A REPORT BY PROFESSOR RICHARD CHISHOLM AM
FOR THE ATTORNEY-GENERAL'S DEPARTMENT

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THE SHARING OF EXPERTS' REPORTS BETWEEN THE CHILD PROTECTION SYSTEM AND THE FAMILY LAW SYSTEM

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Recommendation 1: Review of Family Law Act s 121

The Commonwealth should review the wording of s 121 and consider the desirability of an amendment that would, to remove doubt, state explicitly that it does not apply to the provision of information to the child protection system.

Recommendation 2: Review of certain provisions prohibiting publication of children's court proceedings

State and territory legislatures should where necessary ensure that any provision in their child protection legislation designed to prevent publication of children's court cases to the public is worded so that it does not forbid the sharing of experts' reports in children's court cases with the family law system. In particular, the following provisions should be reviewed: *Children's Protection Act 1993 (SA), s 59A; Child Protection Act 1999 (Qld) s 192; Care and Protection of Children Act (NT) s 97.*

Recommendation 3: Review of certain provisions prohibiting the disclosure of information obtained while administering the Child Protection legislation

State and territory legislatures should urgently review the provisions in child protection legislation that prohibit disclosure of information gained in administering the legislation to ensure that they do not forbid the sharing of experts' reports held by the child protection authority or the children's courts in children's cases with the family law system. [Those provisions are Children, Youth and Families Act 2005 (Vic) ss 205, 206; Child Protection Act 1999 (Qld), s 187; Children's Protection Act 1993 (SA), s 58; Children and Community Services Act 2004 (WA), ss 139, 141; Children, Young Persons and Their Families Act 1997 (Tas), s 103; Children and Young People Act 2008 (ACT), especially ss 846, 865; Care and Protection of Children Act (NT) s 195.]

Recommendation 4: Sharing of experts' reports generally

(1) The recommendations for information-sharing between the family law system and the child protection system contained in the *Information-Sharing Report* should be treated as generally applicable to experts' reports where such sharing is clearly permitted by law.

(2) Having regard to the state of the law at the date of this report, the following arrangements should be made for the sharing of experts' reports between the family courts and independent children's lawyers (the family law system), legal aid commissions, and children's courts and child protection authorities (the child protection system):

- experts' reports provided to a family court or a children's court should be shared with the other system when such sharing is authorised by legislation or by court orders; and
- experts' reports prepared for the child protection authorities and not filed in court should be shared unless such sharing is prohibited under the relevant state or territory child protection legislation.

(3) Responsible authorities in the family law and child protection systems should consider whether sharing arrangements might usefully be extended to include

- individually commissioned experts' reports in the family courts or the children's courts where the commissioning party consents to the sharing, and
- experts' reports that have been admitted into evidence in the family courts or the children's courts

even where the sharing of such reports is not specifically authorised by legislation or court orders.

Recommendation 5: Legislative encouragement of information-sharing

State and territory legislatures other than New South Wales[78] should consider passing legislation that positively authorises, encourages or requires the child protection to share experts' reports with the family law system in appropriate circumstances.

Recommendation 6: Rules of court to specify permissible disclosure

Consideration should be given to amending the Rules of Court applicable to the family courts and the children's courts so that they clearly specify the persons to whom reports may and may not be disclosed where the question is not determined by orders of the court.

The following formulation might be considered as a starting point when drafting such provisions:

- *A copy of a family consultant's report may be given to any person that the court has authorised to receive it.*
- [For the family courts] *Unless the court otherwise orders, a copy of an experts' report may be given to a child protection authority; a children's court; and a State or Territory legal aid commission for use in connection with family dispute resolution or child protection mediation or an application for legal aid relating to family court proceedings.*
- [For the children's courts] *Unless the court otherwise orders, a copy of an experts' report may be given to a family court, an independent children's lawyer appointed by a family court, and a State or Territory legal aid commission for use in connection with family law proceedings or an application for legal aid relating to family court proceedings.*
- *A copy of a family consultant's report may not be given to any other person without the court's permission.*

If such an amendment is made, the relevant procedures should be such as to ensure that the parties have an opportunity to make submissions about the extent to which disclosure will be permitted in their particular case.

Recommendation 7: Amending rules of court so they explicitly enable courts to authorise disclosure of reports to the family law or child welfare systems, and to legal aid bodies

Rec 7.1 If the rules are not to specify directly to whom reports may and may and may not be disclosed, they should be amended to make it explicit that family courts can make orders allowing the disclosure of reports to appropriate bodies in the child protection system, and to legal aid

bodies. The proposals under consideration by the Federal Circuit Court, set out above, would be a valuable starting point in the formulation of such rules.

Rec 7.2 Similarly, rules relating to the children's court should make it explicit that children's courts can make orders allowing the disclosure of reports to appropriate bodies in the family law system, and to legal aid bodies.

Recommendation 8: Model court orders releasing reports in parenting proceedings, and notices accompanying such reports

Rec 8.1 The family courts should develop model court orders providing for appropriate disclosure of experts' reports to the child protection system.

Rec 8.2 The family courts should publish notices attached to experts' reports when released to the parties. Such notices should refer to s 121 of the Family Law Act and to other matters relevant to the proper use of such reports, for example by pointing out that the report may not have been admitted into evidence and may not have been accepted by the court, and that the issues may be affected by information that was not available to the writer of the report.

Rec 8.3 The proposals being considered by the Federal Circuit Court of Australia provide an excellent starting-point for drafting such model orders and notices.

Rec 8.4 In Hague child abduction proceedings, the model orders should include clauses to the effect that copies of the report may be given to

- the Australian Central Authority and its legal advisors;
- The Overseas Central Authority; and
- The requesting parent or any other person on whose behalf the Central Authority has made the application and any lawyer or legal representative or other professional engaged on the requesting parent's behalf in relation to this application.

Recommendation 9: Education and training

Each system should establish appropriate education and training to ensure that its personnel are aware of the potential benefits of experts' reports held by the other system. This could include:

(a) hosting training by personnel in the other system on the types, nature and purpose of reports used in their system;

(b) including guidance in internal training documents;

(c) in jurisdictions where there are out-posted child protection workers, giving these workers an educative role; and

(d) publishing relevant material on the collaboration website established by the Commonwealth Attorney-General's Department.

Recommendation 10: Measures to measure awareness of relevant experts' reports

Formal and informal procedures established for information-sharing between the family law and child protection systems should include measures to ensure that personnel in each system can readily learn whether there is a relevant expert report held by the other system. Such measures include:

(a) placing appropriate provisions in written agreements between stakeholders to facilitate enquires about the existence of experts' reports in the other system;

(b) considering the sharing of experts' reports through the Commonwealth Courts Portal;

(c) implementing appropriate information technology procedures for information-sharing (for example, dedicated email boxes); and

(d) ensuring that procedures for sharing are widely known, for example, placing such procedures on the collaboration website established by the Commonwealth Attorney-General's Department.

Recommendation 11: Increasing knowledge of law relating to permissible sharing of experts' reports

The family law and child protection systems should ensure as far as practicable that their personnel understand the extent to which the law permits experts' reports to be shared between the two systems. This could be facilitated through:

(a) directing personnel to this report, the *Information Sharing Report* and other relevant material on the collaboration website established by the Commonwealth Attorney-General's Department; and

(b) creating or updating internal training manuals to include such information.

Part 1: Preliminary

Background

In March 2013 the Attorney-General's Department published the report *Information-Sharing in Family Law & Child Protection: Enhancing Collaboration* (here referred to as the *Information-Sharing Report*).[1] That report formed part of collaborative work on a project that had been initiated in 2010 and continues today (see Attachment 1). The project includes the aim of ensuring that information relevant to decisions about children is appropriately shared between the family law system, the state and territory child protection system ('Child Protection'), and the legal aid commissions and independent children's lawyers. Following a meeting on 24 May 2013, the Department considered that it would be useful to review in more detail the question of sharing experts' reports, and appointed a Task Force to assist me in the preparation of this report.

Accordingly, this report is essentially a supplement to the *Information-Sharing Report*. Experts' reports are one instance of information that can usefully be shared between the systems, and in general the recommendations made in that report apply as much to them as to other information. But some features of experts' reports require special consideration, and these form the focus of this report.

Defining the task

Terms of Reference

The Terms of Reference for the Task Force are as follows:

1. *The Taskforce is to inquire into and assist Professor Richard Chisholm in his preparation of a report on the sharing of experts' reports between the state and territory child protection systems and the federal family law system, in particular:*
   - *(a) Identifying the legal and practical impediments and issues related to the sharing of experts' reports between the child protection and family law systems.*
   - *(b) Making recommendations for legal and practical solutions:*
     - *(i) to address the difficulties identified relating to the sharing of experts' reports, and*
     - *(ii) to facilitate the effective sharing and use of experts' reports between the child protection and family law systems.*
   - *(c) Considering whether it would be appropriate to practically implement the recommendations made by the Taskforce through a pilot project in a willing jurisdiction, before being rolled out nationally (if appropriate).*
2. *The report will be provided to the Commonwealth Attorney-General's Department by no later than late December 2013.*

1 Richard Chisholm, AM, *Information-Sharing in Family Law & Child Protection: Enhancing Collaboration* (AGD 2013)'. It is *available* at http://www.ag.gov.au/FamiliesAndMarriage/Families/Pages/Familylawandchildprotectioncollaboration.aspx.

The key terms will be understood as follows in this report.

'The federal family law system'

This term includes the Family Court of Australia and the Federal Circuit Court of Australia exercising jurisdiction under the Family Law Act, and is obviously intended to include the family law system in Western Australia, even though that is constituted by state rather than federal legislation. The generic term 'family courts' includes all of those courts.[2] The reference to 'system' may include — depending on the context – all those working in or closely with the courts (such as family consultants, community-based family counsellors and mediators, and independent children's lawyers).

'The child protection system'

This term refers to what is commonly called the 'child welfare' or 'child protection' laws in each state and territory, and the bodies that administer them. These bodies are, in the main, the state or territory child protection authority (which has different titles in the different jurisdictions) and the children's courts. In very general terms, the child protection authority is a government department which administers these laws. It provides various services to families that are in need or crisis in which children are at risk of neglect or abuse, and may be the licensing body for a range of community-based children's services. Most relevantly for the present context, the department carries out investigations into suspected child abuse or neglect, and in serious cases, may apply to the children's court to make what are sometimes called 'intervention orders' – for example, orders that place a child under the responsibility of the department (partly or totally displacing the parents' responsibilities), or place a family under supervision. Typically the department is the applicant in children's court proceedings, and advances evidence (usually the results of its own or others' inquiries) seeking to demonstrate to the children's court that it is entitled to intervene (because the children are demonstrated to be 'in need of care' or a similar statutory term) and to indicate what order would be likely to be best for the children. The parents are entitled to be heard in these proceedings, and may seek to oppose the department's application, or seek different orders.

In this report the child protection system includes personnel of the departments and the children's courts, and lawyers representing the children in those proceedings.

'Experts' reports'

This is taken to mean reports prepared to assist the making of decisions about children, written on the basis of the author's professional qualifications. 'Experts' reports' for the purpose of this report are of different varieties. Experts' reports *held by the family courts* include 'family reports' and other reports prepared for the court by family consultants, as well as reports by 'single experts', and experts' reports provided by a party or by an independent children's lawyer. Experts' reports *held by the children's courts and child protection authorities* include children's court clinic reports and experts' reports commissioned by or obtained by the child protection authority.

2 Although State and Territory magistrates courts also exercise some jurisdiction in family law matters, it has not been possible to include the work of these courts in this report.

There may well be a need for the sharing of other reports, such as reports about supervision, case assessment, and observation of visits by parents at child contact centres. However the terms of reference limit this report to experts' reports.

Experts' reports in the family law system

Individual parties' expert's reports in the family courts

Parties to parenting cases in the family courts are entitled to make private arrangements to seek a report from an expert such as a medical practitioner, a psychologist or psychiatrist. Such a report would be based on materials supplied by the party to the expert, and perhaps on interviews by the expert with relevant persons who are willing to be interviewed. They may also involve interviews with the children. Such reports could provide expert opinion on any matters relating to the parenting case. Parties commissioning such reports would normally own the reports, and might use them to assist their own understanding of the issues in the parenting case, or might wish to tender them as evidence in the proceedings.

Such reports are sometimes filed in children's cases in the family courts, including Hague child abduction cases (for example in one Hague case a mother, resisting an application to return a child to another country, filed a report by a psychologist to the effect that the child would suffer separation anxiety if ordered to return). Individual parties' experts' reports are less common than family consultants' reports (below), however, probably for the following reasons:

- It will usually be impossible for these experts to see the children interacting with the other party, and this greatly compromises the experts' ability to review all the relevant relationships and to make predictions about the future.[3]
- Even though the expert should try to be objective,[4] it is difficult to avoid the impression that the expert favours the party who engaged him or her.
- In cases where expert evidence is required, there will almost always be a family report or single expert report by another expert who is independent of the parties and has had the opportunity to interview all the parties and the children. In general, the court can be expected to give more weight to the independent expert than to the expert called by one of the parties.
- As noted elsewhere, a party needs the court's permission in order to file an affidavit from an expert other than a single expert (although an independent children's lawyer may tender a report or adduce evidence from one expert witness without the court's permission).[5]

Family reports in the family courts

Reports by family consultants prepared for one of the family courts for use in connection with parenting proceedings, are commonly called 'Family reports'. (The term 'Family report' is not used in the Family Law Act.) Family reports are very commonly used, and are of great importance in practice.

3 Authorities referring to this problem include [citation to come]

4 Expert witnesses are required to 'give an objective and unbiased opinion that is also independent and impartial': Rule 15.59.

