.

394 Paragraph 6.9.

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Legal Aid should be parties to agreements

As indicated in Chapter 5, although this is not yet the case in all existing agreements, it is highly desirable that Legal Aid (the practical source of Independent Children's Lawyers) should be a party to information-sharing agreements between the family courts and Child Protection. Having one agreement setting out all the relevant principles and processes, agreed by Legal Aid as well as the other parties, should help to avoid duplication or inconsistent arrangements. If this is not possible, there would be benefit in a separate agreement between Legal Aid and Child Protection, as in New South Wales, but this is less satisfactory.

Lines of communication should be established

It is desirable that clear lines of communication be established between the Independent Children's Lawyer and Child Protection. (The Independent Children's Lawyer's relationship with the family court is clear and does not need to be dealt with in the agreement).

On appointment the Independent Children's Lawyer should advise Child Protection of his or her appointment. This is already provided for in the Independent Children's Lawyer Guidelines.[395] Those Guidelines also provide for the Independent Children's Lawyer to seek information from Child Protection:

> 6.1 [...] The Independent Children's Lawyer is to make contact with [Child Protection] and seek information about:
>
> > the extent of any child protection involvement with the child or family, in particular, any abuse or neglect notifications and investigations;
> >
> > and if there has been any such involvement, whether [Child Protection] intends to become involved in the family law proceedings or is considering the initiation of other legal proceedings. [...]

In addition, the Independent Children's Lawyer is to develop a case plan, and in that connection should, among other things, 'canvass the nature of any reports or examinations of the parties and/or the child', and 'liaise with any [...] relevant government departments, contact centres, schools and agencies to bring together relevant information to assist the Court in assessing and determining the best interests of the child'.[396]

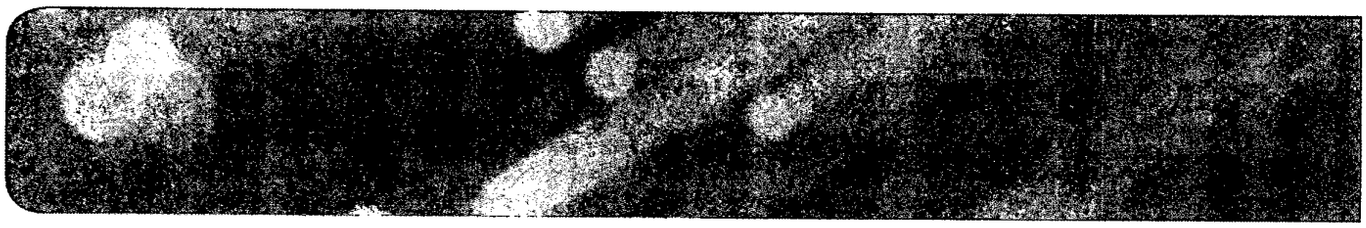
The Guidelines also provide that the Independent Children's Lawyer 'should be proactive ... and be familiar with community based organisations which can provide continuing assistance to the child and the child's family.'[397]

It is necessary for Independent Children's Lawyers to know the name and contact details of the person in Child Protection who should be notified. This is provided for in some of the agreements. That person, ideally, will continue to be involved in liaising with the Independent Children's Lawyer and the family court. For convenience, in this discussion that person will be termed the

395 National Legal Aid, *Guidelines for Independent Children's Lawyers* 6 December 2007 (endorsed by the Family Court of Australia and the Federal Magistrates Court)(accessed on Family Court's website), paragraph 6.1: 'The Independent Children's Lawyer is to advise all necessary agencies, for example [...]the State Welfare Authority, of his/her appointment.'

396 Paragraph 6.5.

397 Paragraph 6.9.



'Child Protection liaison officer': The Child Protection liaison officer will of course need to refer to documents, and perhaps other staff such as caseworkers, in order to provide information. In some situations, it may be convenient for the Child Protection liaison officer to put the Independent Children's Lawyer into direct contact with a Child Protection officer who is dealing with the family.

Independent Children's Lawyers and family consultants will normally wish to share information and collaborate, and obviously lines of communication need to be established between them. Since they are each working in the familiar environment of the family court, unless there are problems of which I am unaware, it does not seem necessary for their relationship to be dealt with in a formal agreement.

Communication with Legal Aid before Independent Children's Lawyer appointed?

There may well be situations, perhaps urgent ones, in which a person applies for legal aid and there are serious concerns about a child: It may be desirable to facilitate communication between Legal Aid and Child Protection in such situations, so that Legal Aid will have access to the information and take it into account in considering whether to grant aid, and, perhaps in preparing for the appointment of an Independent Children's Lawyer.

Principles for information-sharing

Principles of information-sharing could be comfortably included in tri-party agreements between Legal Aid, the family courts and Child Protection. An appropriate model, perhaps, would be the Western Australians formulation, noted above ('the parties share the same aim, to provide for the best possible outcomes for children' ...'as far as is practicable, and permissible under the relevant statutory provisions, the parties should share and exchange information and resources in individual cases where to do so would assist in achieving this aim.'[398]

Relationship between the provision of information to Independent Children's Lawyers and the provision of information to the court

Quite apart from Legal Aid and Independent Children's Lawyers, there are information-sharing arrangements between the family courts and Child Protection. It is important that provision for information-sharing with Independent Children's Lawyers should not lead to duplication or misunderstanding. Agreements could incorporate some mechanism to avoid this.

A simple and perhaps satisfactory solution to the problem is to provide that the Independent Children's Lawyer should, before requesting any information from Child Protection, ensure that the information has not already been provided to the family courts, or requested by a family court. Logically, there is a case for a corresponding obligation on Child Protection not to ask the Independent Children's Lawyer or a family court for information that has already been provided, and perhaps this could be included in an agreement, although it may not be a problem in practice.

398 Paragraph 1.2.2, 1.2.3.

Chapter 6

The initial advice from the Independent Children's Lawyer to Child Protection

Having regard to the previous discussion, agreements should provide that on appointment the Independent Children's Lawyer will write to Child Protection advising of the Independent Children's Lawyer's appointment, and providing identifying details relating to the case.

Where the Independent Children's Lawyer is not aware of any actual or contemplated involvement by Child Protection, the letter will indicate that the Independent Children's Lawyer will provide information about the family court proceedings if Child Protection requests it.

In cases where the Independent Children's Lawyer is aware that Child Protection has been or is likely to be involved with the family, the initial letter will also provide information about the family court proceedings that is likely to be helpful to Child Protection.

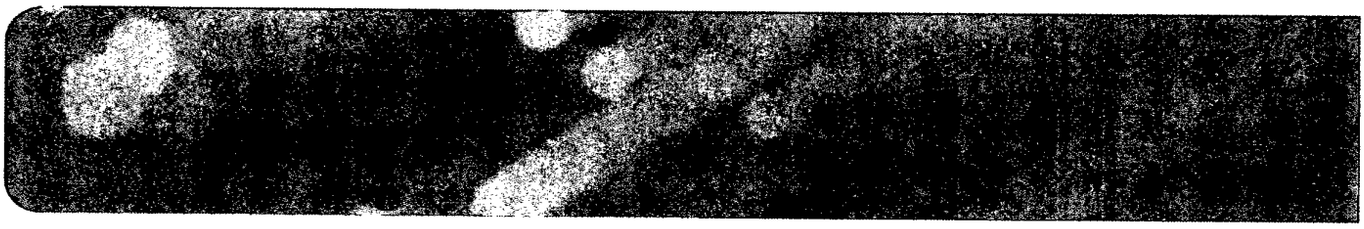
Recommendation 25

Agreements should provide that on appointment an Independent Children's Lawyer who is aware that Child Protection has been involved with the family, or considers that such involvement is desirable or likely, will provide or offer to provide the initial letter will also provide the following information (so far as it is known to the Independent Children's Lawyer) to Child Protection:

- whether any orders have been made, or are likely to be made, under s 69ZW;
- whether any orders have been made, or are likely to be made, under s 91B
- whether any subpoenas have been issued, or are likely to be issued, to Child Protection.
- any notifications that have been made under s 67Z, 67ZA or 67ZBA;
- information about the next steps in the family court proceedings, notably the dates and times of future court hearings or mentions;
- whether the Independent Children's Lawyer is concerned for the immediate safety or welfare of the child, and the basis of such concern; and
- any other information about the family court proceedings that the Independent Children's Lawyer considers is likely to be helpful to Child Protection.

The Independent Children's Lawyer's initial request for information

The Independent Children's Lawyer's letter will normally contain or be accompanied by a request for information. Although the nature of the request will depend on the circumstances, it seems useful to set out in the agreement the sort of information that is likely to be relevant and an appropriate subject for inquiry.



Recommendation 26

Agreements should include provisions to the effect that when writing to advise of his or her appointment, the Independent Children's Lawyer may request information from Child Protection that is (1) likely to be important to enable the Independent Children's Lawyer to discharge his or her functions and (2) is not already available to the Independent Children's Lawyer, whether from the family court file or otherwise.

The information requested may relate, for example, to the following matters:

- whether Child Protection has been involved with the child or the child's family, and the nature of that involvement;
- whether any reports had been received by Child Protection and whether they had closed any files on the basis that the allegations made were 'unsubstantiated';
- the nature of Child Protection's current plans, including any plans relating to responding to orders, subpoenas or requests by the family courts, commencing proceedings in the children's court, and intervening in the family court proceedings; and
- the nature of information held by Child Protection or known to Child Protection relating to the child (for example expert reports) and how that information might be accessed by the Independent Children's Lawyer.

Providing the Independent Children's Lawyer with access to Child Protection documents

An important question in any agreement relates to access by the Independent Children's Lawyer to documents held by Child Protection relating to the child or the family. Those agreements that deal with the topic do so in different ways, as we have seen.

The New South Wales Protocol provides for the Independent Children's Lawyer to issue a subpoena for the Child Protection file as a 'first step'. The Queensland agreement provides that Child Protection will provide photocopies of relevant parts of the file, or will prepare a report for the purpose. The Western Australian agreement does not deal with the question specifically, but provision of information to the Independent Children's Lawyer would fall under the general principle favouring the sharing of information 'as far as is practicable and permissible'.

The fact that the topic is treated so differently in those agreements, and is not treated at all in some jurisdictions, may indicate that the question needs more careful attention than it has been given.

The starting point should be that it would be likely to assist children's best interests if Independent Children's Lawyers have the benefit of access to relevant Child Protection documents. It would then be necessary to consider what limitations might be needed. In principle, there would appear to be three acceptable limitations. The first is the most obvious, namely that access to documents should not be provided if doing so contravenes state law, as might occur, for example, if the information discloses the identity of a notifier of suspected child abuse. It is not necessary for agreements to specify what does contravene state law. The second limitation is that information need not be provided to the Independent Children's Lawyer if it has already been provided, or is being provided, to the family court. The third limitation is that of practicability.

