FAMILY LAW COUNCIL

FAMILY LAW

AND

CHILD PROTECTION

FINAL REPORT

SEPTEMBER 2002
THE FAMILY LAW COUNCIL

The Family Law Council is a statutory authority which was established by section 115 of the Family Law Act 1975. The functions of the Council are set out in sub-section 115(3) of the Act, which states:

It is the function of the Council to advise and make recommendations to the Attorney-General, either of its own motion or upon request made to it by the Attorney-General, concerning -

(a) the working of this Act and other legislation relating to family law;

(b) the working of legal aid in relation to family law; and

(c) any other matters relating to family law.

The Council may provide advice and recommendations either on its own motion or at the request of the Attorney-General.

Membership of the Family Law Council (as at 1 September 2002)

Professor John Dewar, Chairperson

Ms Josephine Akee

Mr Kym Duggan

Ms Tara Gupta

Ms Susan Holmes

Ms Kate Hughes

Mr Mark McArdle

Professor Patrick Parkinson

Federal Magistrate Judy Ryan
THE CHILD AND FAMILY SERVICES COMMITTEE

Members of the Council’s Child and Family Services Committee at 1 September 2002 are:

Professor Patrick Parkinson  (Convenor) FLC Member
Mr Kym Duggan  FLC member
Dr Belinda Fehlberg  University of Melbourne
Ms Tara Gupta  FLC member
Ms Margaret Harrison  Observer, Family Court of Australia
Ms Kate Hughes  FLC Member

Mr Matthew Osborne  Director of Research, FLC Secretariat

Acknowledgments

The Committee wishes to thank the many people who assisted in the preparation of this paper. In particular, the Committee wishes to thank all those who provided submissions in response to Discussion Paper No 2, The Best Interests of the Child? The Interaction of Public and Private Law in Australia (October 2000). The two case studies on pages 39-40 are extracted from Fiona Kelly and Belinda Fehlberg, ‘Australia’s Fragmented Family Law System: Jurisdictional Overlaps in the Area of Child Protection’, International Journal of Law, Policy and the Family, Volume 16, Issue 1, April 2002, 38-70, with permission from Oxford University Press.
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RECOMMENDATIONS

Recommendation 1

The Federal Government should establish a Child Protection Service.

Recommendation 2

The Child Protection Service should be a national service.

Recommendation 3

The objectives of the Child Protection Service should be:

1. To investigate child protection concerns and provide information arising from such investigation to courts exercising jurisdiction under the *Family Law Act*.

2. To ensure, in the course of its work, that children and families are not subjected to unnecessary investigation, assessment or stress.

3. To avoid unnecessary duplication of resources and effort in the investigation and determination of matters involving both family law and child welfare law issues.

4. To promote the development of a co-operative approach between State and Federal agencies in responding to concerns about child abuse and neglect.

Recommendation 4

The Child Protection Service should be an independent service staffed by people with a background in child protection and social welfare and should embrace a multi-disciplinary approach.
Recommendations

**Recommendation 5**

The Child Protection Service should be comprised of a mix of core permanent staff and draw on a mix of contract, fee for service and part-time staff to service rural, regional and remote areas, the needs of indigenous communities and other cultural groups.

**Recommendation 6**

The Child Protection Service should be co-located with appropriate matched services to maximise its effectiveness.

**Recommendation 7**

The establishment of a Child Protection Service should be accompanied by the development of Protocols for co-operation between it and State or Territory child protection authorities.

**Recommendation 8**

The establishment of a Child Protection Service should be accompanied by consequential modification to the mandatory notification system pursuant to s.67Z and s.67ZA of the *Family Law Act*, providing for the mandatory notification of specified child abuse concerns to State and Territory child protection authorities.

**Recommendation 9**

Section 67ZA of the *Family Law Act* should be amended to provide that the courts exercising jurisdiction under the *Family Law Act* can share such information as is reasonably necessary with child protection authorities and the CPS whenever abuse issues arise in proceedings, and ensuring that there is no need for notification to a child protection authority as a precondition for such information sharing.
Recommendation 10

The *Family Law Act* should be amended to allow Children’s and Youth Courts to make consent orders regarding residence and contact in certain circumstances.

Recommendation 11

Section 69ZK should be amended to make clear beyond doubt that residence and contact orders made pursuant to child welfare legislation as an outcome of proceedings brought by a child protection authority for the protection of a child are not inconsistent with the *Family Law Act* 1975.

Recommendation 12

States and Territories should be encouraged to amend their laws to make it possible for Children’s and Youth Courts to make orders concerning residence and contact as an outcome of child protection proceedings brought by the child protection authority.