5 Family Law Rules 2004, r 15.49(1), r 15.51 (which also apply in the Federal Circuit Court of Australia and the Family Court of Western Australia).

The Act provides for the appointment of 'family consultants'.[6] Their tasks include giving evidence in relation to proceedings under the Act, and 'reporting to the court' under section 62G.[7] Section 62G provides in substance that in proceedings under this Act in which the care, welfare and development of a child under 18 is relevant, the court 'may direct a family consultant to give the court a report on such matters relevant to the proceedings as the court thinks desirable'. Family consultants are qualified in psychology or social work, and, being appointed by the court in each case, are independent of the parties. They may be employed by the court, or qualified persons external to the court but designated as 'family consultants' for the purpose of the report. Reports by those in private practice are sometimes known as 'Reg 7' reports, but are no different from the family reports reports prepared by family consultants who are employed by the court.

Although family consultants are experts, their reports are not usually referred to as 'experts' reports' because the legal basis for admitting them into evidence is not the fact that their authors' expertise would allow them to give expert opinion evidence under the general law of evidence, but because the legislation specifically provides for them to be admitted into evidence.[8]

Family reports are in common use in the more difficult children's cases, although I understand that in Western Australia reports by Single Expert Witnesses are more common. They are substantial documents, typically based on the author's reading of the affidavits and other documents filed in the proceedings, interviews with the parties and other significant family members, and interviews with the children, or observations of the children interacting with family members. They can involve home visits, but this is uncommon.

'Family report' in this discussion will include family reports written by family consultants for Magellan cases. The Magellan system is designed for cases involving issues of sexual abuse or serious physical abuse of children. Magellan cases, as they are called, involve early intervention and cooperative management involving Child Protection and Legal Aid as well as the Family Court of Australia.[9] The content of these reports will of course reflect the nature of Magellan cases, and is likely to deal in detail with allegations of child abuse. However, the legal basis of these so-called 'Magellan Reports' is no different from that of other family reports, and there seems no reason to treat them any differently in this discussion.

When family reports are prepared, the author provides them to the relevant family court.[10] The Rules provide that the family courts may release a report to the parties and the independent children's lawyer: r 15.04(a).[11] They may also 'order that the report not be released to a person or that access to the report to the report be restricted': r 15.04(d).

6 See Family Law Act s 11B, 38N; *Federal Circuit Court of Australia Act*; Family Law Regulations, Reg 7.

7 Family Law Act s 11A. Another task, of providing reports that enable the court to find that proper arrangements have been made for children in the context of divorce (s 55A), is not relevant here.

8 Section 62G(8).

9 Information about the Magellan program is available on the website of the Family Court of Australia: http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/Media/Fact_Sheets/FCOA_mc_Magellan_program.

10 Family Law Act s 11A(d).

11 The relevant provisions of the Family Law Rules 2004 apply also to the Family Court of Western Australia: see Family Court Rules 1998 (WA) rule 12. The relevant rules of the FCC are essentially the same:Federal Circuit Court Rules 2001, r. 23.01A

Specific Issues Reports in the family courts

A shorter version of family reports is known as *'Specific Issues Reports'*. These are different from other family reports only in that they are usually prepared earlier in the proceedings and are less detailed – as the name suggests, they are intended to identify the important issues that are involved in the case. But they are likely to contain important information and expert opinion about the circumstances and the issues. It seems appropriate to include them, along with family reports, in any information-sharing arrangement.

Hague Convention reports in the Family Court of Australia

In Australia, the Hague Convention on the Civil Aspects of International Child Abduction is implemented by the Family Law (Child Abduction Convention) Regulations 1986, made under power contained in the Family Law Act.[12] Family consultants provide reports to the Family Court of Australia or the Family Court of Western Australia (the Federal Circuit Court of Australia does not exercise jurisdiction in Hague cases) just as they do in parenting cases. The issues they address are framed in terms of the legal issues arising in a Hague case, but otherwise they are similar to family reports.

Although the order appointing the family consultant in Hague cases is made under the Regulations rather than the Family Law Act,[13] the provisions of the family law legislation discussed in relation to family reports apply equally to Hague Convention reports. This is because the power to make rules[14] extends to 'in relation to the practice and procedure to be followed in the Family Court and any other courts exercising jurisdiction *under this Act*'. The term 'this Act' is defined to include the regulations.[15] Thus the rule-making power extends to rules about cases under the International Child Abduction Regulations. The majority of rules of court are not limited to any particular class of family law litigation, and therefore apply as much to Hague cases as to parenting cases.

In short, Hague Convention reports are reports prepared by family consultants in proceedings under the Hague Convention on child abduction. They focus particularly on issues that arise in those proceedings, but are otherwise similar to family reports (indeed, they may be referred to as 'Hague Convention Family Reports'), and the same legislation applies to them as applies to family reports.

One difference between Hague cases and parenting cases is that normally the parties are the Central Authority, which is seeking a return order, and a parent, who is resisting it. This needs to be kept in mind when considering information-sharing arrangements. In particular, it would be appropriate for the orders normally to provide for the reports to be released to the national Central Authority for Australia and, probably, to the parent at whose request the proceedings were instituted. Otherwise, there appear to be no reasons to treat reports in Hague cases differently from family reports.

12 Family Law Act s 111B.
13 Family Law (Child Abduction Convention) Regulations 1986, r 26.
14 Family Law Act, s 123.
15 Family Law Act, s 4.

'Single expert' reports in the family courts

The Family Law Rules make detailed provision for 'single experts'. Such provisions are now common in civil law matters in many Australian and overseas jurisdictions. The general purpose of such provisions is to reduce the use of experts called by individual parties, by establishing a process in which the court can appoint (ideally after consultation and agreement by the parties) a single expert who will provide impartial expert evidence on relevant issues, saving time, reducing costs, and increasing the prospects of settlement.[16]

As it happens, in children's matters, family law had developed essentially this idea prior to the more general interest in single experts. Family reports, prepared by family consultants, are a well-established form of 'single experts' in children's cases, although in Western Australia and probably elsewhere Single Experts' reports are also used. Similarly it is common for independent children's lawyers to arrange for experts to conduct interviews and prepare experts' reports. Such evidence has been routinely provided as a result of specific provisions relating to children's matters, rather than the generally-applicable Rules relating to single experts. These reports have been considered above.

Experts' reports in the child protection system

Experts' reports in the child protection system may be held by the child protection authority or department or the children's courts in each jurisdiction. The departments may hold various kinds of reports – most obviously reports by its own investigative staff, and by police, but also, in some cases, experts' reports on the state of the family, or relating to, say, the physical or mental health of a parent or child.

The departments may tender such reports as evidence to the children's courts. The parents or other parties are also entitled to tender experts' reports, although presumably in most cases reports are mainly provided by the department. It may be, too, that an expert report will be tendered by a child's legal representative. Apart from reports tendered by one of the parties to the children's court proceedings, in some jurisdictions, as we will see, the legislation provides for the children's court to order that a report be prepared, for example by a clinic attached to the court.

As we will see, the legal permissibility of sharing experts' reports in the child protection system depends to some extent on whether they are held by the child protection authorities or departments, or by the children's courts.

Certain reports not 'expert's reports'

For the purpose of this paper the term 'experts' reports' does *not* include

- Supervision reports prepared by supervision centres for the family courts. These are generally of an observational nature only.

16 One of the purposes of Part 15 of the Rules is 'to ensure that, if practicable and without compromising the interests of justice, expert evidence is given on an issue by a single expert witness': Rule 15.42.

- Reports prepared by child protection caseworkers. These reports usually include information relating to investigations made by the child protection department and observations/ assessments of the family members in question. These reports tend to form the basis of referrals to the children's/youth courts for a report to be prepared.
- Briefer documents prepared by family consultants for the family courts, namely the *Memorandum to Court*, used by the Federal Circuit Court of Australia following reportable family dispute resolution under s 11F of the Family Law Act, and the *Children's and Parents' Issues Assessments*, used by the Family Court of Australia. There is no present indication that these documents are appropriate for information-sharing arrangements, but this is an issue that might be considered in the future if there is reason to believe that such documents would be useful to other agencies.
- Reports by *treating* medical and other practitioners. Such reports may contain expert opinion, and their authors may be asked for their expert opinion on issues in the course of cross-examination, but these reports are mainly intended to deal with the provision of treatment.

Structure of this report

Part 2 reviews the advantages and disadvantages of sharing experts' reports.

Part 3 provides a detailed discussion of the law relating to the permissible disclosure of experts' reports – a topic that turns out to be both complicated and in some ways uncertain. The topic is raised by the Terms of Reference when they refer to the 'legal... impediments and issues' related to the sharing of experts' reports. This discussion includes some recommendations for law reform.

Part 4 deals with what the Terms of Reference calls the 'practical' issues and impediments. It considers the possible amendment of rules to specify the permissible disclosure of reports and to require notices to be provided when experts' reports are released to the parties; then the movement towards uniformity in courts orders made when releasing reports; then some measures to promote the sharing of experts' reports.

Attachment 1 sets out the background to this report, and, because this report builds on the *Information-Sharing Report*, Attachment 2 contains the recommendations and the Model Agreement of that report.

Limited evidentiary basis of this report

It has not been possible here to conduct empirical or other systematic work of the kind that would enable confident statements to be made about current practice in sharing experts' reports between the two systems throughout Australia. This report is largely based on an analysis of the relevant law and the insights into practice that were made possible by the contributions of Task Force members, and some other contributions. Thus readers should treat all statements or assumption about what happens in practice as based on this valuable but limited and fragmentary material, and the discussion and recommendations might need to be reconsidered if more detailed evidence becomes available.

Task Force members

- Professor Richard Chisholm AM, Adjunct Professor ANU School of Law (Chair)
- Adele Byrne (Federal Circuit Court of Australia)
- Francesca Di Benedetto (Legal Officer, Legislative Review Unit, Legal Services, NSW Department of Family and Community Services).
- Helena Mestrovic (Registrar, Family Law Courts Melbourne)
- Sally Field (Regional Coordinating Registrar, Vic/Tas/SA, Family Law Courts, Melbourne)
- Pam Hemphill (Principal, Child Dispute Services, Family Law Courts)
- Julie Jackson (National Legal Aid)
- Magistrate David Monaghan (Family Law Magistrate, Principal Registrar, Family Court of Western Australia)
- Louise Smith (National Legal Aid)
- Megan Giles (Director, Child Safety Strategic Policy and Design, Child Safety Strategic Policy and Programs, Queensland Department of Communities, Child Safety and Disability Services)
- Cameron Lee (Manager Child Protection Legal Group, Office of the Director of Public Prosecutions, Tasmania)
- Lisa Zehetner (Commonwealth AGD)

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Third, I am grateful to other colleagues and Stakeholders who also provided valuable material and ideas: Angela Filippello (FCA), Angela Lynch (Women's Legal Service), Leanne De Morton (Registrar, Children's Court of Victoria), Cesira Mussato (ACT Child Protection Department), and Anna Sandt (Victorian Child Protection Department).

Of course I accept sole responsibility for the contents of the report.

Part 2: Advantages and disadvantages of sharing experts' reports

Introduction

The terms of reference refer to 'the legal and practical impediments and issues related to the sharing of experts' reports'. The 'issues' include a consideration of the relative advantages and disadvantages of such sharing, and this is the topic of this part.

Advantages of sharing experts' reports

The importance of sharing information relevant to decisions about children is discussed in some detail in the *Information-Sharing Report*. Experts' reports form a part of that information, and thus in general that discussion is applicable to the present topic. It is not necessary to repeat that discussion, but some points may be highlighted.

Much expert evidence is important for decisions about children in each system

The children's courts on one hand and the family courts on the other have different histories and different jurisdictions. In essence, the family courts deal with children's issues arising between family members, while the children's courts consider whether the child protection authority should be permitted to intervene into a family, and if so what measures should be taken to protect the children from harm.

But despite these and other differences, in many ways the two systems deal with similar problems, and with a similar objective. Although the precise statutory objectives differ, in each system the courts are very much concerned to do what is best for the children. The issues that arise are often similar – determining what arrangements are likely to be best (or least dangerous) for children where there are issues of substance abuse, violence, mental health, and parenting that has been compromised by many individual and situational factors. In each case, the courts will be looking for a solution that keeps the children in the care of family members while protecting them against harm and seeking to provide the best available parenting for them.

It follows that much of the evidence will be similar in each system: evidence about the family history and the care of the children to date, allegations of various kinds, proposals for the future, the children's own views, and understanding of the situation, and the parenting capacity of the relevant family members. An important part of the evidence is often expert evidence. This may take the form of reports by professionals trained in psychology, social work or psychiatry, perhaps based on interviews with family members, and observations of the children interacting with parents and other family members, and interviews with the children themselves. The expert will then seek to put all those matters into context to produce a nuanced and helpful overview of the situation and assess the most likely ways the children's interests can be advanced. In some cases, the expert's work will be more focused – perhaps there will be an assessment of an individual's mental health, or of whether an individual has recovered from an addiction. Although no doubt many of the investigative reports used by the children's courts would fall outside the present terms of reference,

stakeholder advice is to the effect that, in at least some jurisdictions, the children's court might hold reports that have been commissioned from experts, such as medical reports, psychiatric assessments, and cognitive assessments.

This sort of information and expert assessment commonly forms a vital part of the evidence that is considered by courts in both systems. And, of course, this sort of evidence will also be of great assistance to other decision-makers: the child protection authority, in deciding what steps to take; legal aid bodies considering whether to grant legal aid for a particular application; lawyers and parties making decisions about what applications to make and what proposals and submissions to make to the courts; and counsellors, family dispute resolution practitioners and mediators in the family law and child protection systems, trying to help the parties reach an agreement that will benefit the children.