Recommendation 27

Agreements should provide that Child Protection should make information available to the Independent Children's Lawyer when the information has not already been provided, or is not being provided, to the relevant family court, and when providing the information is likely to assist the Independent Children's Lawyer, and is reasonably practicable, and is not legally prohibited (as, for example, when it would reveal the name of a notifier contrary to state law).

The information may be provided by facilitating photocopy access by the Independent Children's Lawyer, or providing photocopies, or, where it is more convenient, by preparing a report for the Independent Children's Lawyer that contains the information.

It is equally important in principle that Independent Children's Lawyers share relevant information with Child Protection, although in practice Child Protection will normally have more information than Independent Children's Lawyers.

Recommendation 28

Independent Children's Lawyers should keep Child Protection informed if they have information that might reasonably be required by Child Protection, and should provide such information on request if doing so is reasonably practicable, and is not legally prohibited.

Collaboration between Independent Children's Lawyers and Child Protection on measures to be taken

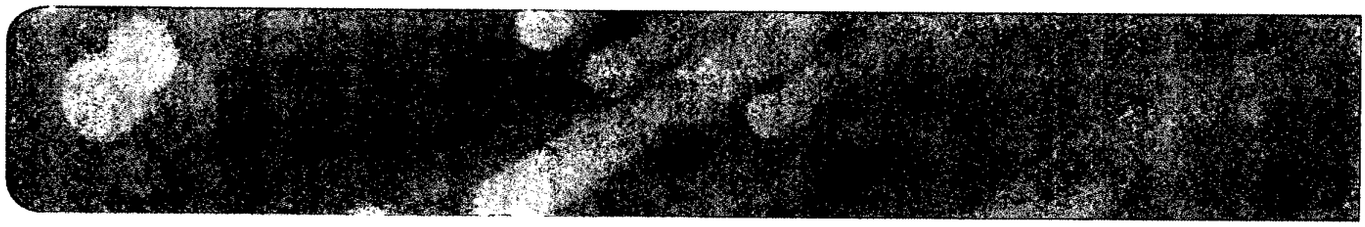
Once communication is established and information as far as possible shared, Independent Children's Lawyers can play a valuable part in collaborative decision-making, as Child Protection considers what measures it might take. Child Protection's options, discussed elsewhere in this report, include taking no steps to intervene, advising family members such as 'viable carers' about taking family court proceedings, seeking to appear in family court proceedings as amicus curiae, intervening in family court proceedings (whether or not after a s 91B request), and commencing or continuing children's court proceedings. Independent Children's Lawyers should keep Child Protection advised of relevant aspects of the family court proceedings, notably about what orders have been made, and what orders are sought by Independent Children's Lawyers or others.

Location and Recovery orders

Introduction

Location orders and recovery orders made by a family court can involve Child Protection. A location order requires a person or state department to provide the court with 'information that the person has or obtains about the child's location'.[399] A location order, therefore, could be directed to Child Protection and would require Child Protection to provide the information. No issues appear to arise in this regard. A recovery order is, in essence, an order requiring a person to return a child to a

399 Family Law Act s 67J.



parent or other person.[400] Such an order could be made in relation to a child from a family being investigated by Child Protection. It could, for example, require a child to be returned to a person considered by Child Protection to be an unsatisfactory carer. It seems obvious that these are situations calling for information-sharing and collaboration.

Treatment in existing agreements

The topic is specifically treated in the New South Wales Protocols, although not in other agreements.

The New South Wales Protocols include two brief effective[401] provisions relating to *location* orders. Where Child Protection has provided information as set out in any location order, the family court 'shall notify [Child Protection] of any listing date when the issue of release of such information is to be considered'.[402] Further, the family court 'shall use its best endeavours to inform [Child Protection] when a location order has been satisfied, discharged or the information sought in the order is no longer required'.[403]

In relation to *recovery* orders, it is provided that if the family court is aware of Child Protection's involvement with the family,[404] it 'should consider whether [Child Protection] should be given notice that an application for a recovery order has been filed before making the order'.[405] The agreement then notes the legal rights of Child Protection to intervene either generally or in relation to the proceedings for the recovery order.[406] Finally, it says that Child Protection reserves the right to bring urgent proceedings in the children's court if the family court has made a recovery order and time does not permit it to intervene or seek to discharge the order. In that event, Child Protection is to notify the family court and keep it informed of any decision 'to continue in the Children's Court or have the matter return to the family court'.[407]

Discussion and recommendation

Location orders, and especially recovery orders, are often considered in urgent and sometimes extreme situations. The carrying out of a recovery order, involving police officers removing a child if necessary by force, can be distressing, especially to the children involved. The main problem arises with recovery orders in situations where Child Protection believes that it would be dangerous for the child to be returned as provided in the recovery order. Such situations can arise because at the time the location or recovery order is made, or is being considered, Child Protection and the family courts may each have different evidence or information about the case.

400 Family Law Act s 67J. The section also authorizes, for example, a search for a child

401 I have omitted those passages that merely state the law.

402 Paragraph 7.10.

403 Paragraph 7.11.

404 More precisely, if there is there is a 'current s 91B invitation' or a Form 4 in existence in the matter; or if 'it appears to the [family court] that [Child Protection] may have some current involvement with the subject child/children': paragraph 8.3.

405 Paragraph 8.3. The Agreement goes on to note that Child Protection is entitled to intervene either generally or in relation to the proceedings for the recovery order:

406 Paragraphs 8.4, 8.5.

407 Paragraph 8.7.

It is important to avoid conflicting orders, for example where Child Protection takes urgent proceedings in the children's court in order to prevent the recovery order from being carried out, agreements can help to ensure that each party is as fully informed as possible, so that the best way forward can be found. Since ultimately the child protection system will prevail against the family law system,[408] it can be wasteful of resources and distressing to those involved if the family court proceeds in a way that is unacceptable to Child Protection.

The basic idea of the New South Wales Protocols is sound, namely that where Child Protection is involved, the family courts should check with Child Protection before making recovery orders. Because the Child Protection system legally prevails over the family law system, it is vital that the family courts have the greatest possible access to information held by Child Protection about the family, and, especially, information about Child Protection's intended actions.

Although the approach of the New South Wales Protocol is sound, it may be unnecessary to make specific provision for the problem posed by recovery orders. If in each jurisdiction the family courts and Child Protection agree on information-sharing principles and effective procedures, these should apply in all situations, including those where the family courts are considering making location or recovery orders. The best approach might be to keep this situation in mind when drafting generally applicable provisions, to ensure that they apply in this as well as other situations that require collaboration and information-sharing.

Recommendation 29

Unless other provisions for information-sharing make it unnecessary, agreements should provide that the family courts should where practicable ascertain whether Child Protection has relevant information before the family court makes a recovery order.

Family Violence

Introduction

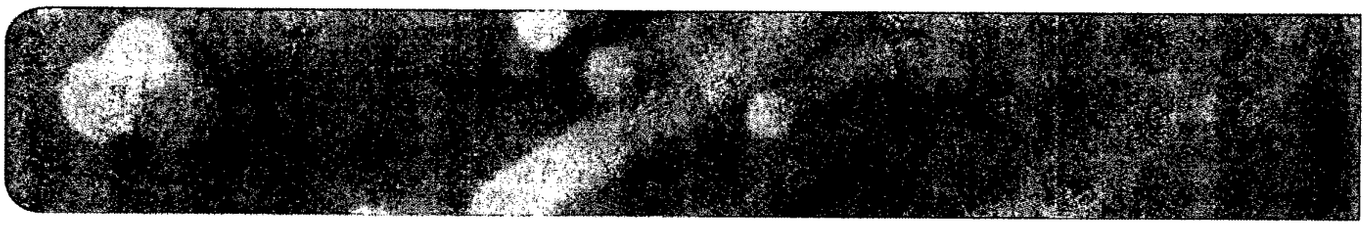
The Law Reform Commissions and the Family Law Council have both made recommendations about family violence that are relevant to the present report.[409] The Law Reform Commissions recommended:[410]

> [**Recommendation 30-14**] The Australian, state and territory governments should develop guidelines to assist agencies and organisations working in the family violence and child protection systems to better understand the rules relating to the sharing of information.
>
> [**Recommendation 30-16**] Federal family courts, state and territory magistrates courts, police, and relevant government agencies should develop protocols for the exchange of information in relation to family violence matters. Parties to such protocols should receive regular training to ensure that the arrangements are effectively implemented.

408 See Family Law Act s 69ZK, and the discussion in Chapter 3.

409 Recommendation 30–8, dealing with access to the Commonwealth Courts Portal in connection with family violence is discussed at [INSERT CROSS-REFERENCE].

410 Recommendation 30–14.



These recommendations are considered further below. Chapter 5 reflects this recommendation in stressing the importance of education and training so that personnel in different parts of the family law system, especially those in the family courts and Child Protection, understand the objectives and procedures of other parts. The same applies to the second sentence of Recommendation 30-16.

The Family Law Council wrote:[411]

> **9.5** Current memoranda of understanding and protocols focus primarily on child protection rather than family violence more generally. The focus of the protocols should be expanded to include the sharing of information in respect of family violence. The federal family courts and legal aid agencies be resourced to undertake the additional workload generated by these families.
>
> **9.6** Prior to embarking on this facilitation the Attorney-General's Department should ensure that the current level of information sharing exhausts the current limits of the legislation imposed by the Privacy Act and legislative provisions around confidentiality. This issue should be revisited as part of any legislative reform introduced in response to the ALRC report on Privacy.

Although the question of resources falls outside this report, the first two sentences of paragraph 9.5 are considered below. This report is consistent with the first sentence of paragraph 9.6 in that it tries to identify the best approach to information-sharing within the current legislation.

Recommendation 9.6 is not expressed as limited to children's cases, and its scope may therefore be wider than that of the present report. It is also beyond the role of this report to make recommendations about resourcing. However the point made, namely the importance of information-sharing in relation to family violence (whether or not accompanied by child abuse or neglect) deserves careful consideration, and is discussed in this section.

Information-sharing about family violence is not treated in existing agreements between the family courts and Child Protection, with the exception of some references to family violence in the Western Australian agreement.[412] The main focus in existing agreements is on information-sharing between the family courts and Child Protection, mainly in situations where both are potentially involved with the same child or family, because of notifications or investigations by Child Protection and child-related proceedings, actual or contemplated, in the family courts. Legal aid commissions are parties to some agreements, essentially because of the role of Independent Children's Lawyers in such cases.

It is well known that child abuse can co-exist with family violence, and the information-sharing arrangements between the family courts and Child Protection will often include information relating to family violence and its likely impact on the children involved. The question provoked by the recommendations of the Commissions and the Family Law Council is whether additional measures should be taken relating to family violence as such.

411 Family Law Council, *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues 2009* (though titled an 'advice,' published as a Report on the Council's website, accessed June 2012).