Recommendation 13

In child protection matters, duplication of effort between state and federal systems should be avoided, and a decision should be taken as early as possible whether a matter should proceed under the *Family Law Act* or under child welfare law with the consequence that there should be only one court dealing with the matter. This is to be known as the ‘One Court principle’.

Recommendation 14

The Council of Community Services Ministers and Standing Committee of Attorneys-General should jointly appoint a Committee consisting of representatives of the child protection authorities in States and Territories, Children’s and Youth Courts, the Family Court of Australia, the Family Court of Western Australia, the Federal
Recommendations

Magistrates Service and the CPS. The Committee shall:

a) promote cooperation in ensuring the effectiveness of the One Court principle;

b) endeavour to agree on the circumstances when the child protection authority should take responsibility for presenting the child protection concerns either under child welfare legislation or by becoming a party to family law proceedings and when it is appropriate for the matter to be left to others, such as the parents, to resolve in private proceedings under the Family Law Act;

c) review the operation of the various Protocols between the Family Court and State and Territory child protection departments with a view to promoting as much consistency as is possible given the variations in state legislation and circumstances;

d) encourage a high-level of commitment to the Protocols and their incorporation in all relevant agencies;

e) explore all the practical issues of improving information sharing, examining how to better coordinate elements of the system, and further refining the role of the CPS;

f) keep under review and progressively enhance the various Protocols and promote ongoing collaboration between the child protection authorities in the States and Territories and the Courts exercising jurisdiction under the Family Law Act.

Recommendation 15

Children’s and Youth courts should be encouraged to collaboratively develop and implement a short form of reporting of their decisions.

Recommendation 16

Section 19N(3) should be amended along the following lines:

“Subsection (2) does not apply to:
(a) any admission of an adult or disclosure of a child which indicates a child under eighteen years of age has been seriously abused; or

(b) any admission of an adult or disclosure of a child which indicates a child under eighteen years of age is at risk of serious abuse

unless in the opinion of the Court there is sufficient other evidence of an admission of the adult or disclosure of the child relating to such abuse which is available to the Court.”

Recommendation 17

Sections 62F(8) and 70NI of the Family Law Act should be amended along the following lines so as not to apply to:

“(a) any admission of an adult or disclosure of a child which indicates a child under eighteen years of age has been seriously abused; or

(b) any admission of an adult or disclosure of a child which indicates a child under eighteen years of age is at risk of serious abuse

unless in the opinion of the Court there is sufficient other evidence of an admission of the adult or disclosure of the child relating to such abuse which is available to the Court.”
TERMS OF REFERENCE

The Terms of Reference for the Child and Family Services Committee require it:¹

(i) To examine:

- the interaction of Commonwealth family law with other child and family legislation;
- the interaction of agencies which give effect to that legislation and related services; and
- protocols, procedures, practices, standards and principles in implementing the legislation, in order to identify factors that result in duplication, gaps, ambiguity, unintended consequences or confusion in responsibility.

(ii) To examine overseas examples of systems of child and family welfare and family law to determine aspects of possible application in the Australian context.²

(iii) To consider options for reform for the efficient and effective integrated delivery of child and family law services in relation to the care and protection of children.

¹ The original terms of reference agreed by Council were amended later to the current terms outlined here, to lessen the emphasis on standards and to focus on the legislation and practices.
² Council subsequently decided that this was not necessary, given that overseas examples are unlikely to have relevance to the Australian experience.
STAGES OF REVIEW

The Committee, with the endorsement of the Council, followed a staged approach to managing this project:

Stage 1: The Council issued Discussion Paper No. 1, *Principles and Minimum Standards* in January 1998. This sought to identify the key principles and standards that could be used as a guide by persons involved in the care, support and protection of children.  

Stage 2: The Council published Discussion Paper No 2, *The Best Interests of the Child? The Interaction of Public and Private Law in Australia* (October 2000). This set out the current legislation, structures and practices in relation to care and protection, identified difficulties in the way the system works, and considered options for reform and improvement. Among its primary findings was that parenting disputes before the Family Court frequently involve allegations of child abuse. It also explained how jurisdictional overlaps and confusion of responsibility have come about and examined the legislative and structural regimes at both Commonwealth and State and Territory levels. It highlighted the particular difficulties being experienced in the areas of family violence and child protection, where jurisdictional overlaps frequently occur, and described a number of statutory provisions and methods by which these difficulties were sought to be overcome.

Stage 3: This is the Final Report setting out findings and options for reform. This Report follows on from the receipt and analysis of submissions in response to the

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3 Note the project stages were amended from the version set out in Discussion Paper No. 1, *Principles and Minimum Standards* (January 1998), at page 5, after the terms of reference were revised. These had the effect of broadening the focus of Stage 2 to the interaction of the two systems, rather than the focus on minimum standards.