It is obvious that despite the differences between the two systems, there is a great deal of expert evidence that would assist each of them in making decisions about particular families. This is demonstrated by numerous illustrative experts' reports which were provided by Task Force members for the purpose of this report. And it is common for families to be involved with both systems: commonly, the child protection authority will have been involved in investigations about a family that is involved in family court litigation, and child protection involvement may occur after there have been proceedings in the family courts.

Thus, a great deal of expert information will be relevant to both systems in relation to some families. There are two basic reasons for sharing such information.

Promoting informed decision-making

First, it is important that decisions about children should as far as possible be based on the best available information. Decisions based on incomplete information are more likely to be wrong, and wrong decisions can disadvantage children. Thus we should try to avoid the position where one person or agency makes a decision in ignorance of information available to another agency, where that information would have assisted the decision-maker. The most obvious example would be a family court making a decision to place a child in the care of a person in ignorance of the fact that a child protection department held information indicating that the person was a risk to the child.

Avoiding unnecessary interviews and inquiries

Second, if a decision-maker is unaware that relevant information is held by another agency, it might put in place interviews or other measures that should be unnecessary. These measures would waste precious time and resources. They might also involve unnecessary delay and stress for those involved, especially children, who might be re-interviewed and as a result be at risk of what has been called 'systems abuse'.

As pointed out by one Stakeholder, of course not all information about a child that is relevant in a child protection context will be relevant in the family law context. No doubt the reverse is also true. However the relevance of material in an expert report can only be ascertained if the person who might wish to use the report has an opportunity to see it.

Possible disadvantages of sharing experts' reports

As discussed in the *Information-Sharing Report*, there may of course be good reasons why some sorts of information, in some circumstances, should not be shared. Care needs to be taken to ensure, for example, that the identity of notifiers of child abuse is not disclosed, and that information such as a person's address should not be released in a way that could expose the person to violence if it came into the wrong hands. Further in some situations it may be illegal to share information: it is common for courts to order that family reports must not be disclosed except to certain persons such as the parties to the proceedings. And in some situations sharing of information may be impractical. The legality of sharing experts' reports is considered in detail in Part 3. The remainder of this discussion deals with some considerations relevant to assessing the merits or demerits of sharing experts' reports.

Privacy and safety

Experts' reports in children's matters deal with highly personal matters. In the case of single experts' reports and family consultants' reports, the author will normally have read affidavits and other material, and interviewed family members and, in particular, will have interviewed the children or observed the way they interact with parents or others. The reports necessarily set out the author's comments on the parties and other family members involved, and such comments may often be critical, or reveal matters that the person would wish to be private. Where family violence is involved, the issues can be particularly serious. The improper or careless use of family consultants' reports can therefore be embarrassing or harmful to one or more family members. Some other experts' reports might involve assessments of the mental health of an individual, or equally sensitive material.

It is therefore of great importance that experts' reports should not be disclosed inappropriately. Fortunately, where experts' reports have been prepared for use in the family courts or the children's courts, their use is closely regulated by the applicable rules of court or other legislation, and by specific orders made about the report in each particular case. In making decisions about the use of the reports, the court will take into account the interests of the family members, especially the interests of the children involved. Further, there are provisions in both systems to prohibit the casual or irresponsible disclosure of experts' reports, for example to the media or to sections of the public (as distinct from disclosure to authorities with a specific task of making decisions about children): section 121 of the Family Law Act is the best-known example. In most cases, this extensive regulation should prevent inappropriate disclosure of experts' reports.

Dangers of flawed or incomplete experts' reports

The value of sharing experts' reports will of course depend to some extent on the quality of the reports. If a report is flawed, its use could create or compound problems. Family violence provides an example. An expert report in a case involving family violence issues could be considered by a legal aid commission in the context of an application for legal aid along with other relevant evidence. If the reporter had an inadequate understanding of family violence, and wrongly treated the allegation as untrue or trivial, this might have an impact on the decision to grant aid if the inadequacy of the report was not addressed in the application for aid. Stakeholder advice is that applications for legal aid are generally made at an early stage when expert reports are

not available. Expert Reports are usually considered by legal aid commissions in the context of a request for extension of aid for further representation, for example, for trial, following the publication of the report. The ICL and solicitors representing legally aided parties would address issues relating to the expert report and the other relevant evidence in their requests for extensions of aid. The legal aid commission's focus is on whether, on all of the available evidence, the issues in the proceedings meet funding guidelines.

Danger could also arise if there were inadequate material available to the report-writer. I understand, for example, that in the child protection system a report-writer might have well-documented material from the child protection authority, but only receive oral information and very limited written material from the parents. In such circumstances, it would be important to ensure that the decision-makers (eg the courts) would be able to take into account all relevant information, and would not place undue weight on an expert report, especially where the report was flawed or based on inadequate or one-sided material.

Although it has not been possible for the purpose of this report to assess either the average quality of family reports or their impact on the decision-making processes of legal aid, it seems reasonable to assume that in each respect the task is normally done in a skilled and professional manner, and that both report-writers and legal aid authorities have regard to such risks when carrying out their work.

Possible misunderstandings of experts' reports when used in a different context

Experts' reports are prepared for use by a particular body and for a particular purpose. Family consultants' reports, for example, are prepared to assist the family courts resolve parenting proceedings in the children's best interests. Sharing of experts' reports will mean that reports prepared for one context will be used in another.

One possible reservation about sharing experts' reports is that they might be misunderstood in a context different from the context for which they were intended. Obviously, any evidence about this should be carefully considered, but I am not aware of any such evidence at the present time, and it is necessary to consider in a practical way what the dangers might be, and how they might be reduced or avoided.

In general, an expert report will commence with a statement about its purpose, and will set out the qualifications of the author and the material that the author has considered – interviews, affidavits, and so on. It should be readily apparent whether the purpose of the report was to assist a court determine what family arrangements will be best for a child, or whether a child needs to be removed from an unsafe home, or to decide whether a person has a substance addiction or a mental health problem. Even if the user of the report is unfamiliar with the details of the other legal system, there seems no reason why the user would not be able to obtain valuable information from the report. In the case of reports by family consultants, as we will see each report will normally be accompanied by a Notice that should contribute to its effective and suitable use.

Misunderstanding of family reports and single expert reports seems largely preventable by such measures, and appropriate training and information for the personnel concerned. In my view the possibility of reports being misunderstood is not a good reason to depart from the default position of sharing.

Part 2

Might decision-makers give undue weight to experts' reports?

Generally, experts' reports will be of an appropriately professional standard, and will provide valuable information and insights. Sometimes, however, the conclusions or reasoning in a report will be contradicted by other material. The most common instance is probably where a court receives evidence that was not available to the report writer at the time the report was written. For example, the expert may have found no reason to doubt a person's assurance that he or she has ceased to be drug-dependent, but the court may have evidence of a relapse after the report was written. A common form of cross-examination is to present the expert with such material, and ask if that would lead the expert to revise his or her conclusions. Often the expert will readily concede that it would, and if the other material is accepted as evidence, the court might find it appropriate to reach a different conclusion from that expressed in the expert report. Less commonly, a competing expert report, or effective cross-examination, might lead a court to criticise the reasoning in an expert report, and reach a different conclusion.

In short, even the best expert report is no better than the information on which it was based, and occasionally cross-examination, or a court judgment, will reveal flaws in a report. It is important, therefore, that persons using the report should be aware of these matters, and treat the report accordingly. Ideally, the user of the report will also have access to the other relevant material, such as the evidence of events since the report was written, or a copy of the judgment or competing expert report criticising the reasoning. And the users of the report should carefully note the date of the report and the information on which it was based, and whether the expert has been cross-examined. In many cases, cross-examination reinforces the value of the expert report, and the court judgment expresses confidence in the expert's findings – ideally that information, too, should be available to the person using the report.

Although it is important that the expert's report might not reveal the full picture, this is equally true of all other material that the decision-maker will use. Professional decision-makers in the family law and the child protections systems will always want the most complete information available, and should be appropriately cautious about giving too much weight to any particular item of evidence or piece of information. Courts and agencies are familiar with the need to understand the context of any piece of evidence, and experts' reports are no different in this respect. Courts and agencies will take into account the significance of any evidence that is available at the time, but was not available to the author of a report. Where the evidence in a family consultant's report has been criticised in a judgment of a family court it is certainly desirable that if it is tendered in another court, the other court should be aware of the fact. I believe it would be unethical for a lawyer to tender such a report without advising the other court that it had been criticised in the family court judgment.

The fact that experts' reports are only a part of what the decision-makers need is not a good reason to deny the decision-makers access to them. But it is a good reason to ensure that the decision-makers are aware of the context in which the report was prepared, and alert to the possibility that there might be other relevant information, including information that might contradict some of the expert's conclusions. Some of the measures that would assist in this regard will be considered below.

Possible workload implications for family consultants

In the course of preparation of this report it emerged that some people had a concern relating specifically to family consultants' reports. The concern is that if they were to be distributed more widely, some might be tendered in other court proceedings, and the other court might issue a subpoena requiring the family consultant to be available for cross-examination. The family consultant would be compelled by law to comply with such a subpoena. Attending the other court, preparing to be cross-examined, and the cross-examination itself, would all be significantly time-consuming activities, and could, therefore, reduce the time the family consultants have to do their ordinary work. Thus, distributing the family consultants' reports and single experts reports more widely could arguably create a resources problem for the family courts.

Although it is difficult to estimate the likely effect on workload of increased sharing of reports with the child protection system, present indications are that it is unlikely to be substantial. One stakeholder suggested that at least in one jurisdiction family consultants would rarely be required to give evidence in children's courts, and another advised that in Western Australia, where such reports are commonly provided to the child protection authority, there have been no reports of the report writers having to give evidence in those proceedings as a result. It was also pointed out that children's courts usually obtain their own investigatory reports, and perhaps the use of family reports or single expert reports will usually be as background information for the department.

I do not recommend that a pilot study be established to examine this issue. Such a study would involve costs, and would indicate, at best, the impact on workload in the jurisdictions or local areas selected, which may or may not be representative (it is known that practice varies considerably throughout Australia). Further, it is possible that the impact on workload might vary over time, especially as people became more familiar with the new arrangements. To measure this, the pilot would need to extend over a significant period. In my view it would be preferable for the family courts to engage in informal monitoring of the impact on family consultants and single experts. If the sharing of family reports and single expert reports proves to be a problem, it will then be appropriate to reconsider this issue.

Considerable sharing of experts' reports under current practice

As indicated above, although there has been no opportunity for empirical research into current practice, some valuable (if fragmentary) insights emerge from the contributions of Task Force members, and some other contributions.

Sharing of experts' reports has been practised in a number of jurisdictions. In Western Australia, when dealing with the complex parenting matters, the family court appreciates the need to share information with relevant agencies and in particular the child protection agencies: the child protection authority regularly requests and is granted approval for provision of court documents, including family consultant and single experts' reports, for use in care and protection proceedings. A number of Magellan Registrars have reported that within their States there is already a high level of cooperation with child protection departments who are provided with copies of family reports as a matter of routine. In addition, in Tasmania at the conclusion of a final hearing in those matters where it is likely that child protection will be involved with the family, the family courts may make orders for child protection to be provided with a copy of the final orders, judgment and the family report.

Concerns have been raised about using a *pro forma* order to extend the release of the family report or single expert report to a number of agencies or individuals where the release order is made in chambers in the absence of the parties, who would therefore have no opportunity to raise any concerns about the broader release of the report. I believe, however, that it is common for the family courts to make orders in the presence of the parties for copies of experts' reports to be made available to child protection or treating medical practitioners to assist with further treatment or management of family. It is important that provisions for the sharing of expert reports should be accompanied by procedural practices in all the family courts to ensure that the parties have an opportunity to address the court on the appropriateness of sharing in each particular case.

Conclusion

On the information available, my view is that overall the advantages of sharing experts' reports are likely to outweigh the disadvantages. Of course, it is important to adopt measures to reduce the risk of those disadvantages. An example of such a measure is the standard form of orders used in the Federal Circuit Court of Australia for the release of family reports, which include a notation that 'at the date of release, this report is untested and forms only one part of the evidence in the proceedings'. The use of such notices is considered later in this report.

For the above reasons, arrangements should be made so that experts' reports, like other documents, fall within the principle expressed in the *Information-Sharing Report*, that '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.'[17]

But when is sharing experts' reports permitted by law? This is the subject of Part 3.

17 Appendix 1, paragraph 5.

Part 3: When is it lawful to share experts' reports?

Introduction

As work proceeded on the present project, it became increasingly apparent that one of the major tasks was to identify the extent to which it is legally permissible to share experts' reports.

The law turns out to be both complex and sometimes uncertain. It is *complex* because the answer varies to some extent from one type of report to another, and according to the applicable legislation – in some cases the Family Law Act and the Family Law Rules (and the equivalent legislation in Western Australia) and in others the particular child protection legislation in one or other of the eight state and territory jurisdictions. And it is *uncertain* because in many situations the legislation does not clearly state whether the sharing of experts' reports is permitted, and some of the principles of general application may or may not apply to experts' reports.

It is obvious that any sharing arrangements should include experts' reports only to the extent that such sharing is lawful, and the relevant law will be examined in this Part. (The recent amendments to the Commonwealth privacy laws[18] need not be considered here, because they apply only to Australian government agencies and businesses.) The discussion will attempt to state the extent to which sharing of experts' reports is permissible under the present law, and will include some recommendations for law reform, essentially to eliminate the present uncertainty and to ensure that sharing these experts' reports is permitted in situations where it is clearly desirable.