412 Paragraph 2.4, especially at 2.4.3, 2.4.4, 2.4.6 and 2.4.7. Paragraphs 2.4.1 states that the family law legislation requires the court to send copies of form 4s to Child Protection in cases of family violence as well as cases of child abuse. However the relevant sections (sections 67Z and 67ZA of the Family Law Act and sections 159 and 160 of the WA Family Court Act) are limited to child abuse, and do not expressly require the court to send a copy of the Form 4 (the court is required only to 'notify' Child Protection).

Chapter 6

The Western Australian agreement on family violence

Western Australia is unique in having an information-sharing protocol relating to matters involving family violence, the parties being the Family Court of Western Australia (here the 'Family Court'), the Magistrates Court of Western Australia (here the 'Magistrates Court'), which deals with family violence matters under state law, the Department of Attorney-General (which provides the family violence service), the Department of Corrective Services, and Legal Aid Western Australia. The measures in the agreement relate mainly to the two courts.

The Protocol refers to common aims of the parties 'to protect victims of violence and to provide the best possible outcomes for children', and embraces the goal of information-sharing ('as far as is practicable, and permissible under the relevant statutory provisions, the parties should share and exchange information and resources in individual cases where in individual cases where to do so would assist in achieving these aims').[413] It notes that the Family Court and the Magistrates Court may share common clients, and that in such cases exchange of information 'will better facilitate the interests of justice and the best interests of children'.[414] It specifies a method by which each court can access information from the other to identify cases in which the two courts have a common client.[415] In such cases, it provides that judicial and other officers of each court may request information of the other, noting in each case the laws that allow such information to be provided.[416]

Part 3 of the agreement deals with a specific situation, namely where an offender who is being case managed in the family violence court is a party to a parenting case.[417] It identifies the person in each court who is to be responsible for liaising (the Coordinator Case Management in the Magistrates Court and the Family Consultant in the Family Court). The Coordinator Case Management may request to search and make copies of relevant parts of the Family Court file (documents are to be provided free of charge).[418] The Family Consultant will make himself or herself available to attend, if requested, 'any meeting or event as part of the case management'. [419] If the Family Court requests, the Coordinator Case Management will seek the offender's consent to release information to the Family Court. With such consent, at the request of a judicial officer or family consultant in the Family Court, information will be provided free of charge.[420] If there is no consent, Community Corrections staff will determine whether releasing the information is consistent with relevant provisions of the relevant state legislation.[421]

Part 4 relates to family violence service workers and the Family Court, dealing in turn with particular situations.

The first situation is when no proceedings have been started in the Family Court, and when the Magistrates Court Family Violence Service refers clients to file proceedings in the Family Court, or becomes aware that such applications are likely.[422] In these situations it is provided that the

413 Paragraph 1.2.
414 Paragraph 2.1.
415 Paragraph 2.2.
416 Paragraph 2.3.
417 Paragraph 3.
418 Paragraph 3.1(i).
419 Paragraph 3.1 (ii).
420 Paragraph 3.1 (iv).
421 Id.
422 Paragraph 4.2.

Family Violence Service will email the Family Court providing the referral (if any), and details of the parties, and advising that the Family Violence Service has 'information that may be of use to the Court'.[423] The Family Court will then forward the email to Legal Aid, and open a file. Thus, as the agreement notes, if an application is later filed, the Family Court will 'be aware from the electronic file that the Family Violence Service may have relevant information on the matter and the inside cover of the paper will be marked accordingly'.[424] The Family Consultant or judicial officer dealing with the matter may then make appropriate enquiries with the Family Violence Service and request any relevant information or documentation. If there is no client consent, 'the Family Violence Service worker may suggest that the file be subpoenaed for production in the Family Court proceedings'.[425] Finally in this paragraph, it is provided that when there is an application for legal aid and Legal Aid is told that the Family Violence Service is involved, Legal Aid may contact the Family Violence Service and enquire about the matter (having obtained the applicant's authority to do so) in connection with determining the application for a grant of legal aid.[426]

The second situation is where the Family Violence Service is assisting clients with an application for interim family violence orders.[427] The agreement notes that the Family Violence Service may need information about past or present children's proceedings that the client may be unable to provide.[428] In such cases, the Family Violence Service Worker may telephone the Duty Registrar of the Family Court (the phone number is specified) and request information about the client's involvement in Family Court proceedings, and request a copy of any current parenting order as a matter of urgency. The agreement also notes the rule that permits the Duty Registrar to disclose that information.[429]

The third and final situation is where the Family Violence Service refers clients to Legal Aid in relation to family law matters.[430] The agreement provides that the Family Violence Service workers will be provided with an 'Information Sheet' attached to the agreement, and that they will complete a referral form, also an attachment to the agreement.

Discussion and recommendation

Western Australia provides a valuable model for agreements relating to family violence, notably an agreement for information-sharing between the family court and the state court dealing with family violence. The fact that Western Australia, uniquely, has its own state Family Court does not make this model inapplicable in other jurisdictions: there seems no reason why similar agreements could not be made in other jurisdictions, between the family courts on one hand and the family violence courts on the other.

423 Paragraph 4.2.2.
424 Paragraph 4.2.4.
425 Paragraph 4.2.5.
426 Paragraph 4.2.6.
427 Paragraph 4.3.
428 Paragraph 4.3.1.
429 Paragraph 4.3.2.
430 Paragraph 4.4.

Chapter 6

The recent family violence amendments to the Family Law Act[431] provide a strong incentive to emulate the Western Australia model. The amendments seek to ensure that the family courts have information relating to family violence[432] (as well as Child Protection involvement)[433], and an agreement along the lines of the Western Australia model would be entirely consistent with this approach. More specifically, family courts must now take into consideration, in determining the child's best interests, the inferences to be drawn from a family violence order, having regard to the circumstances in which it was made.[434] It is obviously important in this connection for the family court to have information about those circumstances. It seems desirable, therefore, that there be information-sharing protocols between the family courts and the courts dealing with family violence, so that relevant material in each court can be accessed by the other. Of course it will be a matter for the judge to determine the admissibility of any material that is tendered.

It seems desirable, and consistent with the spirit of the Law Reform Commissions' and the Family Law Council's recommendations (above), and the family violence amendments of 2011, that all jurisdictions consider the merits of information-sharing agreements between the state family violence courts and the family courts. It seems desirable that Legal Aid, and perhaps other agencies, should be parties to such agreements.

Recommendation 30

Consideration should be given to developing other information-sharing agreements between the relevant parties on other topics, such as family violence.

An overview

This brief overview attempts to draw together the main themes of this chapter. More detailed conclusions are expressed above, and in the 'Model Agreement'.

A distinction was drawn in the earlier discussion between 'process information', such as steps being taken or contemplated, and the nature of documents held, and 'case-specific factual information', that is, information about the particular child or family. Sharing process information seems relatively straightforward, and is obviously desirable. The family courts should be able to learn readily whether Child Protection has been involved with a case, whether it has conducted investigations, what sort of information it has, and what it proposes to do. Similarly, Child Protection should be be able to discover easily what proceedings have been taken in a family court, what orders have been made or have been sought, whether an Independent Children's Lawyer has been appointed, and the date of the next court hearing. We have seen that under some agreements notifications of children at risk, and family court requests for Child Protection to intervene, are treated as a trigger for the sharing of such process information.

431 Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth).

432 See sections 67ZBA, 67ZBB(4).

433 The amendments of 2011 included provisions requiring parties who are aware of child protection involvement to notify the family court: see sections 60CH, 60CI.

434 New s 60CC(3)(k) ('any relevant inferences that can be drawn from the order, taking into account the following: (i) the nature of the order; (ii) the circumstances in which the order was made; (iii) any evidence admitted in proceedings for the order; (iv) any findings made by the court in, or in proceedings for, the order; (v) any other relevant matter.').

This seems desirable. However the value of sharing process information arises whenever there is family court case in which Child Protection has been involved. It would make sense, therefore, to provide for sharing process information in any situation where a family court considers that Child Protection might be involved, rather than limiting it to cases where notifications have been made under s 67Z, or 67ZA or 67ZBA, or orders made under s 91B.

In relation to case-specific factual information, the position is a little more difficult. Reproducing or summarising this information can be labour-intensive, since affidavits and reports of various kinds can often be voluminous and wide-ranging. And the disclosure of this sort of material raises issues of confidentiality more acutely than does the disclosure of what has been called 'process information'.

With the notable exception of New South Wales, the law does not much encourage the unstructured sharing of case-specific factual information. The general practice, reflected in the formal agreements, appears to be that the transmission of such information from Child Protection to the family courts is largely effected by the subpoenas or s 69ZW orders — both of which *require* the information, removing any possibility that providing it might be in some way wrongful.

What is distinctive in New South Wales is that state legislation specifically encouraging the sharing of case-specific factual information applies between Child Protection and the family courts. Because of this legislation, such information can be confidently exchanged, both ways, without the necessity of subpoenas or s 69ZW orders. It has not been possible in this report to develop a detailed law reform proposal, but the cause of information-sharing would be greatly enhanced if other jurisdictions introduced such legislation, and it would be a very positive move if state governments were to give this matter close attention.

In the absence of such legislation, it seems that subpoenas and s 69ZW orders will continue to be the main vehicle for the transmission of case-specific factual information from Child Protection to the family courts, and for this reason the model agreement includes provisions on this topic. They are somewhat general, because in the limited time available, it has been difficult to assess the apparently varied practices and desires relating to these matters in each jurisdiction, and, perhaps, between the Family Court of Australia and the Federal Magistrates Court. In each jurisdiction, even if the model agreement has some value, the parties will need to work through what specific provisions are most appropriate for each jurisdiction.

As has been seen, there is widespread support for the view that consultation and information-sharing should ensure that only one court, namely the most appropriate court, should deal with any particular child. In this connection, the sharing of process information is of great value. Broadly speaking, agreements should encourage such information-sharing, as well as providing guidelines for the circumstances in which it is reasonable for the family courts to expect Child Protection to consider intervening in family court proceedings, rather than taking other actions to discharge their statutory responsibilities.

Other mechanisms to support co-ordination and information-sharing

Facilitating information sharing from child welfare authorities to federal family courts

Establishing a centralised contact point in child welfare authorities to address referrals and enquiries from the federal family courts

The mode of facilitating information sharing from the child welfare authorities to the federal family courts can significantly impact on issues such as the quality of information provided and the efficacy with which it is made available.[435]

One mechanism that has been identified to streamline the provision of information is through the establishment of central contact points within State and Territory child welfare authorities. The establishment of a central contact point was recommended at Recommendation 5 of the Attorney-General's Department's Options Paper. The Department suggested that the role of a central contact point could include:

- processing orders made under sections 91B and 69ZW of the *Family Law Act 1975*;
- responding to Notices of Child Abuse or Family Violence (Form 4);
- coordinating the responses of child welfare authorities to Magellan cases; and
- attending the federal family courts to provide information in relation to information held by the child welfare authority.