Stages of Review

Discussion Paper. In particular, Council focused on the investigation of child abuse allegations arising in family law proceedings. This had emerged as a recurrent theme and a pressing practical concern in submissions to Council. In particular, there was a distinct dissatisfaction expressed as to the timeliness, quality, and probative value of investigations into allegations of child abuse. In consequence it was identified as a priority area adversely affecting the inter-action between the *Family Law Act* and State and Territory child and Family Services legislation.

The Committee devoted significant time and energy to considering how to improve the processing and resolution of child abuse allegations arising in family law proceedings. The solution that emerged as promising immediate and enduring systemic benefits was a proposal to create a Federal Child Protection Service. Given the importance of the improvements promised by the proposal, Council agreed that a Letter of Advice should be sent to the Attorney-General providing details of the proposal to establish a Federal Child Protection Service to investigate child abuse concerns. The rationale for such a service which was set out in the Letter of Advice is included in this Report. Meanwhile the Committee continued with its examination of other reforms. The recommendations arising from these other strands of the project are also explained, and recommendations made, in this Report.
FAMILY LAW AND CHILD PROTECTION

EXECUTIVE SUMMARY

This Report arises from the work of the Family Law Council on the interaction between the state and federal systems when child protection issues arise in cases under the Family Law Act 1975 (Cth). The ability of the Family Court of Australia and the Federal Magistrates Service to properly assess child abuse allegations is a matter of great public concern. Wrong decisions in this area can have tragic long-term consequences for children and families.

The Federal role in child protection

Although the primary responsibility for child protection rests with the States and Territories, the Family Court of Australia and the Federal Magistrates Service play an important role in the protection of children. A substantial proportion of all children’s cases which proceed to trial in these courts involve concerns about physical abuse, sexual abuse and neglect. A history of domestic violence is also a reason why concerns may arise about the safety and wellbeing of children.

Cases brought under the Family Law Act are private law cases. It is rare for the child protection authorities of the States and Territories to participate as parties in such proceedings.

The reliance on State and Territory authorities to investigate

Currently there is no capacity for the courts to investigate such complaints. The Family Court’s Counselling and Mediation services are designed to promote conciliation, not fact-finding. The courts are reliant on the evidence presented by the parties. The Family Law Act requires reports of child abuse concerns to be made to the State or Territory child protection authority, and there is an assumption that the relevant authority will then investigate the case and either substantiate the child protection concerns or declare them to be lacking in substance. However, this misunderstands the role of the State and Territory child protection authorities. They
do not have a general investigatory role in child protection. Their mission is tied to their statutory responsibilities.

The core responsibility given to State and Territory child protection authorities by legislation is to intervene when children are not being properly cared for by their parent or parents, or are not safe in the family home. The orders which can be made by Children’s and Youth Courts typically involve supervising the parents’ care of the children or taking parental responsibility away from them with the consequence that the children must be placed in alternate care. Many child abuse concerns raised in family law proceedings will not be investigated by child protection authorities because, although the issues may be of considerable importance in the family law litigation, the information provided does not indicate that the child is currently at risk of serious harm or because the child can be made safe by orders under the Family Law Act concerning residence and contact.

An example is where a parent alleges a serious incident of physical abuse or a pattern of child maltreatment during the course of the marriage. The issue in proceedings under the Family Law Act is to determine the competing claims of the parents to have a residence order in their favour, or to decide upon arrangements, if any, for contact. A history of domestic violence or physical abuse may be highly relevant to such decisions. Yet it would not be necessary or appropriate for the State or Territory child protection authority to take proceedings under its child welfare legislation because the safety issues can be adequately resolved in the family law proceedings, and the matter is before the Family Court or Federal Magistrates Service. For this and other reasons, including competing demands for scarce resources, as many as half of all reports to State and Territory child protection authorities may be assessed as not requiring further investigation. Even where there has been an investigation, the State or Territory child protection authority may convey very little information about the outcome of that investigation to the Family Court or Federal Magistrates Service.
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The need for a Federal child protection service

When child protection issues become the subject of litigation in the Family Court or Federal Magistrates Service without there being an independent investigation of the concerns, the child protection issues become a matter for the parents to prove or disprove on their own. It can be very difficult for parents to obtain legal aid because even if they satisfy the means test, without independent substantiation of their concerns, they may not satisfy the merits test. Parties who can afford legal representation are put to great expense preparing for litigation. Cases may settle, but compromises about contact may leave children at risk, or break down because the child protection concerns have not been resolved. Parents who believe that they have been the subject of false or malicious allegations are put to great effort and expense in trying to refute them. These cases take a serious toll on children and families, as well as on the resources of the family law system.