We start by considering two propositions that apply to all experts' reports, in the family law system and the child protection system. The first is that as a general principle, sharing of experts' reports is permissible unless there is some identifiable rule that forbids it. The second is that the sharing of the report may be determined one way or another by an order of the relevant court.

The focus then turns to the rules or principles that affect the lawfulness of sharing experts' reports. We start with legislative provisions that prohibit the publication of reports of proceedings in the family courts and (in some jurisdictions) the children's courts, and especially prohibit reports that identify the children, families, and other individuals involved in the proceedings. The best-known provision of this kind is section 121 of the Family Law Act, but we will also examine some similar provisions that can be found in the child protection legislation of some state and territory jurisdictions. These provisions are important because they are sometimes seen, rightly or wrongly, as prohibiting the provision of information or reports between the Child Protection and the family law systems.

Next, we consider the position of experts' reports commissioned by a party to the litigation and provided to a family court, or to a children's court. As we will see, the lawfulness of sharing these reports (where the court has not specifically authorised it) may depend on an application of what has been called the *Harman* principle, which makes it contempt of court, in some situations, to disclose these reports.

18 *Privacy Amendment (Enhancing Privacy Protection) Act* 2012, amending the *Privacy Act* 1988.

The discussion then turns to experts' reports commissioned by the courts. The most obvious examples are reports by family consultants in the family courts – including 'family reports' and Hague reports. The discussion also includes experts' reports commissioned by the children's courts in those jurisdictions that provide for this. It also includes 'single experts' reports' even though in some situations they are not so much reports by experts appointed by the court as reports by a single expert whom the parties have agreed should be the only one to provide expert evidence in the case.

Finally, the discussion deals with the permissible sharing of experts' reports held by the child protection authority in one of the states and territories. The main issue here relates to certain provisions of the respective state and territory Child Protection legislation which make it an offence, subject to certain exceptions, for a child protection officer to disclose information discovered while implementing the legislation. These provisions were probably never intended to prevent an officer from providing information to the family law system in a responsible way where the information would assist the family law system to make good decisions about children. But as we will see, unfortunately the wording of these provisions sometimes seems to prohibit such actions. The resulting recommendation will be a renewal of the suggestion in the *Information-Sharing Report* that the states and territories should review the wording of these offences to ensure that they do not inhibit sensible and appropriate information-sharing from the child protection system to the family law system.

The Part concludes with an attempt to summarise the law and identify those experts' reports that could be permissibly shared, and thus could be considered for inclusion in information-sharing arrangements between the Child Protection and the family law systems. It also recommends reform of some laws that prohibit, or may prohibit, such sharing.

Information-sharing lawful unless prohibited by some identifiable rule

Most of the discussion in this Part will be concerned with rules that prohibit, or might prohibit, the sharing of experts' reports. Such rules may be found in the family law or Child Protection legislation, or under the general law: providing an expert report to someone could, in some circumstances, be contempt of court, or could attract liability for defamation.

Apart from such identifiable rules however, the law does not restrict the sharing of information, even about sensitive and personal matters of the kind included in experts' reports. One might think that because such documents as experts' reports contain sensitive information, somehow the law necessarily prohibits people from disclosing them to others. This is not so. Sharing them will be lawful unless it can be shown that it is prohibited by some specific rule under the family legislation or the general law. A person involved in family law proceedings might, from concern about a child's safety, show a family report to a child protection agency. Another might disclose a report to a school, or to a party's employer. Whatever might be thought about the wisdom or propriety of such actions, they will be lawful unless there is some identifiable rule that forbids them.

Court orders often determine the permissibility of sharing experts' reports

In many situations it is easy to determine whether experts' reports may be shared, because the court in which the expert report has been filed has made an order either authorising or restricting the disclosure of an expert report. The family courts frequently make such orders when releasing a family consultant's report, specifying the persons to whom it is to be released, and specifying the restrictions on its distribution to others. Breaches of such explicit court orders could be punished.[19] It seems that children's courts also make such orders, although little information is available about children's court practice.

Although the courts normally release experts' reports to the parties, occasionally they decline to do so immediately. For example, the court might have reason to fear that the release of a report might trigger violence or self-harm because of the contents of the report and the characteristics of one or more of the parties. It is possible in such cases for the court to limit the release of the report initially, say, to an independent children's lawyer, or to provide for it to be released in a setting where the parties have counselling.

The permissibility of sharing experts' reports is generally obvious when the relevant court has made orders: the report can be disclosed in accordance with any court order authorising such disclosure, and cannot be disclosed where the court's order forbids it. But although a court order will often provide an easy answer to whether a report can be shared, sometimes there is no court order dealing with the question. And sometimes a court order will authorise the disclosure of the report to one person but will be silent on whether it can be disclosed to anyone else. In such circumstances it is necessary to grapple with the problem discussed in the rest of this Part, namely whether, apart from any court order, it is permissible to share an expert report.

Legislative prohibition on disclosures to the public: section 121 of the Family Law Act and equivalent provisions of state and territory legislation

Section 121 of the Family Law Act

Section 121 restricts disclosure of information from family court proceedings that identifies the parties or others involved in the case.[20] It applies only to dissemination to the public or a section of the public,[21] and can apply to disclosures on-line as well as through the media.[22] The words 'section of the public' would also include quite small numbers of people if they have no professional or other involvement in the proceedings: showing a family report to a group of friends at a pub would be an example. 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.[23]

19 Family Law Act s 112AD, s 112AP (contempt).

20 Section 121 applies to proceedings under the Hague Convention as well as to parenting proceedings because the words 'proceedings under this Act' in s 121 are defined in s 4 to include Hague proceedings under the regulations.

21 The courts' power to make suppression orders is not similarly limited to preventing disclosure or publication to the public or a section of the public: see s 102PE.

22 *Xuarez & Vitela* [2012] FAMCA 574 (Forrest J) at paragraph [53].

23 Section 121(1).

Section 121(9) sets out certain exceptions. The only one relevant to the present topic is the communication of transcripts and other court documents from a family court to persons concerned in *other court proceedings*, for use in connection with those proceedings.[24] This exception would apply, for example, to providing experts' reports for the purpose of children's court proceedings.

Resort to the exceptions, however, is necessary only where there is a publication or dissemination of the kind prohibited in subsection (1), namely a dissemination *'to the public or to a section of the public'*. Because of these words, the prohibition in s 121 'should be taken as a reference to widespread communication with the aim of reaching a wide audience'.[25] The case law clearly indicates, in my view, that the section would not apply to providing documents or copies of documents to an individual or agency in the child protection system where the documents are relevant to their work. That would not be dissemination to a section of the public, but to individuals or agencies selected because they have a professional interest in the matter. [26] The few reported cases illustrate this. Thus it is not a dissemination to the public or to a section of the public where a person provides documents to a consulate for advice,[27] or to the Attorney-General's Department.[28] Similarly, where a wife provided family law transcripts and affidavits for use in the husband's public inquiry for bankruptcy, this was not a dissemination to a section of the public.[29] Although there does not appear to be a reported decision on dissemination to a child protection authority, in my view that would clearly be treated in the same way, as not being a dissemination to the public or to a section of the public.

Surprisingly, there appear to be different views on this matter. Stakeholder advice is to the effect that in at least one jurisdiction independent children's lawyers will not release family court documents directly to the child protection authority without an order by the family court authorising the sending of the documents to the child protection authorities. It seems that judicial officers of the family courts have not suggested that such an order is unnecessary.

If (contrary to my view) the prohibition relating to a 'section of the public' does as a matter of law apply to providing the reports to child protection authorities, there would indeed be a problem, because the exception in s 121 (9) can be relied on only if there are proceedings before a State court, which is often not the case when requests from child protection staff are received.

Although in my view releasing family court documents to a child protection authority does not fall within the prohibition in s 121(1) and no permission is required, an order authorising it removes any concern about the possibility of breaching s 121.[30] Such orders make it plain to everyone involved (including unrepresented litigants in some cases) that the court has approved sending the documents to the child protection authorities, and nobody has to worry about the correct interpretation of section 121(1).

24 Section 121(9)(a).

25 *Re Edelsten (a Bankruptcy); Donnelly v Edelsten and Others* (1988) 12 Fam LR 294 (Morling J), followed in *Hinchcliffe v Commissioner of Police of the Australian Federal Police* [2001] FCA 1747.

26 See the discussion in *Hinchcliffe*, and *Edelson*, above.

27 *Marriage of Toric* (1981) 7 Fam LR 370; FLC 91–046.

28 *Marriage of Tingley* (1984) 10 Fam LR 707; FLC 91–588.;.

29 *Marriage of Bateman and Patterson* (1981) 7 Fam LR 33; FLC 91–057 (FC), at 39-40.

30 Section 121(9)(d).

The existence of differing views about whether s 121 forbids providing family court reports to child protection authorities justifies the current practice of obtaining court orders authorising such actions. It also suggests that it would be desirable to amend s 121 to remove any doubt on the matter.

Recommendation 1: Review of Family Law Act s 121

The Commonwealth should review the wording of s 121 and consider the desirability of an amendment that would, to remove doubt, state explicitly that it does not apply to the provision of information to the child protection system.

Prohibition of publishing details of cases: child protection equivalents of s 121 of the Family Law Act

In five jurisdictions the child protection legislation contains a provision similar to s 121 of the Family Law Act (discussed above). These jurisdictions are Victoria, Queensland, South Australia, Western Australia and the Northern Territory. There do not appear to be such provisions in New South Wales, Tasmania or the ACT. The terms of the offence vary among the relevant jurisdictions, but for present purposes it is sufficient to say that they prohibit reporting of cases, often focusing on reports that would enable the identification of individuals involved in the proceedings. It is relevant, however, to note whether the prohibition is limited, as it is in s 121, to dissemination to the public, or to a section of the public.

The offence is clearly limited to dissemination to the public in Victoria and Western Australia. In the *Victorian* provision 'publish' is defined as meaning 'to insert in a newspaper or other periodical publication; or disseminate by broadcast, telecast or cinematograph; or otherwise disseminate to the public by any means'.[31] In *Western Australia*, 'publish' is defined as meaning 'to bring to the notice of the public or a section of the public by means of newspaper, television, radio, the Internet or any other form of communication'.[32]

In *South Australia*, the offence is to 'publish by radio, television, newspaper or in any other way'.[33] Ordinary principles of statutory construction would suggest that this refers only to publication to the public, but it is conceivable that a broader meaning could be given to 'any other way'.

The *Queensland* and *Northern Territory* provisions[34] simply use the word 'publish'. In the law of defamation, the word 'publish' has a special meaning that includes a letter to an individual, whereas in other contexts it refers to books, journals and other media directed to a wide readership (the word 'publish' derives from the Latin *publicare* to 'make public'). The scope of the *Queensland* and *Northern Territory* provisions depends on whether the word 'publish' is given the meaning it has in defamation law or, as seems more probable, its general meaning. Disclosing an expert report to a person in the family law system would be a forbidden 'publication' only if the word 'publish'

31 Children, Youth and Families Act 2005 (Vic), ss 534, 3.
32 Children and Community Services Act 2004 (WA) s 237.
33 Children's Protection Act 1993 (SA), s 59A.
34 Child Protection Act 1999 (Qld) s 192; Care and Protection of Children Act (NT) s 97.

is taken to have the meaning it has in the law of defamation. Such an interpretation would seem unlikely, but not impossible.

Recommendation 2: Review of certain provisions prohibiting publication of children's court proceedings

State and territory legislatures should where necessary ensure that any provision in their child protection legislation designed to prevent publication of children's court cases to the public is worded so that it does not forbid the sharing of experts' reports in children's court cases with the family law system. In particular, the following provisions should be reviewed: *Children's Protection Act 1993 (SA), s 59A; Child Protection Act 1999 (Qld) s 192; Care and Protection of Children Act (NT) s 97.*

Conclusions

To summarise, although in my view s 121 does not prohibit the sharing of an expert report in the family law system with an appropriate person or body in the child protection system, some take a different view, and the practice of applying for orders from the family courts specifically authorising the sharing has the benefit of removing doubt, especially where unrepresented litigants are involved. Amendment of s 121 to clarify the position would be a positive step.

The equivalent provisions in Victoria and Western Australia, and probably also South Australia, are limited to publication to the public. This is probably also true of the Queensland and the Northern Territory provisions, which just use 'publish', but it is possible that the word would be given the meaning it has in the law of defamation, in which case sharing experts' reports from the children's courts could, in theory, violate the provisions of those jurisdictions. Thus in several jurisdictions it could reasonably be feared that sharing children's court reports with the family law system could breach the non-publication provisions of the state or territory legislation. Again, it seems obviously desirable that these provisions should be amended, where necessary, to remove any doubt on this important question.

Individual parties' experts' reports

A commissioning party who chooses[35] to obtain an expert report for use in the family courts or the children's courts, as the owner of the report, may voluntarily disclose it to anyone, unless doing so violates some identifiable rule, such as the law of defamation or one of the statutory provisions discussed in this Part. With that qualification, therefore, it would appear that *the commissioning party* could provide the expert report to, say, a therapist, school or child protection authority, and could ask another person, such as a lawyer or a member of the family court's personnel, to do so. Under rules applicable in the family courts – the details need not trouble us – a party who commissions an expert report is obliged to disclose it to the other parties to the litigation.[36]

35 It is apparently not uncommon for a family court to *require* a party to obtain an expert report such as a psychiatric assessment: whether the analysis in the text applies to such reports is an open question.

36 Family Law Rules 2004, r 15.55.

Those parties, however, may not disclose it to others without the court's permission or the commissioning party's consent – this is the *Harman* principle, to be examined in the following paragraphs. In short, there appears to be no general legal impediment to an individual party's expert's report being provided to the child protection system *with the consent of the commissioning party* (or, of course, with the court's permission).