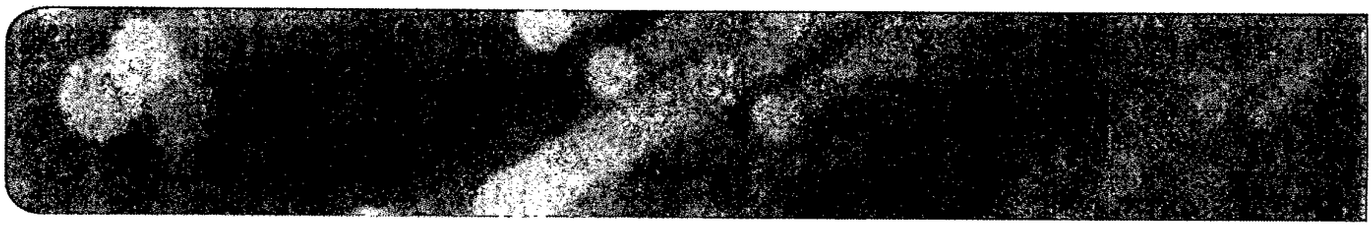
The establishment of a centralised contact point within a child welfare authority aligns with Recommendation 19-1 of the 2010 Report by the Australian and New South Wales Law Reform Commissions.[436] This Recommendation provides that federal, State and Territory governments should, as a matter of priority, make arrangements for child welfare authorities to provide investigatory and reporting services to federal family courts in cases involving children's safety. The Commissions further recommended that where such services are not already provided by agreement, urgent consideration should be given to establishing specialist sections within child welfare authorities to provide those services.

Stakeholders indicated general support for Recommendation 5 in their Options Paper. Stakeholder responses included the following:

- In those registries where this procedure is in place, it works extremely well.
- In Magellan matters contact points enable a more useful flow of information and ensure that information reaches the correct person. This facilitates a more efficient use of court resources and provides better service to clients.

435 I am grateful to the Attorney-General's Department for providing this chapter.

436 Australian Law Reform Commission and the New South Wales Law Reform Commission, *Family Violence — A National Legal Response* (ALRC Report No 114, 2010) ('the Law Reform Commissions' Report').



- A specialist dedicated team would streamline the responses to referrals and inquiries, expertise would continue to be developed and the relationships between the various agencies would be enhanced.
- Ideally, a central contact point would be co-located in one of the federal family courts in each state or territory, as in the WA model. This would help in mutual understanding and cooperative working relationships between the state and federal spheres.
- It is necessary to consider resource implications of a centralised contact point.

Central contact points have already been implemented in some jurisdictions, for example:

- **Queensland:** The Queensland Department of Communities (Child Safety Services) Court Services Unit (CSU) is the central conduit for collaboration between the department, the FCA and the FMC. Through working closely with the Department's Child Safety Service Centres and maintaining strong connections with ICLs the CSU is able to facilitate and support relationships between all key stakeholders.
- **South Australia:** In August 2011, Families SA endorsed the establishment of a 'Court Liaison Team' to be staffed by a Principal Court Liaison Officer, a Magellan and Family Law Project Officer, a Senior Project Officer and a part-time social worker.
- **Western Australia:** An officer from the Department for Child Protection is permanently co-located in the Family Court of Western Australia to facilitate the sharing of information between the Department and the court. This arrangement has been in place since 2009. Stakeholders in Western Australia have noted the success of this initiative in facilitating both information sharing and relationship building between the Department and the Court.

Establishing a network of interstate child welfare collaboration officers

The Options Paper recommended (Recommendation 6) that State and Territory child welfare authorities should establish a network of interstate child welfare collaboration officers, which could comprised a representative or representatives from each child welfare authority's central contact point who are working on the interface between their child welfare authority and the federal family courts. The Attorney-General's Department noted that a network of 'interstate liaison officers' already exists under the *Protocol for the Transfer of Care and Protection Orders and Proceedings and Interstate Assistance* (2007) ('Care and Protection Orders Protocol'). These officers coordinate matters with other jurisdictions and are responsible for general policy and practice issues regarding interstate cooperation. The Attorney-General's Department envisaged that the proposed network of interstate child welfare collaboration officers would however fulfil a different role by discussing policies, practices and processes for the sharing of information between the child welfare authorities and the federal family courts as well as providing an educative role for initiatives such as the implementation of MOUs and Protocols. It is noted that in general, the interstate liaison officers under the Care and Protection Orders Protocol do not deal with family law courts related matters.

Stakeholders indicated general support for Recommendation 6 in their Options Paper. Stakeholder responses included the following:

- A network would be of great assistance, particularly given the mobility of some families with cross-border relocations. Those who have had experience in dealing with families with an interstate history of child protection notifications are critical of the effort required to ascertain and identify the appropriate agency and officer
- If the state and territory authorities had their own networks, it would be extremely useful to assist the flow of information in a timely and more efficient manner.
- A network would allow for cross-jurisdictional issues, policies, practices and processes to be discussed on a regular basis.
- A network could potentially have resource implications for child welfare authorities. A new network of officers may not be necessary, given the existing network of interstate liaison officers under the Care and Protection Orders Protocol.

At the second national family law and child protection collaboration meeting hosted by the Attorney-General's Department on 4 May 2012 there was some discussion in relation to Recommendation 6. While consideration was given to the suggestion of utilising the existing network of interstate liaison officers under the Care and Protection Orders Protocol, it was noted that this group of officers had been established for a specific purpose which does not necessarily relate to issues concerning the interface between the family law and child protection systems.

It was agreed at the meeting that a representative from the Queensland Department of Communities, Child Safety and Disability Services would develop a contact list of officers from state and territory child welfare authorities for dissemination. It was agreed that this department would maintain and distribute this list.

Interagency learning and development

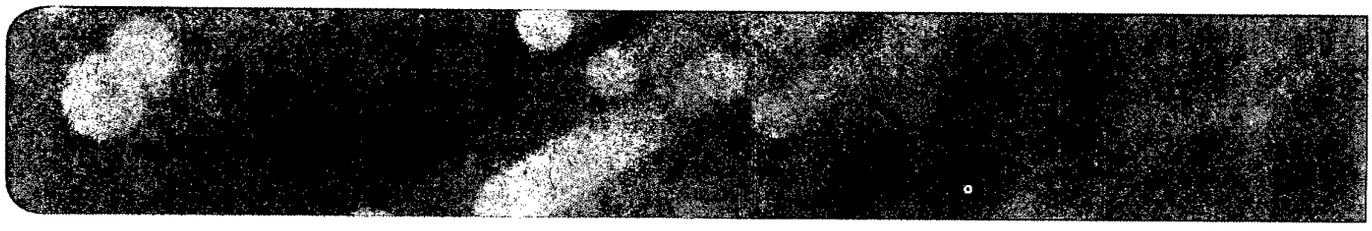
As outlined in Chapter 3, each State and Territory has its own system of child protection laws, which are invoked when parents are determined to be insufficiently protective of a child.[437] The point at which a child welfare authority may intervene to protect a child depends on the legal definition of when a child is 'in need of protection'.[438] Although States and Territories define 'a child in need of protection' (or a child 'at risk') in different ways, the thresholds for statutory intervention are broadly consistent.[439]

In relation to family law proceedings, as noted in Chapter 3 there are three separate provisions under the *Family Law Act 1975* which require the federal family courts to notify a child welfare authority of concerns regarding child abuse. These are sections 67Z, 67ZA, and 67ZBA. Kelly and Fehlberg noted in their 2002 paper (prior to the enactment of section 67ZBA) that these '[n]otification procedures provide state/territory child welfare authorities with the opportunity to assess

437 The Law Reform Commissions' Report, at [19.26].

438 Prue Holzer and Leah Bromfield, *National Child Protection Clearinghouse Resource Sheet April 2010: 'Australian Legal Definition: When is a Child in Need of Protection?'* (Australian Institute of Family Studies, 2010.

439 Ibid.



protective issues arising in family court cases, so that an informed decision can be made whether to intervene in family court proceedings or to have the matter proceed at a state level.'[440]

The Law Reform Commissions' Report notes that under child protection legislation, the threshold for making a mandatory notification is generally higher than the threshold under the Family Law Act.[441] Higgins and Kaspiew state that, '...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'.[442]

Difficulties have arisen in jurisdictions on occasions due to a lack of understanding between the child welfare authorities and the family law courts as to the different thresholds for intervention between the systems. Accordingly, the Department's Options Paper made the following recommendations in relation to interagency learning and development as follows:

> **Recommendation 9** — Officers from State and Territory child welfare authorities should provide training to officers from the Family Court of Australia and the Federal Magistrates Court of Australia in relation to how child welfare authorities determine if a child is need of care and protection or is at risk.
>
> **Recommendation 10** — The Family Court of Australia and the Federal Magistrates Court of Australia should provide training to officers from State and Territory child welfare authorities on the federal family courts and how they operate to reduce concerns of child welfare officers regarding appearances in the family courts.

Recommendation 9 of the Options Paper received significant support from stakeholders, who made the following points.

- Training has been occurring in a number of jurisdictions.
- There is a need for greater understanding as to the assessment of the various tiers of abuse applied by child welfare authorities. It is apparent that the assessment processes between the family law courts and the child welfare authorities are very different and a frank exchange as to how this occurs would be beneficial
- Training needs to be ongoing to compensate for change in personnel.
- Any training by child welfare authorities to officers of the family law courts should be provided to judicial officers, family consultants, Independent Children's Lawyers and other family lawyers. In addition to training, information relating to the various tiers of abuse applied by child welfare authorities may be considered for inclusion in formal Agreements.

440 Fiona Kelly and Belinda Fehlberg, 'Australia's Fragmented Family Law System: Jurisdictional Overlap in the Area of Child Protection' (2002) 16 *International Journal of Law, Policy and the Family* 43.

441 The Law Reform Commissions' Report, at [19.67].

442 Daryl Higgins & Rae Kaspiew, 'Child Protection and family law...Joining the dots' (2011) 34 National Child Protection Clearinghouse Issues, 13.

Recommendation 10 of the Options Paper also received significant support from stakeholders. In particular it was noted that:

- training has been occurring in a number of jurisdictions and that this has been useful in demystifying court processes;
- any training should include Independent Children's Lawyers and other family lawyers in relation to their roles and practices to facilitate and promote collaborative working practices;
- training of officers needs to be ongoing to compensate for change in personnel; and
- consideration must be given to financial resourcing being available.

It is important for stakeholders in the family law and child protection systems to recognise that the systems 'play very different roles and consequently function according to distinct legislative, philosophical and operational imperatives.'[443]

The importance of education and training is emphasised in the Model Agreement, which includes the following clause:

> A collaborative relationship between the parties will be facilitated if personnel understand the legislative requirements and operational methods of each of the parties. Each party will therefore take appropriate measures, in consultation with the other parties, to assist the other parties to understand its legislation, role and objectives. Those measures will include:

- Publishing summaries of relevant legislation on websites or otherwise making them available to the other parties;
- Providing some education or training in areas of particular need;
- Encouraging collaboration in particular cases, for example by means of participation in case conferences;
- Providing mechanisms by which personnel can readily interact with and learn from personnel in different organisations.