The Council recommends that to meet this serious problem and gap in services, the Federal Government should establish its own Child Protection Service to investigate child abuse concerns arising in family law proceedings. This Service would need to be organisationally separate from the Family Court of Australia or the Federal Magistrates Service, although it could be co-located with the courts or with another agency. It would only investigate matters on referral from the Court, and if two conditions are fulfilled. First, the child abuse allegation is likely to be a major disputed issue in any subsequent proceedings. Secondly, there is a need for the investigation of allegations of child abuse because evidence is not likely to be presented to the Court through other means. This avoids duplication of the work of State and Territory child protection authorities, or re-investigation of matters where adequate assessment has otherwise already occurred.

The establishment of a Child Protection Service is consistent with the recommendations of the Family Law Pathways Advisory Group and is also entirely compatible with the successful approach adopted in the Magellan Project in Victoria to the resolution of child protection cases. The existence of the Child Protection Service will ensure that the proper resolution of cases within the family law sphere is not dependent on the resource allocation decisions and priorities of State and Territory
Executive Summary

child protection services which do not have the same organisational mission. The need for the co-operation of the State and Territory child protection authorities in providing the level of investigation and reporting required by the Magellan Project is the most serious obstacle to its national implementation.

The establishment of the Service will involve some new expenditure, but the evidence of the Magellan Project is that there are also likely to be savings in the family law system as a whole, as cases resolve earlier on the basis of the findings of the independent investigation. The benefits of such a service in determining the truth or otherwise of child abuse allegations and child protection concerns will not only accrue to children and families. The entire family law system will benefit. There will also be benefits for the State and Territory child protection authorities which will need to process fewer notifications and to respond to fewer cases, allowing them to concentrate on their core mission.

The continuing role of State and Territory authorities in family law disputes

While the establishment of the CPS will go a long way towards ensuring that in cases of alleged child abuse or domestic violence affecting children, the Court has an early independent assessment of the child protection concerns, this does not mean that State and Territory child protection authorities should always refrain from getting involved in dealing with such cases. There will be many situations where they will have an appropriate role in assisting in the protection of children subject to family law disputes. In some cases, it will be most appropriate for action to be taken under the State or Territory child welfare legislation in order to resolve the child protection concerns. In other cases, it will be important for the child protection authority to present its concerns regarding the child protection issues to courts exercising jurisdiction under the Family Law Act.

One reason why action is not taken by State and Territory child protection authorities through the Children’s and Youth Courts is that the legislation in various States and Territories does not allow for the possibility that long-term orders can be made in favour of one parent or restricting the contact of the other parent as a way of resolving
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the child protection concerns. In certain States, orders can only be made, in the first instance, for a limited period. In others, the range of available orders only contemplates placing a child in the care of someone other than a parent. In order to ensure that, in appropriate cases, State and Territory child protection authorities take the lead in resolving the child protection concerns arising in the course of parenting disputes, legislative reforms are needed. Council recommends that Children’s and Youth courts in the States and Territories be given the power to make orders under the Family Law Act by consent. It also proposes that the States and Territories be encouraged to amend relevant child welfare laws so that all relevant issues concerning the protection of a child can be addressed by one court in one proceeding. In particular, it recommends that the Children’s and Youth courts be given the power to make residence and contact orders under state legislation as an outcome of proceedings brought by the child protection authority for the protection of a child. This is most likely to be useful where a child can be adequately protected by orders restricting or denying contact to a perpetrator of abuse. The Family Law Act should be amended to remove any doubt that such provisions would be constitutionally valid.

Improving coordination between the State and Federal jurisdictions

Another serious problem that has been identified is one of lack of coordination between the State and Territory authorities and courts exercising jurisdiction under the Family Law Act. The consequence is that in some cases inconsistent orders have been made by different courts and there has been unnecessary duplication of legal process in dealing with the issues in a family where child protection concerns have arisen. Council recommends that attempts be made to secure agreement, at the highest levels of government, for a One Court principle.

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

In order to promote cooperation and coordination between the various state and federal bodies involved in child protection cases, Council recommends that the Council of Community Services Ministers and the Standing Committee of Attorneys-General should jointly appoint a Committee consisting of representatives of the child protection authorities in States and Territories, Children’s and Youth Courts, the Family Court, the Federal Magistrates Service and the Child Protection Service. It should endeavour to promote cooperation in ensuring the effectiveness of the One Court principle, and should be given a number of other coordinating and monitoring functions in relation to the interface between State and Federal spheres of responsibility in child protection.

Exclusion of evidence concerning admissions of child abuse

Council also recommends the enactment of a carefully limited exception to the normal rule that nothing said in confidential counselling or mediation sessions may be admitted into evidence in court proceedings. This principle is an important one to promote frankness and honesty in seeking to reach a settlement of the dispute. However, such counselling and mediation is not, at present, entirely confidential. A counsellor may find it necessary to disclose information resulting from a primary dispute resolution session. He or she may even be required to do so by law. What is prohibited by s.19N of the Family Law Act and related provisions in Part VII of the Act is not the disclosure of such information, but its use as evidence in court proceedings.