Other parties to the litigation not permitted to disclose an individually commissioned expert's report without court's permission: the *Harman* principle

The *Harman* principle,[37] mentioned earlier, applies directly to experts' reports commissioned by a party, making it contempt of court for another party to disclose such an expert report without the court's permission, until the report has been admitted into evidence.

The *Harman* principle was applied and explained by the High Court in *Hearne v Street*.[38] That case involved litigation against Luna Park; the Managing Director of Luna Park was found guilty of contempt of court because he sent to the media material obtained through court processes for the purposes of the legal proceedings. The principle was stated as follows in the High Court decision:[39]

> *Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence. The types of material disclosed to which the principle applies include documents inspected after discovery, answers to interrogatories, documents produced on subpoena, documents produced for purposes of taxation of costs, documents seized pursuant to an Anton Piller order, witness statements served pursuant to a judicial direction and affidavits.*

The principle does not forbid persons disclosing *all* court documents. It prevents disclosure of documents that one party has been *compelled* to provide, eg under subpoena (unless the document has been received into evidence), unless the court has given permission for the documents to be disclosed. The idea is that if the law has required a person to provide a document for a particular purpose, it would be unfair if the other party could then use the document or the information for other purposes.

The *Harman* principle has been applied in many cases, including at least one in the Family Court of Australia, and although the principle can be overridden by an inconsistent statutory provision,[40] there seems no reason why experts' reports would be exempt from its operation. Where a party's expert report came to the knowledge of the other party because of the legal obligation to disclosure that is imposed by the Family Law Rules, it seems clear that the *Harman* principle would apply, so that it would be contempt of court for the other party to disclose the report to anyone else without the court's permission. Thus a party to the litigation who obtained a report as a result of the commissioning party's obligation to disclose could not then provide it to any third party, even, say, a child protection agency, without the court's permission.

37 The name derives from *Harman v Home Department State Secretary* [1983] 1 AC 280.
38 *Hearne v Street* (2008) 235 CLR 125.
39 *Hearne v Street* (2008) 235 CLR 125, Hayne, Heydon and Crennan JJ at [96].
40 As illustrated by *Pedrana & Pedrana* (No 2) [2012] FamCA 348.

In the above quotation, the words 'unless it has been received into evidence' indicate that the *Harman* principle ceases to operate if the report has been admitted in evidence. In ordinary civil litigation, especially given the oral tradition of the common law (people could come to court and hear the evidence), this made sense: once the document had been admitted into evidence it was, so to speak, out in the public.[41] The point is arguably not so strong in recent times, when much of the evidence is in written form, and there could be room for argument about whether the principle might need to be modified in cases where there are restrictions on reporting the case to the public, and where the child's best interests are paramount, not the rights of the litigating parties. Unfortunately, there appear to be no reported cases on this point.

To summarise, in its ordinary application in civil cases the *Harman* principle does not prevent the disclosure of reports after they have been received into evidence; but it is possible that if the point arises the courts might develop a version of the *Harman* principle that would apply it to experts' reports in children's cases, even after they have been received into evidence.

Experts' reports commissioned by the family courts and the children's courts

Family consultants' reports in the family courts

As previously mentioned, the rules applicable in the family courts[42] provide that the family court may release a family report to the parties and the independent children's lawyer, and may order that the report not be released to a person or that access to the report be restricted. Apart from section 121 (which prohibits the dissemination of identifying information to the public or a section of the public) there are no other provisions in the Act or the rules that deal with the disclosure or distribution of family consultants' reports.

Obviously, family reports may be of value for purposes other than the court proceedings for which they were written. For example, a party to whom a family report has been released might want to make it available to child protection authorities, or, say, a school or a therapist working with the affected child. Another possibility, however, is that a party might provide the report to a third party for less honourable motives, and perhaps with damaging consequences. There is at least one anecdotal report of a party to proceedings supplying a family report to the *employer* of the other party.[43]

In the first instance, the report is provided to the court,[44] which has authorised the report. In the brief period between the supply of the report to the court and the court's order releasing the report, it seems likely that if anyone obtained the report and disclosed it to someone else, that would be contempt of court. This is of little importance, because in practice those interested may not know the report has yet been provided to the court, and would normally be unable to access it.

41 Apparently in WA consultant's and single experts' reports are treated as being in evidence once they have been filed and distributed, for the purposes of interim hearings. It would be surprising if they were then seen to be in evidence for the purpose of the exception to the *Harman* principle, because there would be no application of the possible rationale, ie that the material was in some sense open to the public.

42 The rules applicable to the Family Court of Australia are the Family Law Rules 2004 (Cth). The Federal Circuit Court has its own rules, but to a large its rules adopt the Family Law Rules 2004 (Cth), so that for most present purposes there is effectively no different between the two federal courts that administer the Family Law Act. The Family Court of Western Australia has different legislation, but again for present purposes the rules are essentially the same.

43 It is not necessary here to review whether such actions might be defamatory or be in breach of some other law.

44 Family Law Act s 11A(d).

The real issues relate to the permissible disclosure of reports after they have been released to the parties. Normally the court will have made orders about its disclosure. But what is the position where such orders are not made, or do not deal with all possible disclosures, (such as when they provide for the report to be released to the parties but say nothing more)? Can a party, having obtained the report, then disclose it to others? Can an independent children's lawyer do so? Can members of the court's staff do so? And in each case, are some disclosures permissible or not permissible depending on the person or body to whom the disclosure has been made, or the purpose of the disclosure? Is the situation different after the report has been received into evidence?

Answering these questions is difficult, because it is doubtful whether the *Harman* principle, or some variant of it, would apply to family consultants' reports. One view might be that family consultant reports are somewhat similar to documents produced under subpoena, since parties can be required by court directions to attend an appointment with a family consultant[45] (for the preparation of the family report). This could be seen as a form of compulsion analogous to a party being required to produce information or documents. Arguably, then, the *Harman* principle should apply, because it would be equally unfair to someone who has provided information to a family consultant to discover that such information, in the form of a family report, had been supplied to third parties.

On the other hand, the *Harman* principle was developed in ordinary civil proceedings between two parties, and applied when one party takes legal steps to obtain, for the purpose of the proceedings, documents belonging to the other party. Family consultants' reports, however, are not documents belonging to one party. Again, in the civil proceedings for which the *Harman* principle was designed, the issues are what is fair between the parties; by contrast, in family law and Child Protection cases the child's best interests must be paramount, not the rights of the competing parties. There is room for argument, therefore, about whether the *Harman* principle should apply to family consultants' reports in children's cases, and if so whether it should be modified in some way. Indeed, it is possible that the courts might take a fresh look at the question whether it is contempt to disclose, without court permission, experts' reports that were provided to the court for the purpose of proceedings in which the child's best interests are paramount. If they took a fresh approach, the courts could say that any such disclosure would be contempt of court; or could take the opposite view, that there might be circumstances in which disclosure is permissible. And although the *Harman* principle does not apply to reports that have been admitted into evidence, it is possible that the family courts could consider this issue in relation to experts' reports.

As explained earlier, *Hague Convention reports* are similar to family reports, and the same legislation applies to them as applies to family reports. Thus the above comments on family reports also apply to them.

Single experts' reports in the family courts

In relation to the disclosure of single experts' reports without the court's permission, these reports seem to be in the same position as family consultants' reports. It is equally difficult to say whether disclosures to third parties are permissible, and if so in what circumstances.

45 Family Law Act s 11F.

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Experts' reports commissioned by the children's courts

In general, the relevant state and territory legislation usually does not have detailed provisions relating to the procedure in children's courts. This contrasts somewhat with the Family Law Act and the Family Law Rules, which have detailed provisions about such matters as family consultants' reports, single experts, and, especially since the amendments of 2006, detailed principles and procedural rules about the conduct of children's proceedings. In particular, these principles, and the associated powers, involve the court in a more interventionist, child-centred role than that of the traditional 'adversary' procedure of the common law system. Broadly speaking, although the Child Protection legislation emphasises the importance of the child's interests, and the strict rules of evidence may not apply, the legislation does not set out a detailed departure from the 'adversary' system — the adversaries being the child protection authority, which normally brings the proceedings seeking to intervene to protect the child, and the parents, who are normally the respondents in the proceedings.

In most jurisdictions, therefore, the court receives evidence essentially from the parties. Typically, much of the background information and medical and expert material is provided by reports tendered by the child protection authority. In general, the children's court itself receives the material provided by the child protection authority, and there is no real equivalent to the family consultants, the court employees who provide expert advice and reports to the family courts. Similarly, there are no detailed provisions for the appointment of single experts, in contrast to procedural rules that exist in the Family Court of Australia and in many state Supreme Courts.[46]

The legislation of three jurisdictions, however, does include provision for reports being provided to the children's courts other than by the parties. They are New South Wales, Victoria and Western Australia.

In *New South Wales* there is a clinic associated with the children's court. The Clinic prepares 'assessment reports' for the court.[47] These reports tend to be less detailed than family reports used in the family courts, and involve less interaction between the report writer and the family members. The report writers are understood to be former child protection departmental employees. There is a provision that *parties* may apply for access to the assessment report.[48] However it is understood that in practice the court also hears applications by non-parties, such as people caring for a child, no doubt applying its general procedural powers. The legislation does not specifically deal with the question whether a person could provide the report to someone in the family law system, but it would probably be desirable to obtain the court's permission before doing so. Legislation of 2010 that would have opened up court documents has not been brought into force.[49]

46 For example, Uniform Civil Procedure Rules 1999 (Qld) Part 5.

47 Children's Court Rule 2000 (NSW), Part 7A.

48 Children's Court Rule 2000 (NSW), r 36.

49 The *Court Information Act 2010* (NSW), although passed in 2010, had not been brought into force by February 2014. Under this Act, had it been in force, experts' reports that had been admitted as evidence in a children's court and other specified courts (s 4) would have been 'open access information' (s5(2)(e), and there would have been no restriction on people obtaining them, eg by inspection of the court file – unless, of course, a court has ordered to the contrary (s 8).

In *Victoria*, the legislation deals with various categories of reports,[50] some of which, such as 'protection reports'[51] and 'disposition reports'[52] could perhaps constitute or include what are here treated as experts' reports. The legislation carefully regulates access to these reports. By section 552, a person who prepares or receives or otherwise is given or has access to a report must not, without the consent of the child or the child's parent, disclose any information contained in the report to any person who is not entitled to receive or have access to that report.[53] The section applies subject to a contrary direction by the court,[54] and does not prevent the department's employees or lawyers from having such access.[55] The court can grant any person specified access to a report.[56]

In *Western Australia*, the court may appoint a person to give a written report to the court, and the report is admissible in evidence.[57] The *report-writer* is forbidden from disclosing anything in it without the court's permission, but the child protection authority ('the CEO') may do so.[58] Thus this provision does not prohibit departmental officers from providing such reports to the family law system.

Summary: permissible sharing of experts' reports in the children's courts

In all jurisdictions, it would seem that any person can apply to the children's court for access to experts' reports, even when this is not expressly stated in the legislation. Even where the relevant legislation is silent on the point, it would appear that the children's courts would have power to make orders about the release of any reports or other items of evidence, as part of their general power to control proceedings. Thus the children's courts can make orders either permitting or forbidding the disclosure of reports. It is clear that sharing of experts' reports prepared for or held by children's courts can be permissibly shared when this is authorised by the court, and cannot be shared when the court forbids it.

In Western Australia and Queensland, the provisions just considered suggest that in relation to the reports specified, departmental officers could provide them to the family law system. But in relation to other reports (such as individuals parties' experts' reports), and in relation to the other jurisdictions, it is not entirely clear whether such disclosure to the family law system would be permissible in the absence of a court order. The *Harman* principle, considered earlier, suggests that such reports cannot be so disclosed without the court's permission, although the principle may not apply once the report has been admitted into evidence. And as noted in the earlier discussion, it remains to be seen whether the *Harman* principle will be applied without modification to children's cases in the family courts, and in the children's courts.

50 Children, Youth and Families Act 2005 (Vic), Part 7.8; see s 547.
51 Children, Youth and Families Act 2005 (Vic), s 553.
52 Children, Youth and Families Act 2005 (Vic), s.557.
53 Children, Youth and Families Act 2005 (Vic), s.547(1).
54 Children, Youth and Families Act 2005 (Vic), s.552(2).
55 Children, Youth and Families Act 2005 (Vic), s. 552((3).
56 Children, Youth and Families Act 2005 (Vic), s. 556 (protection reports), s.559 (disposition reports), ss. 561, 562 (additional reports).
57 Children and Community Services Act 2004 (WA), s 139.
58 Children and Community Services Act 2004 (WA), s 141(2)

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Given the complexity and uncertainty about the matter, it seems appropriate to recommend sharing of experts' reports in the children's courts only *if sharing is permitted by the applicable legislation or by order of the children's court.*

Experts' reports held by the child protection authorities

Introduction

In general, the sharing of experts' reports held by child protection authorities (as distinct from the children's courts) is covered by the *Information-Sharing Report*, and that discussion need not be repeated in detail. As discussed in that report, apart from the information-sharing provisions of New South Wales, there is little or no legislative *encouragement* for the child protection system to share information with the family law system, and it is important to build on existing formal and informal arrangements for the sharing of relevant information between the family law and the child protection systems.

The *Information-Sharing Report* also reviews two groups of provisions that could *inhibit* the sharing of information in some situations. The first group contains the provisions forbidding disclosure of the *identity of people who notify the authorities* of suspected child abuse or neglect. Experts' reports will not normally identify any person who notified the child protection authorities of suspected child abuse or neglect, and there would be little point in returning to this topic here.