443 Daryl Higgins and Rae Kaspiew, 'Mind the Gap...': Protecting Children in Family Law Cases' (2008) 22 *Australian Journal of Family Law* 235, 240

Appendix 1: Model information-sharing agreement

Title

Information-sharing Agreement between the Family Court of Australia, the Federal Magistrates Court, Child Protection and Legal Aid

Purpose

1. This Agreement set out principles and procedures agreed by the parties relating to information-sharing and associated procedural matters. It is a collaborative measure and is not intended to create legal obligations or entitlements.
2. This agreement does not purport to alter the law or interfere with the exercise of jurisdiction by the courts. Its intention is that judicial officers will have regard to the terms of the agreement in circumstances where it is proper for them to do so.

Principles

3. Safeguarding children's safety and promoting their best interests will be facilitated by a free flow of relevant information between the parties, so that decisions affecting children will be based on the best available information.
4. A co-operative working relationship, with appropriate sharing of information, can also reduce conflict and misunderstanding, avoid duplication of effort and resources, and reduce the risk of 'systems abuse' of children.
5. Each party will use effective, practical and efficient procedures to share information with each of the other parties, where the information appears relevant to the other party and where providing it is lawful and reasonably practicable.
6. The information to be shared will include information about steps taken, and if practicable about steps likely to be taken, by each party, and other information, particularly information relating to the particular child, that will assist a party in carrying out its role.
7. The simultaneous involvement of separate courts in issues relating to a particular child can cause added cost, confusion, delay and distress for family members involved, and inefficient and wasteful use of scarce public resources, particularly where one court in effect overrules the previous decision of another. The parties will therefore take all practicable steps to ensure that proceedings relating to a child occur only in one court, being the most suitable court for the particular child or family.

[redacted]

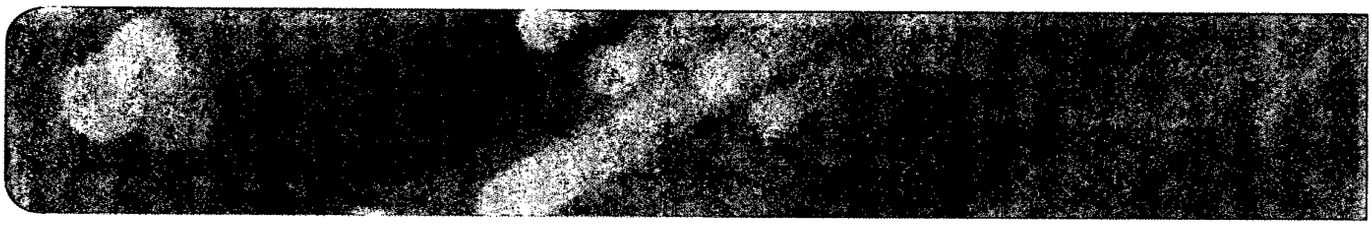
Communication between the parties

8. Subject to any specific provisions of this Agreement relating to particular matters,
   - information intended for Child Protection should be supplied to [specify], and requests for information from Child Protection directed to [specify];
   - information intended for the family courts should be supplied to [specify], and requests for information from a family court directed to [specify]; and
   - information intended for an Independent Children's Lawyer should be directed to [specify].

Child Abuse Notices (s 67Z and 67ZA)

The family court

9. When sending a notice under s 67Z or 67ZA of the Family Law Act 1975 to Child Protection, the family court will, unless the circumstances make it impracticable or inappropriate:
   - make an order granting Child Protection leave to inspect the court file and send a copy of the order to Child Protection;
   - provide (in addition to the information contained in the Child Abuse Notice) details of the next date on which the matter will come before the court, and any orders that have been made or sought by any party or Independent Children's Lawyer;
   - in the case of a notice under s 67ZA, provide a summary of the nature of the officer's concerns (including whether the concern relates to past abuse or a current risk of abuse) and the reasons for them; and
   - specify the person responsible for further communications with Child Protection relating to the matter and the manner of such communications (eg telephone, email).
10. After sending a notice under s 67Z or 67ZA to Child Protection,
    - The family court will specify the person or body from whom Child Protection can obtain information about developments likely to be relevant to its work, such as orders made, subpoenas issued, proceedings discontinued, significant amendment of orders sought by parties and significant reports becoming available.
    - So far as possible, the family court will keep Child Protection informed whether subpoenas have been or are likely to be issued in relation to Child Protection, and whether s 69ZW orders have been made or are likely to be made.
    - The family court will take into account any views expressed by Child Protection relating to the issuing of subpoenas and the making of s 69ZW orders and the time it might need to respond to them.
    - In order to guard against the risk of adding unnecessarily to the Child Protection's work, the family court will ensure that steps taken by Independent Children's Lawyers will not duplicate steps taken by others on behalf of the court.



Child Protection

11. On receipt of a notice under s 67Z or 67ZA, Child Protection will, unless the circumstances make it impracticable or inappropriate:
    - Acknowledge receipt of the notification and accompanying information;
    - As soon as possible, indicate whether it has been or is likely to become involved with the child or the family, what steps, if any, it has taken or proposes to take in relation to the matter, details of any current child protection orders, and any other available information that would be likely to assist the family court; and
    - Specify the person or body responsible for further communications with Child Protection relating to the matter.
12. After receiving a notice under s 67Z or 67ZA from the family court, Child Protection will, so far as practicable, respond to any requests for information relevant to the family court proceedings, such as information about investigations commenced or discontinued, relevant proceedings in the children's court, and significant assessments or reports becoming available.

Family Court orders requesting information from Child Protection

13. When a family court has reason to believe that Child Protection has information that may assist in a particular case, it will consider making an order requesting information from Child Protection in terms such as the following:
    - The [Specify, eg Independent Children's Lawyer or Family Consultant] is requested to liaise with Child Protection to ascertain the existence of any relevant documentation in relation to this case, and officers of [Child Protection] are requested to provide information that would assist the court understand the extent of [Child Protection's] involvement in the matter, including, in particular:
        (i) whether [Child Protection] has a file in relation to the matter
        (ii) the date that the file was opened
        (iii) the most recent intervention by [Child Protection] in relation to the matter
        (iv) the current status of any ongoing interventions by [Child Protection]
        (v) the estimated time frame for the completion of those interventions; and
        (vi) to the extent practicable, the nature of the documents on the [Child Protection] file/s.
    - The [Specify, eg Independent Children's Lawyer or Family Consultant] will promptly advise [Child Protection] of the order by [specify means eg email] and will seek the information from [specify Child Protection officer or department].
    - The responsible officers in Child Protection will use their best endeavours to provide the information promptly.

Appendix 1

- Upon receipt of such information, the [specify, eg Independent Children's Lawyer or Family Consultant] will report to the Court, at the next hearing date, and seek any appropriate orders for the production of such documents or otherwise. The Court will attempt to ensure that any such orders do not involve Child Protection in avoidable use of resources.

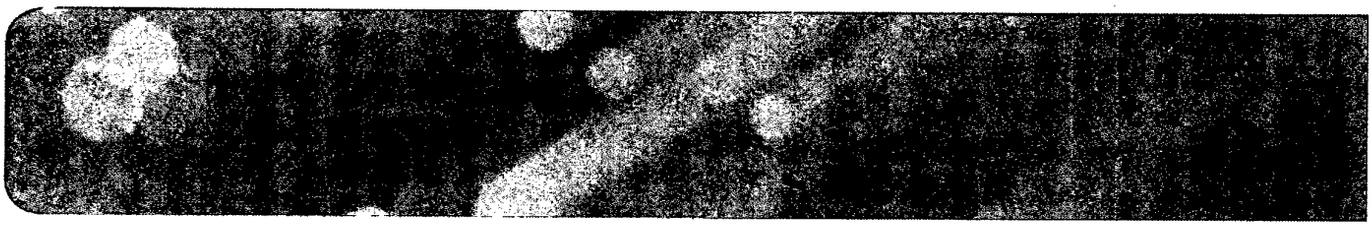
Subpoenas and Family Court orders requiring information (s 69ZW)

General

14. Child Protection will respond as promptly and completely as possible to subpoenas and s 69ZW orders.
15. Recognising that subpoenas and s 69ZW orders are different ways for the family courts to obtain documents or information from Child Protection, the family court will take into account Child Protection's views about the resource implications of each method, and will seek to ensure that the choice between subpoenas and s 69ZW orders, and the way they are drafted and processed, will as far as possible minimise the time and resources Child Protection needs in order to comply with them. In particular, the family courts will avoid a situation in which s 69ZW orders and subpoenas both require production of the same documents.
16. The parties will explore ways of avoiding undue formality associated with the provision of documents and information to the family courts in connection with subpoenas and s 69ZW orders.
17. The family courts will make appropriate use of Family Consultants and Independent Children's Lawyers in connection with subpoenas or s 69ZW orders.
18. The family courts will seek to ensure that subpoenas and/or s 69ZW orders identify only those documents really required for the family court proceedings.

Requests for Child Protection to intervene in family court proceedings (s91B)

19. Unless there are reasons for not doing so, the family court will, when making a s 91B order:
    - indicate that the court is concerned that a child is likely to be exposed to a serious risk of harm if Child Protection does not intervene (as, for example, where it appears that the court may be unable to place the child with a viable carer);
    - indicate the nature of the risk and the reasons for such concern;
    - indicate the reasons for believing that the risk would not be averted by Child Protection providing information to the court or contributing in other ways without intervening; and
    - ensure that Child Protection has been provided with copies of any orders made in the proceedings, and information about the next steps to be taken in the proceedings;
    - take all other appropriate steps to ensure that Child Protection has appropriate access to any relevant information held by the family court (including making an order permitting Child Protection to inspect the Court file and make copies of relevant documents);
    - specify the person or body within the family court to whom Child Protection should respond, and with whom Child Protection should continue to communicate in relation to the matter;



20. The family courts will collaborate with Child Protection to develop check-lists or other such measures to assist judges to identify relevant matters when making s 91B orders, and to formulate them in a way that will assist Child Protection in considering the request.

21. On receipt of a s 91B request, Child Protection will

    - promptly acknowledge receipt of the request, and indicate the person or body with whom the family court should thereafter communicate in relation to the matter;
    - as soon as practicable, will respond to the request by indicating
        - whether Child Protection intends to intervene in the proceedings;
        - what other steps if any Child Protection intends to take in relation to the matter;
        - if decisions remain to be made, what steps are being contemplated and when it is likely that such decisions will be made; and
        - what involvement, if any, Child Protection has had in relation to the child, and what information is held in relation to the matter; and
    - in cases where it is unable to respond within [specify time frame], advise the court of the reasons, and the time within which it will respond.