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

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

Child protection is a fundamental responsibility of government. As this Report demonstrates, it is not only a responsibility of the governments of the States and Territories. Through the *Family Law Act*, the Federal Government has a major responsibility for child protection. It requires the co-operation of the States and Territories also, in meeting that obligation and ensuring that no children are endangered because of preventable harm arising from system failure.
FAMILY LAW AND CHILD PROTECTION

CHAPTER 1

INTRODUCTION

We run the risk in this country of compartmentalising public and private law; - of seeing child protection matters as being the State's responsibility, and parenting disputes as being inherently a matter for family members to resolve or litigate over.5

1.1 The interaction between State and federal systems concerned with the wellbeing of children is an important issue on the national agenda. In the light of such concerns, the Family Law Council established its Child and Family Services Committee (‘the Committee’) to examine the interaction between Commonwealth and State and Territory child and family legislation.

1.2 This report is the culmination of several years work. It draws together the analysis from the two previous Discussion Papers.6 It is a forward-looking document in that it focuses on ways in which the current family law system could address the problems illustrated in its previous work in a systematic fashion. It takes it as a given that improvements could and should be made to current procedures, Protocols and ways of doing business. It recognises that more than change at the margin is required if more than a marginal improvement in child protection is to eventuate. It develops the case for an evolutionary approach which would bring significant benefits to children in need of protection.

1.3 Given that Council’s consideration of the issues raised by this reference, and the consequent consultations, have taken several years, it was to be expected that the

family law environment would not stand still. Indeed, the past few years have been
marked by the release of significant research findings and Government Reports which
have informed and guided Council’s deliberations.

1.4 The most significant milestone in terms of broad Government policy direction
and objectives is the Report of the Family Law Pathways Advisory Group, *Out of the
Maze - Pathways to the Future for Families Experiencing Separation*. The Pathways
Report reflects an extensive conversation about all aspects of the family law system
with the Australian community by way of consultations with a wide range of
individuals and focus groups. The Report reinforced Council’s long-standing
commitment to foster an integrated family law system in devising its own practicable
reform proposals. Hence, Council’s recommendations have been drafted in light of the
discussion contained in that Report.

1.5 Council has also closely monitored the implementation of Project Magellan.
This is the Family Court of Australia’s innovative approach to what may once have
been perceived by some as an intractable segment of the Court’s case-load - those
complex residence and contact cases involving allegations of child abuse. The
recently released report evaluating Project Magellan, *Resolving Family Violence to
Children*, helped refine Council’s thinking in drafting its Report. Other valuable
research has also played a role in shaping the thinking behind the recommendations in
this Report.

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8 The Council is actively involved in implementing a number of the recommendations of the Pathways
9 Thea Brown, Rosemary Sheehan, Margarita Frederico, Lesley Hewitt, *Resolving Violence to
Children, Report Number Three: An Evaluation of Project Magellan and the Pilot Program for
Managing Residence and Contact Disputes in the Family Court When Child Abuse Allegations are
Involved*, (Social Work at Monash, Monash University, Caulfield, Victoria, 2001 - released on 24 April
2002.
10 Examples include: *An Unacceptable Risk: A Report on Child Contact Arrangements when there is
Violence in the Family*, Kathryn Rendell, Zoe Rathus, and Angela Lynch, Women’s Legal Service,
Brisbane, November 2000; Rhoades, H Graycar, R, and Harrison, M, *The Family Law Reform Act*
Introduction

1.6 The report will touch on some matters of detail and evidence that have been to a greater or lesser extent canvassed previously but, in the main, this report looks to solutions and has an explicitly reformist charter. Chapter Two of the report explains the extent of the Commonwealth’s involvement in child protection matters. Chapters Three and Four address the issues where neither system operates effectively to resolve the child protection concerns. This occurs usually when the States and Territories don’t get involved because it is a family law matter, while parents, left to take action for themselves in the family law system, are unable to navigate the system to get the help they need either to prove the child abuse case or to successfully defend themselves against the allegations. Chapter Five explains the recommendation to establish a federal Child Protection Service to address these problems. Chapter Six deals with the issues which arise from overlap between the systems, with legal action being taken on the same matter in both the State and federal spheres. Chapter Seven deals with the problem of confidentiality in relation to admissions or disclosures of child abuse in counselling, mediation, and in post-separation parenting programs.