The second group contains provisions forbidding officers from disclosing information obtained while administering the legislation. The *Information-Sharing Report* discusses this legislation, and the various exceptions that apply. However it is worth revisiting this topic, and considering how those provisions might apply to the disclosure of experts' reports held by the child protection authorities.

Provisions that criminalise disclosing information obtained while administering the child protection legislation

In each jurisdiction it is an offence to disclose (to use the language of the New South Wales Act) 'any information obtained in connection with the administration or execution of this Act', except in certain circumstances. The wording is virtually the same in all jurisdictions. Disclosing an expert report that had been prepared in connection with child protection work would clearly involve disclosing information, and thus the relevant provision would apply to it just as it would apply to other disclosures of information obtained in connection with the administration of the act. In each jurisdiction there are exceptions, and the question is whether providing an expert report to a family court falls within one of more of the exceptions. It will be necessary to consider each jurisdiction in turn.

New South Wales

In New South Wales[59] the exceptions are (in slightly abbreviated form), where the disclosure is made:

> *(a) with the consent of the person from whom the information was obtained, or*
>
> *(b) in connection with the administration or execution of this Act or the regulations, or*
>
> *(c) for the purposes of any legal proceedings arising out of this Act or the regulations, or of any report of any such proceedings, or*
>
> *(d) in accordance with a requirement imposed under the Ombudsman Act 1974 , or*
>
> *(e) with other lawful excuse.*

Chapter 16 of the Act contains information-sharing provisions that (uniquely in state and territory legislation) expressly include the family courts in the 'prescribed bodies' that are to share information.[60] The legislative principles stated in that 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.

The Act provides for voluntary provision of information by one information-sharing entity ('prescribed body') to another, those entities relevantly including the child welfare authority and the family courts. Section 245C provides:

> *(1) A prescribed body (the 'provider') may provide information relating to the safety, welfare or well-being of a particular child or young person or class of children or young persons to another prescribed body (the 'recipient') if the provider reasonably believes that the provision of information would assist the recipient:*
>
> > *(a) to make any decision, assessment or plan or to initiate or conduct any investigation, or to provide any service, relating to the safety, welfare or well-being of the child or young person or class of children or young persons, or*

59 Children and Young Persons (Care and Protection) Act 1998 (NSW), s 254.

60 Section 248 defines 'prescribed bodies' to include and the Family Court of Australia and the Federal Magistrates Court (now the Federal Circuit Court) are specified by the Children and Young Persons (Care and Protection) Regulation 2000, reg 7(d) and (e).

(b) to manage any risk to the child or young person (or class of children or young persons) that might arise in the recipient's capacity as an employer or designated agency.

(2) Information may be provided under this section regardless of whether the provider has been requested to provide the information.

In addition, s 254D provides that when one prescribed body asks another for information that relates to the safety, welfare or well-being of a child, for the purposes of assisting the requesting agency 'to make any decision ...or to provide any service, relating to the safety, welfare or well-being of the child', the other prescribed body is normally *required* to comply with the request if it reasonably believes, after being provided with sufficient information by the requesting agency to enable it to form that belief, 'that the information may assist the requesting agency' for any such purpose.

It is clear, therefore, that it would be lawful within s 254(1)(b) and (f) ('with other lawful excuse') for a child protection officer to provide to a family court[61] an expert report relating to the safety or welfare of a child, reasonably believing that it would assist the family court to make a decision relating to the safety or welfare of the child.

Victoria

In Victoria, departmental officers must not disclose any information arising from the investigation other than to certain persons: the list includes the children's court, and persons to whom disclosure has been authorised by the Secretary, but does not include persons or bodies in the family law system.[62]

Queensland

In Queensland the exceptions to the offence of disclosing information obtained while administering the Act[63] are expressed as follows:

(a) except to perform functions under the Act;[64] or

(b) if 'the use, disclosure or giving of access is for purposes related to a child's protection or wellbeing',[65] 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'.[66]

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

61 A technical question could perhaps be raised whether providing an expert report to an independent children's lawyer is providing it *to the court*. If there is any concern on this score, the report could be supplied directly to the court when requested by an independent children's lawyer.

62 Children, Youth and Families Act 2005 (Vic) s 205(2)(b); s 206(2); see also the definition of 'court' in s 3.

63 Child Protection Act 1999 (Qld), s 187(1), (2). There is a similar obligation on people to whom departmental officers give information: see s 188.

64 Child Protection Act 1999 (Qld), s 187(3)(a).

65 Child Protection Act 1999 (Qld), s 187(3)(b).

66 Child Protection Act 1999 (Qld), s 187(3)(c).

The Queensland Government has announced a wide ranging review of its child protection system, following on the Carmody Report.[67] Thus in relation to Queensland, Recommendation 4, below, should be treated as a recommendation that these issues be included in that review.

South Australia

In 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.[68] As in the case of Victoria, it is difficult to find anything in the Part that would *require* the disclosure of an expert report to the family courts, and again, unless doing so was required by the department, in theory the disclosure might violate the law. Again, there is a strong argument for amendment.

Western Australia

In Western Australia, the offence is not committed when the disclosure is[69]

(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.

It might be arguable that paragraph (e) would apply to disclosures made to the Family Court of Western Australia. This argument depends on that court being a 'public authority' under s 23(2) of the Children and Community services Act 2004 (see the definition of that term in s 3 of the Act). It is difficult to find any other exception that would include a voluntary provision of an expert report to a family court, and, again, in my view the provision should be amended to make it clear that the person who does so does not commit an offence. If 'public authority' in s 23 is intended to include the Family Court of Western Australia, in my view it would be desirable to state that explicitly. In the meantime, as suggested in the *Information-Sharing Report*, a convenient solution 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[70] is not committed if authorised or required by law, or in the administration of the Act, or to provide statistical information.[71] Again, the voluntary provision of an expert report to a family court would not appear to fall within any exception.

ACT

The offence[72] is not committed by a disclosure when administering the Act.[73] Section 865 provides that an information holder must give protected information to a court or investigative entity if

67 Queensland Government Response to the Queensland Child Protection Commission of Inquiry final report 'Taking Responsibility: A Roadmap for Queensland Child Protection' (December 2013)(accepting Recommendations 14.1 and 14.2).

68 Children's Protection Act 1993 (SA), s 58(3)(a).

69 Section 241(2).

70 Children, Young Persons and Their Families Act 1997 (Tas), s 103(1).

71 Children, Young Persons and Their Families Act 1997 (Tas), s (3).

72 Children and Young People Act 2008 (ACT), s 846.

73 See Children and Young People Act 2008 (ACT), s 865.

'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 seems, therefore, that the exception would apply to the provision of an expert report to a family court when this is required or authorised by the family court, but not when it is provided on a voluntary basis.

Northern Territory

The offence[74] is not committed if the disclosure is made when exercising a power or function under the Act,[75] or making a disclosure to a court or tribunal,[76] or 'otherwise authorised or required by law'.[77] If the family courts fall within the words 'court or tribunal', then the disclosure of a family report to a family court would not be an offence.

Summary

The provision of experts' reports from the child protection system to the family law system is complicated by the existence in a number of jurisdictions of what may well be unenforced and perhaps largely forgotten statutory offences which forbid departmental officers from disclosing information obtained while administering the child protection legislation.

In New South Wales, Queensland and probably the Northern Territory, the offence of disclosing information obtained while administering the child protection legislation would not apply to an officer who responsibly and voluntarily provided an expert report to a family court. By contrast, in Victoria, South Australia and Tasmania, and probably in Western Australia and the Australian Capital Territory, doing so could, in theory, involve the commission of an offence.

The prohibition against disclosure of information obtained in administering state and territory Child Protection legislation: comments and recommendation

Despite these offences on the statute books, it seems that in practice, as a result of informal and formal measures for cooperation, information is in fact frequently provided by the child protection system to the family law system. I am not aware of any prosecutions having been made in such cases, or, indeed, in any cases in recent times.

What can be said about the apparent disconnect between the practice and the statutory offences?

One possibility is that these offences are little known or routinely disregarded (although no doubt they could be dusted off and applied if it were shown that an officer disclosed the report to an inappropriate person, or in a random or malicious way).

Another possibility is that providing information to the family law system in a way that is in accordance with accepted practice is seen as falling within one of the exceptions, namely the exception (variously expressed) of performing functions 'under this Act'. No doubt this would mean that in practice prosecution of the officers would be unthinkable. However, as a technical matter

74 Care and Protection of Children Act (NT), s 195. There is a similar provision relating to Part 3.3 (prevention of child deaths): s 221.
75 Care and Protection of Children Act (NT), s 195(2)(a).
76 Care and Protection of Children Act (NT), s 195(2)(b).
77 Care and Protection of Children Act (NT), s 27(2)(c).

it may be doubtful whether providing information to the family law system can be regarded as performing functions under the child protection legislation if that legislation does not in any way authorise such actions, and the actions, while desirable, may not directly advance the tasks of the department as specified in the legislation. In theory, the answer might depend on a close analysis of the legislation in each jurisdiction.

In my view decent officers who responsibly provide information to the family courts should not have to do this in the shadow of possible criminal liability, however unrealistic a prosecution might be. In many situations, children's safety and wellbeing is unnecessarily put at risk if the family courts have to make decisions without the benefit of experts' reports held by the child protection system that would help the family courts protect children. There is an overwhelming argument to repeal or amend the provisions that would criminalise a child protection officer who conscientiously provides an expert report to a family court in order to help the court make a correct decision relating to the safety and welfare of a child. In my view the law should positively encourage such conduct, not forbid it. While no doubt there could be different views about the ideal legislation, in my view the New South Wales provisions provide an excellent starting-point for a reconsideration of this area of law.

Recommendation 3: Review of certain provisions prohibiting the disclosure of information obtained while administering the Child Protection legislation

State and territory legislatures should urgently review the provisions in child protection legislation that prohibit disclosure of information gained in administering the legislation to ensure that they do not forbid the sharing of experts' reports held by the child protection authority or the children's courts in children's cases with the family law system. [Those provisions are Children, Youth and Families Act 2005 (Vic) ss 205, 206; Child Protection Act 1999 (Qld), s 187; Children's Protection Act 1993 (SA), s 58; Children and Community Services Act 2004 (WA), ss 139, 141; Children, Young Persons and Their Families Act 1997 (Tas), s 103; Children and Young People Act 2008 (ACT), especially ss 846, 865; Care and Protection of Children Act (NT) s 195.]

Permissible disclosure of experts' reports: summary and conclusions

This Part has sought to identify so far as possible in what circumstances experts' reports could be lawfully included in information-sharing arrangements between the Child Protection and the family law systems.

In relation to experts' reports held by the courts, one question is whether sharing the reports without the courts' permission would violate s 121 of the Family Law Act or the equivalent provisions of some state and territory legislation. As to s 121, although in my view the answer is no, not everyone shares this view, and accordingly there is a practice of seeking court approval for such sharing. I know of no judicial or other interpretations of the equivalent state and territory provisions, but in my view (with the possible exception of Queensland and Northern Territory) they would probably not prohibit people in the child protection system from sharing these reports with the family law system.

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A second question is whether the sharing of reports commissioned by the family courts and children's courts without the courts' permission may amount to contempt of court. The answer depends on the extent to which the courts would apply or adapt the *Harman* principle. Unfortunately, in the absence of authority on the point it is difficult to predict the outcome with any confidence, even where the report has been admitted into evidence. Individually-commissioned reports in the courts may be in a different position, at least when they are provided to the courts voluntarily: sharing in this case appears to be permissible if it is with the consent of the person who commissioned the report. On the other hand, it might be cumbersome to have information-sharing arrangements limited to this category of report, since the arrangements would have to include measures by which the information-sharers could be satisfied that the party had in fact consented. Also, the available evidence does not indicate that there is a great demand for sharing such reports. I am therefore not inclined to recommend special arrangements for this category of expert reports.

In view of the possibility that in some situations at least sharing expert reports filed in court would be unlawful either because of the prohibition against publicising court cases, or the Harman principle, and the uncertainty of these areas of law, it would be unfair to establish information-sharing arrangements that could possibly involve unlawful acts. Consequently, it seems best to limit any sharing of such reports to cases where the court has authorised it.

At the time of writing, the Federal Circuit Court of Australia is considering revising its rules so that experts' reports could in some circumstances be shared with the Child Protection system. The subject of such legislation is considered elsewhere in this report. It is obviously sensible to include in sharing arrangements any disclosure of experts' reports that is specifically authorised by legislation.

Accordingly, I will recommend a simple rule, applicable to all experts' reports in the courts, that information-sharing arrangements should be limited to situations where the court has given permission for the sharing, or the sharing is authorised by legislation (a term that of course includes rules of court).

In relation to experts' reports held by the Child Protection authorities, the position is quite different. There is no need to obtain court approval. The only possible impediment appears to be the risk that in some jurisdictions sharing might infringe the provisions of the Child Protection legislation forbidding the disclosure of information obtained while administering the legislation. As mentioned in the previous discussion, there may be no realistic possibility of any action being taken under these provisions, especially where the sharing was done in accordance with approved departmental practice. Nevertheless, although departmental officers may well decide to share information in such circumstances, it would not be appropriate to recommend that they risk breaching such provisions (see Recommendation 3, above, to the effect that these provisions should be reviewed).

Recommendation 4: Sharing of experts' reports generally

(1) The recommendations for information-sharing between the family law system and the child protection system contained in the *Information-Sharing Report* should be treated as generally applicable to experts' reports where such sharing is clearly permitted by law.

(2) Having regard to the state of the law at the date of this report, the following arrangements should be made for the sharing of experts' reports between the family courts and independent children's lawyers (the family law system), legal aid commissions, and children's courts and child protection authorities (the child protection system):

- experts' reports provided to a family court or a children's court should be shared with the other system when such sharing is authorised by legislation or by court orders; and
- experts' reports prepared for the child protection authorities and not filed in court should be shared unless such sharing is prohibited under the relevant state or territory child protection legislation.