Recovery orders

22. Wherever possible, especially if it appears that Child Protection might have been involved with the matter, the family courts should consult with and share relevant information with Child Protection before making recovery orders.

Referral of person to a family court

23. If Child Protection has been involved with a family and has suggested that a person should seek parenting orders from a family court, it will so advise the family court and, if the family court requests, share relevant information with the family court.

Independent Children's Lawyers

General

24. Independent Children's Lawyers will take care to ensure that in seeking or providing information to Child Protection, and in other matters, they do not duplicate what has been done by other personnel.

On appointment

25. On appointment, the Independent Children's Lawyer will write to Child Protection advising of his or her appointment, and providing identifying details relating to the case.

26. Where the Independent Children's Lawyer is not aware of any actual or contemplated involvement by Child Protection, the letter will indicate that the Independent Children's Lawyer will provide information about the family court proceedings if Child Protection requests it.

Appendix 1

27. If the Independent Children's Lawyer has reason to believe that Child Protection has been involved with the family, or considers that such involvement is desirable or likely, the initial letter will also provide the following information (so far as it is known to the Independent Children's Lawyer):

    - Any notifications that have been made under s 67Z or 67ZA;
    - Whether any subpoenas have been issued, or are likely to be issued, to Child Protection;
    - Whether any orders have been made, or are likely to be made, under s 91B;
    - Whether any orders have been made, or are likely to be made, under s 69ZW;
    - Information about the next steps in the family court proceedings, notably the dates and times of future court hearings or mentions;
    - Whether the Independent Children's Lawyer is concerned for the immediate safety or welfare of the child, and the basis of such concern;
    - Any other information about the family court proceedings or the circumstances of the case that the Independent Children's Lawyer considers is likely to be helpful to Child Protection.

Sharing information

28. Independent Children's Lawyers should keep Child Protection informed if they have information that might reasonably be required by Child Protection, and should provide such information on request if doing so is reasonably practicable, and is not legally prohibited.

Collaborative decision-making

29. Where practicable, Child Protection and Independent Children's Lawyers should collaborate, for example in relation to Child Protection's decisions about what steps to take, for example advising family members such as 'viable carers' about taking family court proceedings, seeking to appear in family court proceedings as amicus curiae, intervening in family court proceedings (whether or not after a s 91B request), and commencing or continuing children's court proceedings.

Encouragement of informal collaboration

30. This agreement is intended to support rather than inhibit open and collaborative relationships between the parties and their personnel at the operational level, and the development of other agreed measures (including local arrangements) that are consistent with the principles stated above.

Education and training

31. A collaborative relationship between the parties will be facilitated if personnel understand the legislative requirements and operational methods of each of the parties. Each party will therefore take appropriate measures, in consultation with the other parties, to assist the other parties to understand its legislation, role and objectives. Those measures will include:

- Publishing summaries of relevant legislation on websites or otherwise making them available to the other parties;
- Providing some education or training in areas of particular need;
- Encouraging collaboration in particular cases, for example by means of participation in case conferences;
- Providing mechanisms by which personnel can readily interact with and learn from personnel in different organisations.

Implementation of this agreement

32. This Agreement will be prominently displayed in a form readily available to personnel of each party, for example by having a conspicuous presence on each party's Intranet.
33. This Agreement will be published in a form readily available to those affected by it, for example legal practitioners and family counsellors, and to the public (for example by inclusion on the public websites of the relevant agencies).
34. Each party will ensure that this Agreement is given appropriate attention in staff training and supervision.
35. The operation of this agreement will be monitored by a committee comprising at least one representative from each party, namely [specify]. The committee will invite personnel to keep them informed about the operation of the agreement, and about any difficulties that arise. The Committee will prepare and publish a report at least once in each twelve-month period commencing on the date of the agreement, making any appropriate recommendations.

Appendix 1

Notes to Model Agreement

General

The 'model agreement' is intended only to provide a starting-point, indicating one of the many ways of stating information-sharing principles and procedures. Obviously, the parties will want to draft an agreement that reflects their own intentions, and the result will no doubt vary from one jurisdiction to another.

The draft generally reflects the discussion in other parts of this Report, especially in chapters Five and Six. These notes merely add some comments on particular points.

Title

As discussed in Chapter Five, the suggested title indicates the purpose of the document, information-sharing, and the fact that it is an agreement, and avoids the somewhat technical terms 'Memorandum of Understanding' and 'Protocol', again for reasons set out in that chapter.

Parties, purpose and principles

These clauses draw on the discussion in Chapter Five. For reasons explained there, this model Agreement has four parties — The Family Court of Australia (in Western Australia the Family Court of Western Australia), the Federal Magistrates Court, Child Protection and Legal Aid — although of course it could be adapted to other parties. The appropriate titles can be substituted for the generic terms 'Child Protection', and 'Legal Aid', and if the generic term 'family court' is used, the draft should indicate that it includes the Federal Magistrates Court. The formulation of principles draws on existing agreements, the literature, and stakeholder responses to the Department's Options Paper.

Principle 4 refers to the lawful provision of information. As discussed in Chapter 4, identifying what information may lawfully be disclosed involves reference to state laws, which differ between jurisdictions. Consistently with the position taken in Chapter Five, however, agreements should not attempt to spell out the law, on this or on other topics.

Child Abuse Notices (s 67Z and 67ZA)

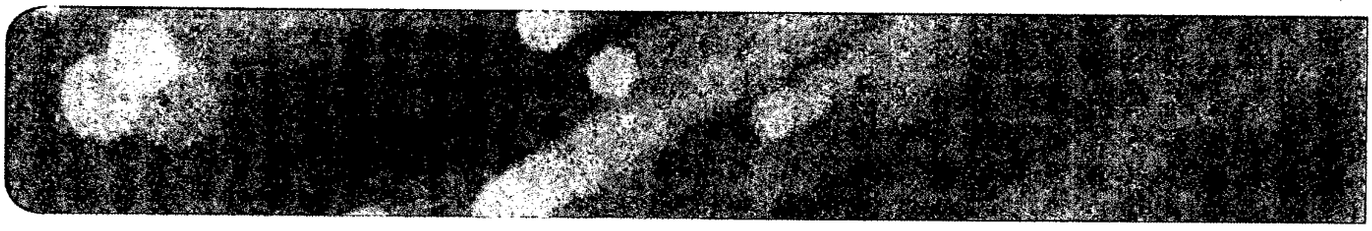
See generally the discussion in Chapter 7 (which also refers to s 67ZBA).

If the draft paragraph 10 is thought to impose too great a burden on Child Protection, it could be revised to omit anticipated actions, thus:

- As soon as possible, indicate whether it has been ~~or is likely to become~~ involved with the child or the family, what steps, if any, it has taken ~~or proposes to take~~ in relation to the matter, details of any current child protection orders, and any other available information that would be likely to assist the family court [...]

Family Court orders requesting information from Child Protection

This draws on the Western Australia Agreement clauses dealing with 'Pre s 69ZW orders'. The practice in Western Australia is that when such orders are made the Family Consultant or



Independent Children's Lawyer telephones Child Protection and identifies the relevant documents, which are then specified in the s 69ZW order. The specified documents are downloaded from the electronic filing system and provided to the court. This practice is thought to minimise the time and labour used, by reducing reliance on subpoenas and helping ensure that subpoenas, when used, are narrowly drafted.

Subpoenas and Family Court orders requiring information (s 69ZW)

As noted in Chapter Six, stakeholder advice indicated considerable variation in practices and preferences relating to subpoenas and s 69ZW orders. The model agreement therefore contains some fairly general provisions. These overlap somewhat with the more specific proposals, such as those for pre-s 69ZW orders. It is expected that jurisdictions may differ in relation to this topic, and may wish to adapt only some of the suggested clauses, or, may of course prefer differently drafted clauses. The parties may also wish to deal with other topics not treated in the draft, for example conduct money.

Requests for Child Protection to intervene in family court proceedings (s91B)

As discussed in Chapter Six, the operation of s 91B appears to have been the source of difficulty and perhaps misunderstanding. It is hoped that the discussion in that Chapter, and these clauses of the model agreement, will help to ease these difficulties.

For reasons discussed in Chapter Five, the Agreement could not restrict the exercise of judicial discretion, and should not purport to do so. Instead, as explained in Chapter Five, it contains agreed principles and measures which judges can properly consider in exercising jurisdiction. If the wording of the opening clause is seen as attempting to direct judges, however, other opening words could be used, such as:

> *'Child Protection can reasonably expect that a court making a s 91B request will normally...'*
>
> *'Child Protection will normally be more likely to intervene if...'*

Education and training

These provisions are consistent with the recommendation in Chapter Five, that the task of education and training should be conducted separately from Agreements, but should be encouraged by Agreements. As noted in Chapter Five, a great deal of the sort of material in existing Agreements would be very suitable for that educational task.

Encouragement of informal collaboration

This paragraph picks up the idea from the Victorian Agreement — see Chapter Five.

Independent Children's Lawyers

These paragraphs reflect the discussion of Independent Children's Lawyers in Chapter Six and are influenced by existing agreements, especially the New South Wales Agreement between Child Protection and Legal Aid.

Appendix 1

Review and amendment of the agreement

The model does not include provisions of some existing agreements relating to the resolution of disputes; the formulation relating to monitoring and reviewing seeks to achieve that objective in a more optimistic vein. If such provision is to be included, however, it would be valuable for it to focus on mediation as a suitable mechanism, and, perhaps, nominate a mediator or mediators.

An alternative drafting option: standardised information-sharing provisions

Reflecting existing Agreements, the Model Agreement deals separately with information-sharing in particular situations, leading to some possible repetition. An alternative drafting approach, seeking to avoid this problem, could provide for some standardised information-sharing arrangements to apply when actions have been taken under any of the relevant legislative provisions. (Of course there would still be a need to make provision for some aspects of particular provisions, such as the circumstances in which the family courts will make an s 91B request.) By way of illustration, such a drafting approach might lead to something like this:

"Standard information-sharing arrangements

1. *Information-sharing arrangements relating to a child or family will apply between a family court and Child Protection*

   (a) *when a family court has, in relation to the child or family*

      (i) *notified Child Protection under s 67Z or s 67ZA;*

      (ii) *issued a subpoena to Child Protection;*

      (iii) *made a s 69ZW order directed to Child Protection; or*

      (iv) *made an order requesting an Independent Children's Lawyer, Court Counsellor or other person to obtain information from Child Protection; and also*

   (b) *when Child Protection has applied for leave to inspect a family court file relating to a child or family.*

2. *When information-sharing arrangements apply in relation to a child or family,*

   (a) *The family court and Child Protection will each promptly inform the other of the name and contact details of the person or body responsible for sharing information, and the appropriate means of communication (eg fax, email).*

   (b) *The family court and Child Protection will each provide to the other, on request, information relating to relevant developments, such as court orders made or applied for, proceedings commenced or discontinued, investigations conducted, reports or assessments made, and the possession of relevant documents. [etc.]*

Appendix 2: Selected provisions of the Family Law Act

67ZA Where member of the Court personnel, family counsellor, family dispute resolution practitioner or arbitrator suspects child abuse etc.