CHAPTER 2

FEDERAL INVOLVEMENT IN CHILD PROTECTION

Designed originally as a court for divorce and the resolution of consequent property and children’s matters, the studies showed that the court was now a forum for the resolution of family violence.\(^{11}\)

Background

2.1 Dealing with cases involving allegations of child abuse and violence is part of the ‘core business’ of courts exercising jurisdiction under the *Family Law Act 1975*.\(^{12}\) For a number of reasons these courts have not traditionally been seen in this light. First and foremost from a legal perspective the constitutional child ‘welfare’ power resides with the States. Moreover, the administrative agencies most usually associated with child protection issues operate as an integral part of the State and Territory machinery of government. Finally, Commonwealth legislation was not originally framed to reflect the need to interact with this aspect of proceedings. But the reality is that today, courts exercising jurisdiction under the *Family Law Act* have a substantial child protection role. In this area at least, the Commonwealth has a major role in child protection.

2.2 How has this come about? It has been suggested that over time there has been a change in the nature of the disputes coming before the Courts.\(^{13}\) Where once the preponderance of proceedings dealt solely with the distribution of property and resolving questions of children’s residence, studies now show a trend for the Courts to

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\(^{11}\) Thea Brown, Rosemary Sheehan, Margarita Frederico, Lesley Hewitt, above, n. 9, 1.


\(^{13}\) Note that cited research relates to the Family Court of Australia. The Federal Magistrates Service began operation in July 2000: *Federal Magistrates Act 1999* (Cth).
Federal Involvement in Child Protection

be ‘a forum for the resolution of family violence’. The largest number of such cases involve allegations of violence against women which may raise issues about the safety and emotional well-being of the children. This trend is allied with a greater community awareness of, and institutional responsiveness to, allegations of ‘domestic’ violence and concerns about child abuse. Australia is not unique amongst Western nations experiencing these trends, but as a result of the Australian Constitution it must manage them through its own particular bifurcated institutional framework.

2.3 What has been the impact on the nature of proceedings coming before the Court? A line of research extending through the 1990s indicates how substantial a portion of the Court’s working day is given over to child protection issues.

2.4 Research published in 1994 indicated that sexual abuse allegations are made in a significant number of cases concerning children. The Family Court’s study of 294 judgments in defended cases from all over Australia heard in 1990, found that 7% of cases involved allegations of sexual abuse by the child's father, and in another 3% of cases it was alleged that the children had been abused by another adult such as a stepfather or other relative. Thus, the study concluded that in 10% of the defended hearings in the Family Court, the Court had to deal with the question of alleged sexual abuse. In a further 11% of cases, there were allegations of physical abuse or neglect.

2.5 A review of 1997 Family Court data confirmed that a significant child abuse workload was a feature of the cases coming to court, which might subsequently result

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14 Thea Brown, Rosemary Sheehan, Margarita Frederico, Lesley Hewitt, above n.9, 1.
16 For example since 1993 the Family Court has had a Family Violence policy containing protocols for the protection of people who fear being a victim of violence and for the counselling of couples where violence had occurred.
in court proceedings. The review examined over 700 cases awaiting pre-hearing conferences in the Melbourne registry of the Family Court and found that more than 40% of children’s cases involved allegations of some form of child abuse.\textsuperscript{18}

2.6 More recent research by Prof. Thea Brown and her colleagues found that while only about 5% of all children’s matters filed in the Family Court involved child abuse allegations,\textsuperscript{19} they are very time and resource intensive.\textsuperscript{20} Their analysis of cases in Melbourne and Canberra between January 1994 and June 1995 found that 50% of all the cases which went to a prehearing conference involved allegations of some form of child abuse.\textsuperscript{21} Of the cases which went to court, 25% involved allegations of child abuse.

2.7 Where there has been a history of domestic violence, drug or alcohol addiction or in some cases, psychiatric illness, there may well be significant child safety concerns which arise in deciding on arrangements for residence and contact.

2.8 This line of research suggests that many of the cases with which the Family Court and Federal Magistrates’ Service have to deal present an additional layer of complexity. Such cases are often those where the evidence is not sufficiently clear to justify a criminal prosecution or proceedings under State or Territory child welfare legislation. Usually, the cases which go to hearing are especially complex. As Fogarty and May JJ noted in \textit{Re C and J},\textsuperscript{22} the cases where investigation or other evidence

\begin{itemize}
\item \textsuperscript{18} Alistair Nicholson, ‘The Approach of the Family Court of Australia to Child Abuse Matters’ paper presented at 12\textsuperscript{th} International Congress on Child Abuse and Neglect, Auckland, September 1998.
\item \textsuperscript{19} Thea Brown (editor), Rosemary Sheehan, Margarita Frederico, Lesley Hewitt, above n. 12, p. 87.
\item \textsuperscript{20} In some cases the difficulty of the cases may also be because they have been transferred from a Children’s Court ‘where protective concerns have existed, and often continue to exist’; see Fiona Kelly and Belinda Fehlberg, ‘Australia’s Fragmented Family Law System: Jurisdictional Overlaps in the Area of Child Protection’, \textit{International Journal of Law, Policy and the Family}, Volume 16, Issue 1, April 2002, 38-70.
\item \textsuperscript{22} (1996) FLC 92-697.
\end{itemize}
Federal Involvement in Child Protection

indicate that the allegations are without foundation or where they indicate the likelihood that they have validity tend to be resolved at an earlier point.23