(3) Responsible authorities in the family law and child protection systems should consider whether sharing arrangements might usefully be extended to include

- individually commissioned experts' reports in the family courts or the children's courts where the commissioning party consents to the sharing, and
- experts' reports that have been admitted into evidence in the family courts or the children's courts

even where the sharing of such reports is not specifically authorised by legislation or court orders.

Recommendation 5: Legislative encouragement of information-sharing

State and territory legislatures other than New South Wales[78] should consider passing legislation that positively authorises, encourages or requires the child protection to share experts' reports with the family law system in appropriate circumstances.

78 This recommendation does not include New South Wales because that jurisdiction has done what is here recommended: see Children and Young Persons (Care and Protection) Act 1998 (NSW), Chapter 16.

Part 4: Some practical issues and recommendations

Introduction

The Terms of Reference ask me to identify '*the legal and practical impediments and issues related to the sharing of experts' reports between the child protection and family law systems*', and to suggest solutions.

Issues about the desirability of sharing experts' reports were discussed in Part 2. The lawfulness of sharing experts' reports was considered in Part 3. Those discussions led to recommendations to the effect that experts' reports should be shared in the specified circumstances, and that certain laws that might inhibit such sharing should be reviewed.

This Part deals with particular issues and practical impediments to the sharing of reports, and suggests solutions.

First, it discusses three ways in which the law could promote appropriate sharing of reports that have been provided to the courts, while prohibiting inappropriate disclosures. In principle, the discussion is relevant to the position of children's courts as well as the family courts, but very little information is available about the release of reports provided to the children's courts, and thus the discussion will deal primarily with the family courts. Further, although the issues relate to all forms of experts' reports, most of the focus of existing work is on family reports, and the discussion will reflect this. The first possible measure would be to amend the rules so they specify the persons to whom experts' reports may normally be released. The second would be for the family courts to develop precedent orders, to ensure so far as appropriate that there is consistency in court orders dealing with the disclosure of reports. The third measure would to issue notices when releasing experts' reports, designed to help people make appropriate use of the reports. As we will see, the second and third measures have already been adopted to some extent, and very recently the Federal Circuit Court of Australia has developed an approach that appears to have great benefit.

Secondly, this Part discusses whether sharing arrangements should include the legal aid commissions as well as the independent children's lawyers. This leads to a more general discussion of the advantages of relying on professionalism rather than detailed regulation to avoid some of the inevitable risks of information-sharing.

Finally, the Part proposes a number of measures designed to increase awareness and understanding relating to the sharing of experts' reports.

Regulating the disclosure of experts' reports provided to the courts

The first approach: amending the rules to specify those to whom the reports may be disclosed

The most obvious way of regulating the disclosure of reports that have been provided to the courts would be by legislation: amending the rules so they specify the persons to whom experts' reports in the family courts and the children's courts may and may not be disclosed, subject of course to any court order applicable in a particular case. Such an amendment could provide, for example, that

unless the court otherwise ordered, when a report is released to the parties it can also be disclosed to specified individuals or bodies, but not disclosed to anyone else. In the case of the family courts, the list would include the appropriate bodies in the child protection system. In the case of the children's courts, it would include the appropriate bodies in the family law system.

The main argument in favour of this approach is that the law would be clear. The report could be disclosed to anyone authorised by the court order, or anyone authorised by the rule, provided there was no inconsistent court order. It could not be disclosed to anyone else.

One stakeholder, however, has drawn attention to the situation in which a litigant might show a report to a partner, close friend or counsellor to obtain emotional support and assistance. How would that situation be dealt with in the rules? It would be difficult to formulate a rule that would be satisfactory in all situations, and attempting to do so might lead to unduly complex provisions. Some might argue that it would be better to live with a degree of legal uncertainty, and that as a practical matter, the existence of s 121 (and equivalent sections in some children's jurisdictions) would be enough to ensure that the parties would be circumspect about showing it to others, but would not make it an offence from them to do so in such intimate situations – in which, I assume, there would be no serious objection to their doing so. Arguably, a degree of uncertainty has possible advantages in this situation.

The prospect of making rules to specify comprehensively the permissible disclosure of experts' reports does not appear to have been much considered. As we will see, the main developments have been to develop more uniform precedents and notices to accompany the release of reports. For these reasons, the present recommendation will be only that the family courts and children's courts give consideration to such legislation.

Even if the rules were not to specify the persons to whom reports could be disclosed, it would be desirable that they explicitly indicate that the court could make orders authorising the disclosure of reports to child protection bodies and to legal aid. Although such a provision might not change the law – because the courts can surely make such orders under their general powers to control proceedings - it would make the power clear, and also encourage everyone to consider the value of such distribution. The proposed amendments to the Federal Circuit Court of Australia rules, discussed below, provide a model for such an amendment.

The second approach: using precedents to crease a measure of consistency in making orders for the release of experts' reports

While it is essential that the judge or registrar should tailor such orders to the particular case where necessary, it seems desirable that there be a uniform approach in unremarkable cases. Not surprisingly, it seems that judges generally have a precedent that they use in the majority of cases. It is not known how uniform such precedents are, as between the three family courts, and from one registry (or one judge) to another.

I have been advised that the common form of such orders in one registry of the Family Court of Australia is as follows:

3. *"Pursuant to rule 15.04 of the Family Law Rules 2004, copies of the report by [...] dated [...] may be given to:*

   (a) the parties;

   (b) the lawyer(s) for the parties;

   (c) the lawyer(s) representing the child/ren in the proceedings under s 68L of the Act (if appointed), and

   (d) if a party is legally aided, to employees of the legal aid body providing financial assistance to the party, but only upon a request from an employee of the legal aid body, for a copy of the report.

4. *Except with the Court's permission, no person is to release the report, or provide access to the report, to any person other than those mentioned in paragraphs (a), (b), (c) or (d) of the previous order."*

Another precedent available to judges in the Family Court of Australia is similar but contains some differences. Paragraph (d) is more widely drafted: '*a legal aid body, for use in connection with any application for legal aid, and any mediation associated with such an application.*' There is also an additional paragraph, as follows: '*a family dispute resolution practitioner, for use in relation to the proceedings*'.

It seems likely that there may be other variants. I understand the Family Court of Western Australia makes standard orders that include an injunction restraining the parties and any independent children's lawyer from providing copies of any Single Expert's report prepared for the purpose of the proceedings to 'any person other than their solicitor or counsel in these proceedings, without first obtaining leave of the Court'. The orders make provision for applications for leave to provide copies to other people. The orders are expressed to continue in force following completion of the proceedings.

In relation to Hague reports, the wording of draft orders relating to the disclosure of family consultant reports has been the subject of a recent discussion between the Australian Central Authority and the State Central Authorities. As part of this discussion it was proposed that a possible draft order could be: '*That liberty be given to the applicant to disclose and provide a copy of the Regulation 26 Report to officers of the Department of Communities, Child Safety and Disability Services (or other relevant agency) and the Commonwealth Attorney-General's Department and their legal advisors, the (overseas) central authority, the requesting applicant parent, and any lawyer or legal representative or other professional engaged on her/his behalf or the applicant's behalf in relation to the application and the respondent and any lawyer or legal representative or other professional engaged on her/his behalf or the applicant's behalf in relation to the application.*' The substance of this draft is incorporated in the recommendation below.

It appears, therefore, that at least some of the precedent orders being used in the family courts do not include provision for experts' reports to be made available to child protection authorities. If we are to encourage the sharing of experts' reports between the family courts and the child protection authorities, some initiative needs to be taken. A very promising initiative being taken by the Federal Circuit Court of Australia is considered below.

The third approach: use of notices to accompany reports when released to the parties

A third approach is to provide for a notice to accompany the release of family reports. Such notices could, for example, draw attention to s 121 and contain some information about the nature and status of the report, with the intention of ensuring that it is appropriately used. They would be as valuable in relation to Hague reports as to other experts' reports. I am not aware of any similar practice in the children's courts, and accordingly this discussion is limited to the family courts.

Available information suggests that such notices are in use, but the drafting has not been uniform. One version of the Notice says that penalties may apply under section 121 of the Family Law Act 1975 'to the printing or publication of any material contained in this report other than for use in connection with the proceedings'. With respect to the person who drafted it, this wording is misleading in a number of ways. Section 121 does not prohibit *printing* a document (as distinct from dissemination), and it applies only to material that would identify a party or a witness, not to 'any material' in a report. More important, a reader of that Notice would gain the false impression that s 121 forbids *any* other publication of the report, whereas as explained in Part 3 it prohibits only publication to the *public* or a section of the public. The version of the Notice just quoted also says that the report '*should not be disclosed to persons other than the legal representatives of the parties and the parties unless the Court directs*'. This is problematical, however, because unless the court has so ordered, as previously indicated it is somewhat uncertain whether disclosing such a report would necessarily be unlawful. The Notice itself, unless part of the court's orders, obviously could not make it so.

Another precedent has different wording. The standard order includes a provision that except with the court's permission, no person is to release the report, or provide access to it, to anyone other than those mentioned in the court order. Then the Notice used in conjunction with that precedent order says that the report '*should be treated as confidential and, in accordance with the release order, should not be disclosed to persons other than those mentioned in the release order, unless the Court subsequently orders otherwise*'. This wording is more satisfactory, it is submitted, since it rightly identifies the court's order as the basis for the statement that the report should not be disclosed.

The existence of these different forms of notice suggest that it would be desirable to have a carefully drafted version formulated and supported by legislation so that it will be consistent. Ideally, such notices will contain advice and information about the law, but will attribute any restriction about information-sharing to the relevant court orders (or, if the Rules are amended, to the relevant rule).

Different opinions could be held on what such notices should contain. They should certainly draw attention to s 121 of the Family Law Act. They could also usefully point out some features of the report. One such feature could be that the report may or may not have been admitted into evidence, and if so that a court may or may not have accepted the views expressed in the report. The Federal Circuit Court of Australia proposals, discussed below, deal with both these matters. The notices could also point out that the reports are written on the basis of the information available to the expert at the time, and thus it might be unsafe to rely on them if there is later or contradictory evidence.

Current proposals in the Federal Circuit Court of Australia

I understand that the Federal Circuit Court of Australia is considering fairly comprehensive measures to encourage the appropriate disclosure of expert reports. There are three ingredients: an amendment to the rules make it clear that the court has power to release reports to the child protection system; a model or precedent order; and the use of notices.

The Federal Circuit Court's proposed rule amendment

The proposed amendment would change sub-rule 23.01A(5) and add a new sub-rule (6), so it would read:

Rule 23.01A Family reports

(5) If the Court orders the preparation of a family report, the Court may:

(a) release copies of the report by way of an Order or otherwise to the following:

(i) each party, or the party's lawyer, and to any independent children's lawyer in the proceedings;

(ii) a children's court;

(iii) a child protection authority;

(iv) a State or Territory legal aid authority;

(v) the convenor of any legal dispute resolution conference;

(b) receive the report in evidence and permit oral examination of the person making the report; and

(c) order that the report not be released to a person or that access to the report be restricted.

(6) If a copy of a family report is provided other than by way of an Order to any persons or authorities listed in sub-rule 5A then it shall be accompanied by a notice which:

(d) lists the people to whom a copy of the report may be provided;

(e) advises the reader of the report of the status of the report at the time of the release; and

(f) advises the reader of the potential consequences for unauthorised publication of information contained in the report.

This amendment would specifically enable the court to release reports to a children's court, a child protection authority, a State or Territory legal aid authority, or the convenor of any legal dispute resolution conference. It would also provide a legislative basis for the practice of publishing notices accompanying the release of experts' reports to the parties.

The Federal Circuit Court's proposed model order when ordering a family report

I was also informed, as this report was being prepared for publication, that the Federal Circuit Court was considering adding the following clauses to the usual form of order made when the Court orders a family report:

- *Upon the Report being provided to the Court, the Court will provide a copy to each party (or if represented the party's lawyer) and to any Independent Children's Lawyer in the proceedings.*
- *Unless a party objects, in writing, within 14 days of the date of releasing the Report, copies of the Report may further be provided to the following, if the Court is requested to do so for a purpose related to the care, welfare or development of the child/ren to whom these proceedings relate:*

  a Children's Court;

  a child protection authority;

  a State or Territory legal aid authority; and

  a convener of any legal dispute resolution conference.
- *Unless otherwise ordered, no person shall release the Report, or provide access to the Report to any other person.*

AND THE COURT NOTES THAT:

A. At the date on which a copy of the Report is to provide to any of those identified above, it may not have been admitted into evidence and may be untested or if admitted would only form one part of the evidence in the proceedings.

B. Section 121 of the Family Law Act 1975 provides that it is an offence punishable by imprisonment for up to one year to publish or disseminate to the public any account of family law proceedings which identifies the parties, witnesses or other people concerned with the proceedings, unless specifically authorised by the Court.

The Federal Circuit Court's proposed notice accompanying family reports

Finally, I understand the Federal Circuit Court of Australia is considering the following form of Notice:

NOTICE

(P) (INSERT FILE NUMBER)

PLEASE NOTE that pursuant to the orders of INSERT DATE a copy of this report is provided to each party or the party's lawyer and to any Independent Children's Lawyer in the proceedings

AND FUTHER, unless a party objects in writing within 14 days of the date of release, copies of the Report may be provided to the following if the Court is requested to do so for a purpose related to the care, welfare or development of the child/ren to whom these proceedings relate:

a children's Court;

a child protection authority;

a State or Territory legal aid authority; and

a convener of any legal dispute resolution conference.