(1) This section applies to a person in the course of performing duties or functions, or exercising powers, as:

(a) the Registrar or a Deputy Registrar of a Registry of the Family Court of Australia; or

(b) the Registrar or a Deputy Registrar of the Family Court of Western Australia; or

(c) a Registrar of the Federal Magistrates Court; or

(d) a family consultant; or

(e) a family counsellor; or

(f) a family dispute resolution practitioner; or

(g) an arbitrator; or

(h) a lawyer independently representing a child's interests.

(2) If the person has reasonable grounds for suspecting that a child has been abused, or is at risk of being abused, the person must, as soon as practicable, notify a prescribed child welfare authority of his or her suspicion and the basis for the suspicion.

(3) If the person has reasonable grounds for suspecting that a child:

(a) has been ill treated, or is at risk of being ill treated; or

(b) has been exposed or subjected, or is at risk of being exposed or subjected, to behaviour which psychologically harms the child;

the person may notify a prescribed child welfare authority of his or her suspicion and the basis for the suspicion.

Note: The obligation under subsection (2) to notify a prescribed child welfare authority of a suspicion that a child has been abused or is at risk of being abused must be complied with, regardless of whether this subsection also applies to the same situation.

(4) The person need not notify a prescribed child welfare authority of his or her suspicion that a child has been abused, or is at risk of being abused, if the person knows that the authority has previously been notified about the abuse or risk under subsection (2) or subsection 67Z(3), but the person may notify the authority of his or her suspicion.

(5) If notice under this section is given orally, written notice confirming the oral notice is to be given to the prescribed child welfare authority as soon as practicable after the oral notice.

(6) If the person notifies a prescribed child welfare authority under this section or subsection 67Z(3), the person may make such disclosures of other information as the person reasonably believes are necessary to enable the authority to properly manage the matter the subject of the notification.

67ZB No liability for notification under section 67Z or 67ZA

(1) A person:

(a) must give notice under subsection 67Z(3) or 67ZA(2); or

(b) may give notice under subsection 67ZA(3) or (4); or

(c) may disclose other information under subsection 67ZA(6);

in spite of any obligation of confidentiality imposed on the person by this Act, another Act, another law or anything else (including a contract or professional ethics).

(2) A person is not liable in civil or criminal proceedings, and is not to be considered to have breached any professional ethics, in respect of a notification under subsection 67Z(3) or 67ZA(2).

(3) A person is not liable in civil or criminal proceedings, and is not to be considered to have breached any professional ethics, in respect of a notification under subsection 67ZA(3) or (4), or a disclosure under subsection 67ZA(6), if the notification or disclosure is made in good faith.

(4) Evidence of a notification under subsection 67Z(3) or subsection 67ZA(2), (3) or (4), or a disclosure under subsection 67ZA(6), is not admissible in any court except where that evidence is given by the person who made the notification or disclosure.

(5) In this section:

court means a court (whether or not exercising jurisdiction under this Act) and includes a tribunal or other body concerned with professional ethics.

67ZBA Where interested person makes allegation of family violence

(1) This section applies if an interested person in proceedings for an order under this Part in relation to a child alleges, as a consideration that is relevant to whether the court should make or refuse to make the order, that:

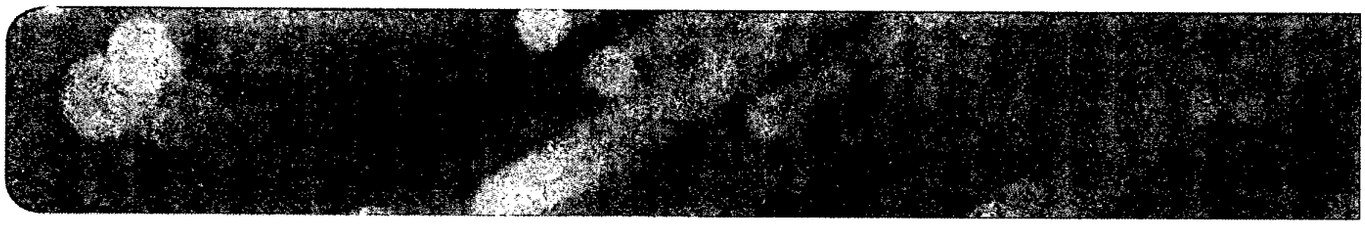
(a) there has been family violence by one of the parties to the proceedings; or

(b) there is a risk of family violence by one of the parties to the proceedings.

(2) The interested person must file a notice in the prescribed form in the court hearing the proceedings, and serve a true copy of the notice upon the party referred to in paragraph (1)(a) or (b).

(3) If the alleged family violence (or risk of family violence) is abuse of a child (or a risk of abuse of a child):

(a) the interested person making the allegation must either file and serve a notice under subsection (2) of this section or under subsection 67Z(2) (but does not have to file and serve a notice under both those subsections); and



(b) if the notice is filed under subsection (2) of this section, the Registry Manager must deal with the notice as if it had been filed under subsection 67Z(2).

Note: If an allegation of abuse of a child (or a risk of abuse of a child) relates to a person who is not a party to the proceedings, the notice must be filed in the court and served on the person in accordance with subsection 67Z(2).

(4) In this section:

interested person in proceedings for an order under this Part in relation to a child, means:

(a) a party to the proceedings; or

(b) an Independent Children's Lawyer who represents the interests of the child in the proceedings; or

(c) any other person prescribed by the regulations for the purposes of this paragraph.

prescribed form means the form prescribed by the applicable Rules of Court.

Registry Manager has the same meaning as in section 67Z.

67ZBB Court to take prompt action in relation to allegations of child abuse or family violence

(1) This section applies if:

(a) a notice is filed under subsection 67Z(2) or 67ZBA(2) in proceedings for an order under this Part in relation to a child; and

(b) the notice alleges, as a consideration that is relevant to whether the court should make or refuse to make the order, that:

(i) there has been abuse of the child by one of the parties to the proceedings; or

(ii) there would be a risk of abuse of the child if there were to be a delay in the proceedings; or

(iii) there has been family violence by one of the parties to the proceedings; or

(iv) there is a risk of family violence by one of the parties to the proceedings.

(2) The court must:

(a) consider what interim or procedural orders (if any) should be made:

(i) to enable appropriate evidence about the allegation to be obtained as expeditiously as possible; and

(ii) to protect the child or any of the parties to the proceedings; and

(b) make such orders of that kind as the court considers appropriate; and

(c) deal with the issues raised by the allegation as expeditiously as possible.

(3) The court must take the action required by paragraphs (2)(a) and (b):

(a) as soon as practicable after the notice is filed; and

(b) if it is appropriate having regard to the circumstances of the case—within 8 weeks after the notice is filed.

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(4) Without limiting subparagraph (2)(a)(i), the court must consider whether orders should be made under section 69ZW to obtain documents or information from State and Territory agencies in relation to the allegation.

(5) Without limiting subparagraph (2)(a)(ii), the court must consider whether orders should be made, or an injunction granted, under section 68B.

(6) A failure to comply with a provision of this section does not affect the validity of any order made in the proceedings for the order.

68LA Role of Independent Children's Lawyer

When section applies

(1) This section applies if an Independent Children's Lawyer is appointed for a child in relation to proceedings under this Act.

General nature of role of Independent Children's Lawyer

(2) The Independent Children's Lawyer must:

(a) form an independent view, based on the evidence available to the Independent Children's Lawyer, of what is in the best interests of the child; and

(b) act in relation to the proceedings in what the Independent Children's Lawyer believes to be the best interests of the child.

(3) The Independent Children's Lawyer must, if satisfied that the adoption of a particular course of action is in the best interests of the child, make a submission to the court suggesting the adoption of that course of action.

(4) The Independent Children's Lawyer:

(a) is not the child's legal representative; and

(b) is not obliged to act on the child's instructions in relation to the proceedings.

Specific duties of Independent Children's Lawyer

(5) The Independent Children's Lawyer must:

(a) act impartially in dealings with the parties to the proceedings; and

(b) ensure that any views expressed by the child in relation to the matters to which the proceedings relate are fully put before the court; and

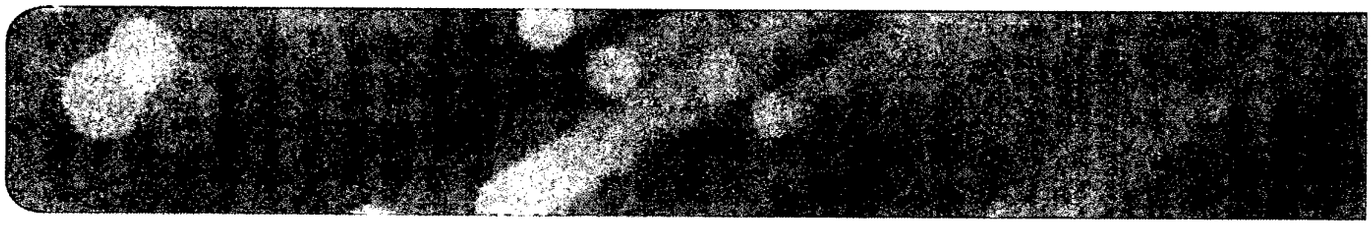
(c) if a report or other document that relates to the child is to be used in the proceedings:

(i) analyse the report or other document to identify those matters in the report or other document that the Independent Children's Lawyer considers to be the most significant ones for determining what is in the best interests of the child; and

(ii) ensure that those matters are properly drawn to the court's attention; and

(d) endeavour to minimise the trauma to the child associated with the proceedings; and

(e) facilitate an agreed resolution of matters at issue in the proceedings to the extent to which doing so is in the best interests of the child.



Disclosure of information

(6) Subject to subsection (7), the Independent Children's Lawyer:

(a) is not under an obligation to disclose to the court; and

(b) cannot be required to disclose to the court;

any information that the child communicates to the Independent Children's Lawyer.

(7) The Independent Children's Lawyer may disclose to the court any information that the child communicates to the Independent Children's Lawyer if the Independent Children's Lawyer considers the disclosure to be in the best interests of the child.

(8) Subsection (7) applies even if the disclosure is made against the wishes of the child.

69ZK Child welfare laws not affected

(1) A court having jurisdiction under this Act must not make an order under this Act (other than an order under Division 7) in relation to a child who is under the care (however described) of a person under a child welfare law unless:

(a) the order is expressed to come into effect when the child ceases to be under that care; or

(b) the order is made in proceedings relating to the child in respect of the institution or continuation of which the written consent of a child welfare officer of the relevant State or Territory has been obtained.

(2) Nothing in this Act, and no decree under this Act, affects:

(a) the jurisdiction of a court, or the power of an authority, under a child welfare law to make an order, or to take any other action, by which a child is placed under the care (however described) of a person under a child welfare law; or

(b) any such order made or action taken; or

(c) the operation of a child welfare law in relation to a child.