2.9 Frequently, the cases which go to hearing involve pre-school or kindergarten children.24 Cases involving such children are especially problematic because children under 5 or 6 years of age do not have the linguistic skills, knowledge and capacity for accurate expression to articulate precisely what has happened to them in the way that older children can.

2.10 It can therefore be seen that this flow of cases to the Courts presents new challenges. One response to dealing with such cases is to call for a shift from what has been termed a ‘relationship breakdown’ model to a ‘family violence’ framework.25 The ‘relationship breakdown’ model assumes that the central problem is one of the partners needing to separate because they no longer want to be together, and therefore that any problems existing in the relationship are related to the partnership. Hence dissolving the relationship should dissolve the problems. In contrast, a ‘family violence’ framework would acknowledge violence as the central issue in relevant cases, and relate this to decisions about the best interests of the child.26

2.11 These concerns about domestic violence were reflected in the Family Law Reform Act 1995. This Act inserted into the Family Law Act a number of new provisions concerned with violence. ‘Family violence’ is defined as:

“As conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person’s family that causes that or any other member of the person’s family to fear for, or to be apprehensive about, his or her personal well being or safety.”27

23 ibid at 83,334.
24 In the study by Brown et al, the average age of the child in the Melbourne cases where there was only one child in the family, was 5. Where there was more than one child, the average age was 6. In Canberra, the average ages of the children was higher: Brown et al, (1998), above n. 12, page 56.
26 ibid.
27 Section 60D(1).
2.12 In making decisions about the best interests of a child, including decisions about residence and contact, a court must consider a range of factors, including the need to protect the child from physical or psychological harm, which encompasses exposure to abuse, ill-treatment or violence, and it must also consider any family violence, and any family violence order that applies to the child or to a member of the child’s family. Changes to the *Family Law Act* also recognised the need to provide for rules as to the precedence of orders made, or capable of being made, by State and Territory courts in proceedings before the Family Court. Hence a Division was enacted devoted to the interaction between the Family Court and the orders of State and Territory Courts.

2.13 At the heart of the problem in dealing with child abuse issues under the *Family Law Act* is the fact that litigation under this Act is a private law matter. This means that as distinct from a criminal prosecution, or a child protection matter in the Children’s Court or Youth Court of the States and Territories, the Family Court and the Federal Magistrates Service are reliant upon the resources and resourcefulness of the private individuals appearing before it for the evidence upon which it will make critical decisions. Where child protection concerns arise in proceedings under the *Family Law Act*, therefore, the Court is reliant on the parties, usually the parents, to adduce the evidence to determine whether or not children are at risk of significant harm. And with the rise of self-represented litigants, it is increasingly the parties in person rather than their representatives that the Court is dealing with.

2.14 In a situation where a child is allegedly being abused in an intact family, and all attempts to keep the child with the parents have failed, then the State or Territory child protection authority will take action in the Children’s Court or Youth Court to protect the child. It is a public law matter, and the State takes responsibility for

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28 Section 68F(2), (g), (i), and (j). Note a family violence order is defined in s60D(1) as an order, including an interim order, made under a prescribed law of a State or Territory to protect a person from family violence.

proving the case. But under the present arrangements in Australia, if one parent is allegedly abusing the child and the parents have separated, it is often left to litigation in the Family Court or Federal Magistrates Service without the State or Territory child protection authority getting much involved. It is seen as a private law matter, and a parent is required to take responsibility for proving the case. Courts exercising jurisdiction under the *Family Law Act* have a limited capacity to generate independent evidence in the area of allegations of child abuse. There is often an ‘evidence vacuum’.

2.15 Why the separation of the parents should make such a difference in Australia has much more to do with the peculiarities of state and federal jurisdiction and funding arrangements than any rational approach to child protection practice. The current arrangements have the potential to put some children at grave risk of harm, and also make it much more difficult to deal speedily with unfounded allegations of child abuse.

2.16 The Family Court of Australia has taken a major initiative to address this problem within the constraints of the existing arrangements which result from the division of responsibilities between the Commonwealth and the States and Territories. Its most notable initiative has been Project Magellan. Project Magellan was a trial in Melbourne of an innovative new approach to the management of cases in which there were serious allegations of child abuse. One hundred cases were selected into the program, most from the Melbourne registry and the remainder from Dandenong.