AND no person shall release the report, or provide access to the report to any other person.

JUDGE (INSERT NAME)

Date: (INSERT DATE)

NOTICE TO PERSON RECEIVING COPIES OF THIS REPORT.

1. *At the date on which a copy of the Report is provided to any of those identified above, it may not have been admitted into evidence and may be untested or if admitted would only form one part of the evidence in the proceedings.*
2. *Section 121 of the Family Law Act 1975 provides that it is an offence punishable by imprisonment for up to one year to publish or disseminate to the public any account of family law proceedings which identifies the parties, witnesses or other people concerned with the proceedings, unless specifically authorised by the Court.*
3. *Any party requiring the Family Consultant for cross-examination provide at least 14 days' notice in writing to the Family Consultant and each party of the proceeding.*

The Federal Circuit Court of Australia proposals: summary and comment

The effect of these proposals may be summarised briefly as follows. The permissible distribution of the reports is addressed initially, when the Court orders a report. The normal order will provide that when the report is provided to the court it will be released to the parties, and unless a party objects within 14 days, it may then be provided to child protection and legal aid bodies who request it, for a purpose related to the care of the child. Unless otherwise ordered, the report is not to be released to any other person. When the report is released, the judge signs a Notice relating to the appropriate use of the report.

This mechanism avoids the need for a separate hearing about the distribution of the report, but makes it clear to whom the report might be disclosed if there is no objection. The possibility of objecting addresses the need for procedural fairness.

In my view these proposals in the Federal Circuit Court of Australia deserve careful attention. They would normalise the distribution of family reports to child protection and legal aid bodies in ordinary cases (the information-sharing approach embraced in this report) while allowing the system to provide for wider or narrower distribution in particular cases. While it is not possible to assess these proposals here, in my view they appear to be an excellent initiative, and one that would serve the interests of children.

For the above reasons, the following recommendations are made:

Recommendation 6: Rules of court to specify permissible disclosure

Consideration should be given to amending the Rules of Court applicable to the family courts and the children's courts so that they clearly specify the persons to whom reports may and may not be disclosed where the question is not determined by orders of the court.

The following formulation might be considered as a starting point when drafting such provisions:

- *A copy of a family consultant's report may be given to any person that the court has authorised to receive it.*
- [For the family courts] *Unless the court otherwise orders, a copy of an experts' report may be given to a child protection authority; a children's court; and a State or Territory legal aid commission for use in connection with family dispute resolution or child protection mediation or an application for legal aid relating to family court proceedings.*
- [For the children's courts] *Unless the court otherwise orders, a copy of an experts' report may be given to a family court, an independent children's lawyer appointed by a family court, and a State or Territory legal aid commission for use in connection with family law proceedings or an application for legal aid relating to family court proceedings.*
- *A copy of a family consultant's report may not be given to any other person without the court's permission.*

If such an amendment is made, the relevant procedures should be such as to ensure that the parties have an opportunity to make submissions about the extent to which disclosure will be permitted in their particular case.

Recommendation 7: Amending rules of court so they explicitly enable courts to authorise disclosure of reports to the family law or child welfare systems, and to legal aid bodies

Rec 7.1 If the rules are not to specify directly to whom reports may and may and may not be disclosed, they should be amended to make it explicit that family courts can make orders allowing the disclosure of reports to appropriate bodies in the child protection system, and to legal aid bodies. The proposals under consideration by the Federal Circuit Court, set out above, would be a valuable starting point in the formulation of such rules.

Rec 7.2 Similarly, rules relating to the children's court should make it explicit that children's courts can make orders allowing the disclosure of reports to appropriate bodies in the family law system, and to legal aid bodies.

Recommendation 8: Model court orders releasing reports in parenting proceedings, and notices accompanying such reports

Rec 8.1 The family courts should develop model court orders providing for appropriate disclosure of experts' reports to the child protection system.

Rec 8.2 The family courts should publish notices attached to experts' reports when released to the parties. Such notices should refer to s 121 of the Family Law Act and to other matters relevant to the proper use of such reports, for example by pointing out that the report may not have been admitted into evidence and may not have been accepted by the court, and that the issues may be affected by information that was not available to the writer of the report.

Rec 8.3 The proposals being considered by the Federal Circuit Court of Australia provide an excellent starting-point for drafting such model orders and notices.

Rec 8.4 In Hague child abduction proceedings, the model orders should include clauses to the effect that copies of the report may be given to

- the Australian Central Authority and its legal advisors;
- The Overseas Central Authority; and
- The requesting parent or any other person on whose behalf the Central Authority has made the application and any lawyer or legal representative or other professional engaged on the requesting parent's behalf in relation to this application.

Legal aid bodies or independent children's lawyers?

It is obvious that information provided to the family courts and to the children's courts is to be used for the purpose of decision-making in those courts, and equally obvious that information provided to Child Protection authorities is to be used for child protection work in accordance with the state or territory legislation. Legal aid bodies, however, provide legal aid to people for a range of different types of legal issues and court proceedings, including, for example, criminal law. The intention of including legal aid bodies and independent children's lawyers in information-sharing arrangements is, of course, to assist them in relation to family law and child protection proceedings, and it is not intended that these highly sensitive experts' reports would be available for other use by the legal aid agencies (nor, I believe, is it the practice). Mostly, no doubt, the expert report will have little or no relevance to other functions, but it is possible to imagine situations where it could be relevant to some other work of the legal aid authority. It will be a matter for those involved in working out sharing arrangements whether it is necessary to make this point explicit, and whether to limit the sharing of experts' reports to independent children's lawyers, as distinct from legal aid agencies.

Professionalism rather than detailed regulation may be the best way to avoid risks associated with information-sharing

The above comments about legal aid agencies and independent children's lawyers lead to a more general point about avoiding the risks associated with sharing such sensitive documents as experts' reports. Where there is close professional cooperation, understanding and respect, it may be unnecessary to frame the formal arrangements in relation to the sharing of expert reports to avoid the risk that they might be used for inappropriate purposes. Thus, for example, so far as I know nobody has thought it necessary to specify that experts' reports or other information provided to child protection agencies should be used only in relation to interventions in the particular family and not, for example, in connection with other functions of the department. A relationship of professional collaboration, and internal work practices or guidelines, should make it unnecessary to formulate detailed rules about matters that can be left to the good judgment of personnel in each system. In each system, professionals will be aware of the need to ensure that documents containing sensitive information are used appropriately and not circulated in ways that might unnecessarily violate privacy and create risks.

Anecdotal evidence suggests that whatever the formal arrangements might be, information-sharing arrangements work best when the individuals involved have a good working relationship and confidence in each other. The information-sharing considered in the *Information-Sharing Report*, and in this report, is essentially sharing between agencies and officers whose task is to make professional decisions about the interests of the children and families who are the subjects of the experts' reports, and who understand that their counterparts in the other system have essentially the same task.

Promoting the sharing of experts' reports

As already indicated, the main difficulty with the sharing of experts' reports appears to be that in some circumstances it is unlawful to disclose them, and in many other circumstances the law is unclear. Thus much of this report has been devoted to identifying what sharing the law does permit, and the recommendations about this topic are variously directed to clarifying and improving the law, encouraging consistent making of court orders, and accompanying experts' reports with notices to provide guidance on how they might best be used. The basic approach, however, is that except when the law forbids it, the family law system and the Child Protection System should share experts' reports in the same was as they share other information that is important in making decisions about children. The recommendations of the *Information-Sharing Report* are thus generally applicable to experts' reports. In addition, it is important for personnel in both systems to be aware of the opportunities for sharing experts' reports.

This last section recommends some ways in which the appropriate sharing of experts' reports might be promoted, in a way that will benefit the children and families whose welfare is the ultimate goal that unites all those working in the family law and Child Protection Systems.

Ensuring awareness of the potential value of expert reports in the other system

One impediment to sharing may be that personnel in each system may be unaware, or insufficiently aware, that the other system holds experts' reports, that they might obtain such reports, and that such reports might be of assistance in their work. Busy personnel might not think of the possibility that the other system might have and be able to share experts' reports that could help them.

Recommendation 9: Education and training

Each system should establish appropriate education and training to ensure that its personnel are aware of the potential benefits of experts' reports held by the other system. This could include:

(a) hosting training by personnel in the other system on the types, nature and purpose of reports used in their system;

(b) including guidance in internal training documents;

(c) in jurisdictions where there are out-posted child protection workers, giving these workers an educative role; and

(d) publishing relevant material on the collaboration website established by the Commonwealth Attorney-General's Department.

Ensuring awareness of the existence of an expert's report in the other system in a particular case

Personnel in each system may be unaware of an expert report held in the other system that would be helpful to them in relation to a particular case or a particular family.

Recommendation 10: Measures to measure awareness of relevant experts' reports

Formal and informal procedures established for information-sharing between the family law and child protection systems should include measures to ensure that personnel in each system can readily learn whether there is a relevant expert report held by the other system. Such measures include:

(a) placing appropriate provisions in written agreements between stakeholders to facilitate enquires about the existence of experts' reports in the other system;

(b) considering the sharing of experts' reports through the Commonwealth Courts Portal;

(c) implementing appropriate information technology procedures for information-sharing (for example, dedicated email boxes); and

(d) ensuring that procedures for sharing are widely known, for example, placing such procedures on the collaboration website established by the Commonwealth Attorney-General's Department.

Promoting understanding about the extent of legally permissible sharing of experts' reports

Because of the complexity of the law (Part 3) there is naturally some misunderstanding and uncertainty about the extent of legally permissible sharing of experts' reports between the family law and the child protection systems. While it is hoped that this report will clarify the operation of the law in this area and can be used as a guide, there is also other relevant material that can be easily referenced.

Recommendation 11: Increasing knowledge of law relating to permissible sharing of experts' reports

The family law and child protection systems should ensure as far as practicable that their personnel understand the extent to which the law permits experts' reports to be shared between the two systems. This could be facilitated through:

(a) directing personnel to this report, the *Information Sharing Report* and other relevant material on the collaboration website established by the Commonwealth Attorney-General's Department; and

(b) creating or updating internal training manuals to include such information.

Attachment 1: Background to collaboration project

On 22 July 2010, the National Justice Chief Executives Officers' (NJCEO) Group approved a project plan for the development of national initiatives to improve collaboration between the federal family law system and the State and Territory child welfare authorities to better protect children. In October 2012, SCLJ agreed to the Commonwealth Attorney-General's Department continuing to work with stakeholders in the federal family law system and the State and Territory child protection systems to contribute to achieving the best outcomes for children, including initiatives to share and enhance effective and promising practice. This project has been listed as a priority for both the NJCEOs and the SCLJ.

Since 2010, a significant body of work has been undertaken under the auspices of the NJCEO project plan. This work has included:

- The development of an Options Paper which examined the intersection between the two systems and how this impacted families and children involved in both systems. The recommendations in the Options Paper have been largely delivered by the work discussed below.
- Three annual National Collaboration Meetings between various stakeholders, including family law court officials and child protection officials. These meetings have fostered greater communication and provided a forum for ideas and projects for better ways of working together.
- Professor Chisholm's paper titled, *Information-sharing in Child Protection and Family Law*, which provided advice and assistance with the development of a best practice framework for Protocols or Memorandums of Understanding to improve the exchange of information between the two systems. The Commonwealth understands most jurisdictions are using this paper to review and update their existing Memoranda of Understanding.
- The establishment of a website by the Commonwealth Attorney-General's Department which is an information-sharing platform for stakeholders in the child protection and family law systems.

In addition to this the States and Territories have undertaken several initiatives to improve collaboration between the two systems. This work currently includes:

- The Western Australian Integrated References Committee. This Committee has explored the possible integration of the protection and care jurisdictions of the Children's Court of Western Australia and the Family Court of Western Australia. Agreement has been reached that a joint partial concurrency model should be implemented in that state. This model would permit FCWA and the Children's Court to make specified orders in certain circumstances. The model has two limbs: FCWA has the jurisdiction to make a protection order upon application by CPFS where parenting order proceedings are on foot; and the Children's Court has the jurisdiction to make parenting orders where protection orders are on foot so long as all parties agree. Stakeholders in WA are currently working on a Cabinet Submission to seek approval for the joint partial concurrency model.

- The out-posting of child protection workers from the Victorian Department of Human Services in the Melbourne and Dandenong family law court registries. Anecdotal evidence has suggested that these roles are invaluable in improving information sharing between the family law and child protection system, and ensuring that the child is in the appropriate court given the family circumstances. A formal evaluation of the roles is likely to occur within the next 12 months.
- The Federal Circuit Court of Australia is conducting a pilot project in South Australia which is currently trialling a new Notice of Risk to replace the prescribed Notice of Child Abuse, Family Violence, or Risk of Family Violence (Form 4). This project has arisen in light of the recent family violence amendments to the Family Law Act 1975 (Cth) (the Family Law Act) and it seeks to better facilitate the early identification of risk in parenting matters where allegations of child abuse or family violence are raised. Early feedback indicates it has started a productive dialogue between Families SA and the family courts.

The Commonwealth Attorney-General's Department has the following strategic aim in its Strategic Plan for 2012 to 2015:

> *Improve collaboration between the Commonwealth family law system and the State and Territory child protection systems to contribute to achieving the best outcomes for children, including initiatives to share and enhance effective and promising practice.*

Attachment 2: Extracts from the information-sharing report of 2013

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 recommendations 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.

Attachment 2

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.

Attachment 2

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 experts' 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.

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.

Attachment 2

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 the current status of any ongoing interventions by [Child Protection]
        (iv) the estimated time frame for the completion of those interventions; and
        (v) 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.

- 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.

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.

Attachment 2

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.

Attachment 2

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.

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,*

   (c) 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).

   (d) 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.]