(3) If it appears to a court having jurisdiction under this Act that another court or an authority proposes to make an order, or to take any other action, of the kind referred to in paragraph (2)(a) in relation to a child, the first-mentioned court may adjourn any proceedings before it that relate to the child.

69ZW Evidence relating to child abuse or family violence

(1) The court may make an order in child-related proceedings requiring a prescribed State or Territory agency to provide the court with the documents or information specified in the order.

(2) The documents or information specified in the order must be documents recording, or information about, one or more of these:

(a) any notifications to the agency of suspected abuse of a child to whom the proceedings relate or of suspected family violence affecting the child;

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(b) any assessments by the agency of investigations into a notification of that kind or the findings or outcomes of those investigations;

(c) any reports commissioned by the agency in the course of investigating a notification.

(3) Nothing in the order is to be taken to require the agency to provide the court with:

(a) documents or information not in the possession or control of the agency; or

(b) documents or information that include the identity of the person who made a notification.

(4) A law of a State or Territory has no effect to the extent that it would, apart from this subsection, hinder or prevent an agency complying with the order.

(5) The court must admit into evidence any documents or information, provided in response to the order, on which the court intends to rely.

(6) Despite subsection (5), the court must not disclose the identity of the person who made a notification, or information that could identify that person, unless:

(a) the person consents to the disclosure; or

(b) the court is satisfied that the identity or information is critically important to the proceedings and that failure to make the disclosure would prejudice the proper administration of justice.

(7) Before making a disclosure for the reasons in paragraph (6)(b), the court must ensure that the agency that provided the identity or information:

(a) is notified about the intended disclosure; and

(b) is given an opportunity to respond.

91B Intervention by child welfare officer

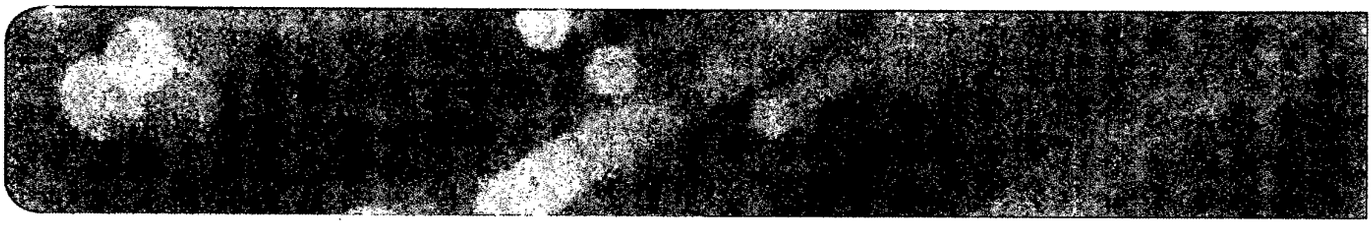
(1) In any proceedings under this Act that affect, or may affect, the welfare of a child, the court may request the intervention in the proceedings of an officer of a State, of a Territory or of the Commonwealth, being the officer who is responsible for the administration of the laws of the State or Territory in which the proceedings are being heard that relate to child welfare.

(2) Where the court has, under subsection (1), requested an officer to intervene in proceedings:

(a) he officer may intervene in those proceedings; and

(b) where the officer so intervenes, the officer shall be deemed to be a party to the proceedings with all the rights, duties and liabilities of a party.

Note: If an officer intervenes in proceedings and acts in good faith in relation to the proceedings, an order for costs, or for security for costs, cannot be made under subsection 117(2) against the officer: see subsection 117(4A).



92 Intervention by other persons

(1) In proceedings (other than divorce or validity of marriage proceedings), any person may apply for leave to intervene in the proceedings, and the court may make an order entitling that person to intervene in the proceedings.

(1A) In divorce or validity of marriage proceedings, a person in relation to whom an order has been made under subsection 69W(1) requiring a parentage testing procedure to be carried out may apply for leave to intervene in the proceedings, and the court may make an order entitling the person to intervene in the proceedings.

(2) An order under this section may be made upon such conditions as the court considers appropriate.

(3) Where a person intervenes in any proceedings by leave of the court the person shall, unless the court otherwise orders, be deemed to be a party to the proceedings with all the rights, duties and liabilities of a party.

92A Intervention in child abuse cases

(1) This section applies to proceedings under this Act in which it has been alleged that a child has been abused or is at risk of being abused.

(2) Each of the following persons is entitled to intervene in the proceedings:

(a) a guardian of the child;

(b) a parent of the child with whom the child lives;

(ba) a person with whom the child is to live under a parenting order;

(bb) a person who has parental responsibility for the child under a parenting order;

(c) any other person responsible for the care, welfare or development of the child;

(d) a prescribed child welfare authority;

(e) a person who is alleged to have abused the child or from whom the child is alleged to be at risk of abuse.

(3) Where a person intervenes in proceedings pursuant to this section, the person is, unless the court otherwise orders, to be taken to be a party to the proceedings with all the rights, duties and liabilities of a party.

121 Restriction on publication of court proceedings

(1) A person who publishes in a newspaper or periodical publication, by radio broadcast or television or by other electronic means, or otherwise disseminates to the public or to a section of the public by any means, any account of any proceedings, or of any part of any proceedings, under this Act that identifies:

(a) a party to the proceedings;

(b) a person who is related to, or associated with, a party to the proceedings or is, or is alleged to be, in any other way concerned in the matter to which the proceedings relate; or

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(c) a witness in the proceedings;

is guilty of an offence punishable, upon conviction by imprisonment for a period not exceeding one year.

(2) A person who, except as permitted by the applicable Rules of Court, publishes in a newspaper or periodical publication, by radio broadcast or television or by other electronic means, or otherwise disseminates to the public or to a section of the public by any means (otherwise than by the display of a notice in the premises of the court), a list of proceedings under this Act, identified by reference to the names of the parties to the proceedings, that are to be dealt with by a court is guilty of an offence punishable, upon conviction by imprisonment for a period not exceeding one year.

(3) Without limiting the generality of subsection (1), an account of proceedings, or of any part of proceedings, referred to in that subsection shall be taken to identify a person if:

(a) it contains any particulars of:

(i) the name, title, pseudonym or alias of the person;

(ii) the address of any premises at which the person resides or works, or the locality in which any such premises are situated;

(iii) the physical description or the style of dress of the person;

(iv) any employment or occupation engaged in, profession practised or calling pursued, by the person or any official or honorary position held by the person;

(v) the relationship of the person to identified relatives of the person or the association of the person with identified friends or identified business, official or professional acquaintances of the person;

(vi) the recreational interests, or the political, philosophical or religious beliefs or interests, of the person; or

(vii) any real or personal property in which the person has an interest or with which the person is otherwise associated;

being particulars that are sufficient to identify that person to a member of the public, or to a member of the section of the public to which the account is disseminated, as the case requires;

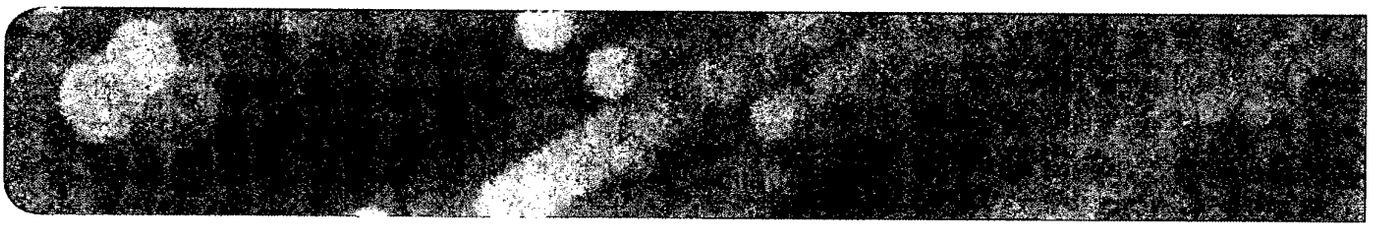
(b) in the case of a written or televised account or an account by other electronic means — it is accompanied by a picture of the person; or

(c) in the case of a broadcast or televised account or an account by other electronic means — it is spoken in whole or in part by the person and the person's voice is sufficient to identify that person to a member of the public, or to a member of the section of the public to which the account is disseminated, as the case requires.

(4) A reference in subsection (1) or (2) to proceedings shall be construed as including a reference to proceedings commenced before the commencement of section 72 of the Family Law Amendment Act 1983.

(5) An offence against this section is an indictable offence.

(6)–(7) (Omitted by No 37 of 1991, s 20 and Sch.)



(8) Proceedings for an offence against this section shall not be commenced except by, or with the written consent of, the Director of Public Prosecutions.

(9) The preceding provisions of this section do not apply to or in relation to:

(a) the communication, to persons concerned in proceedings in any court, of any pleading, transcript of evidence or other document for use in connection with those proceedings; or

(b) the communication of any pleading, transcript of evidence or other document to:

(i) a body that is responsible for disciplining members of the legal profession in a State or Territory; or

(ii) persons concerned in disciplinary proceedings against a member of the legal profession of a State or Territory, being proceedings before a body that is responsible for disciplining members of the legal profession in that State or Territory; or

(c) the communication, to a body that grants assistance by way of legal aid, of any pleading, transcript of evidence or other document for the purpose of facilitating the making of a decision as to whether assistance by way of legal aid should be granted, continued or provided in a particular case; or

(d) the publishing of a notice or report in pursuance of the direction of a court; or

(da) the publication by the court of lists of proceedings under this Act, identified by reference to the names of the parties, that are to be dealt with by the court; or

(e) the publishing of any publication bona fide intended primarily for use by the members of any profession, being:

(i) a separate volume or part of a series of law reports; or

(ii) any other publication of a technical character; or

(f) the publication or other dissemination of an account of proceedings or of any part of proceedings:

(i) to a person who is a member of a profession, in connection with the practice by that person of that profession or in the course of any form of professional training in which that person is involved; or

(ia) to an individual who is a party to any proceedings under this Act, in connection with the conduct of those proceedings; or

(ii) to a person who is a student, in connection with the studies of that person; or

(g) publication of accounts of proceedings, where those accounts have been approved by the court.

(10) Applicable Rules of Court made for the purposes of subsection (2) may be of general or specially limited application or may differ according to differences in time, locality, place or circumstance.

Note: Powers to make Rules of Court are also contained in sections 26B, 37A, 109A and 123.

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(11) In this section:

court includes:

(a) an officer of a court investigating or dealing with a matter in accordance with this Act, the regulations or the Rules of Court; and

(b) a tribunal established by or under a law of the Commonwealth, of a State or of a Territory.

electronic means includes:

(a) in the form of data, text or images by means of guided and/or unguided electromagnetic energy; or

(b) in the form of speech by means of guided and/or unguided electromagnetic energy, where the speech is processed at its destination by an automated voice recognition system.

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