2.17 This project involved a variety of agencies. A steering committee, chaired by Justice Linda Dessau, included representatives from a range of organisations, including Victorian Legal Aid, the Department of Human Services in Victoria, and the Victoria Police. Special arrangements were made with these organisations. Legal Aid provided a child representative in every case. The financial cap on representation

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30 The prime example being the ordering of Family Reports: Order 25, Rule 5. Evidence may also be generated by the Court ordering a separate representative for the child - although uncertainty about the evidence-gathering responsibilities inherent in this position can lead to a marked variability in evidentiary input: section 68L.
was lifted with the consent of the Commonwealth Attorney-General. Parents were subject to the normal means and merits test but the financial cap was also lifted for their representation, if they were granted legal aid. The Department of Human Services undertook to investigate all child abuse concerns arising from Project Magellan, and to write a report for the Court. Thus in every case there was a separate representative for the child and a report of an investigation of the allegations from the Department of Human Services. In a majority of cases, there was also a Family Report. It was ordered if the case had not been resolved following the report of the Department of Human Services. Two judges, Justice Dessau and Justice Brown, were responsible for all the judicial involvement in the cases.

2.18 The report of the evaluation of Project Magellan was published at the end of 2001.\textsuperscript{31} The evaluation team were able to compare the results of Project Magellan with their findings in an earlier study of child abuse cases in Melbourne.\textsuperscript{32} This acted as baseline data to evaluate the success of the Project. On numerous measures, Project Magellan proved to be an outstanding success. Project Magellan demonstrates the value for the work of the Family Court of early and careful professional assessment of child abuse allegations, separate representation of children and active case management involving interagency co-operation and co-ordination. The benefits for children and families are also evident from the Program.

2.19 Following this project’s positive evaluation, the Family Court would like to implement this approach nationally. Whether Project Magellan could be translated from a pilot project to a national system does, however, depend crucially on the ability to ensure that there is an independent investigation of the child abuse allegations in every case, and a report to the Court, as the Department of Human Services in Victoria provided for the Magellan Project. At present, a substantial proportion of all reports of child abuse in the States and Territories are not followed up by a proper investigation. Rather, the States prioritise their work according to criteria of seriousness and urgency. This issue is addressed in Chapter 3, and the

\footnotesize{\textsuperscript{31} Thea Brown with Rosemary Sheehan, Margarita Frederico and Lesley Hewitt, above n. 9
\textsuperscript{32} Thea Brown, Margarita Frederico, Lesley Hewitt and Rosemary Sheehan, above n. 12}
recommendations of the Council in this Report are intended to address this critical problem of ensuring that for the purposes of resolving cases under the *Family Law Act*, the parties and the Court have the benefit of an early and independent assessment of the child abuse concerns.

2.20 Another issue is overlap between the jurisdictions, with some matters being dealt with both by State courts and the Family Court or Federal Magistrates Service. This problem usually arises from lack of coordination between the state and federal systems. The major strategy which has been adopted by the Family Court to deal with this problem has been to develop a range of Protocols with State and Territory children’s welfare and protection authorities. Protocols exist with most, but not all, States. These examples of ‘cooperative federalism’ are worthwhile ways to provide linkages in what might otherwise be seen to be disjointed parts of a system. However, the principles and procedures embodied in the Protocols are, as Council’s second Discussion Paper explained, at times difficult to translate into practice and at times fall far short of a seamless approach to dealing with child protection issues from the client’s perspective. They are an important part of providing better coordination between the courts exercising jurisdiction under the *Family Law Act* and the State and Territory child protection authorities, but they are not a panacea for addressing all the problems associated with the interaction between the State and Federal systems concerned with the resolution of child protection concerns.

2.21 This Report seeks to make practical and cost-effective recommendations to address these problems within the constraints of the existing constitutional arrangements.
CHAPTER 3

THE RESPONSE OF CHILD PROTECTION AUTHORITIES TO ABUSE NOTIFICATIONS IN FAMILY LAW CASES

The effect of notification to child protection authorities

3.1 At present, if an allegation of child abuse is made within the context of family law proceedings, the system relies on two sources of independent assessment. The first is notification to the State or Territory child protection authority in accordance with the provisions in FLA ss 67Z & 67ZA. The second is the evidence of experts, typically appointed to provide an assessment under Order 30A of the Family Law Rules.

3.2 It is often assumed that if a notification is made to the relevant State or Territory child protection authority, whether pursuant to the mandatory reporting requirements of the Family Law Act or otherwise, that an investigation will occur and that the results of that investigation will be made known to the Court by means of a letter, report or by giving oral evidence. There are, however, indications from a number of different quarters that this is not so. For example, the research by Prof. Thea Brown and her colleagues in Victoria found that half of the notifications received by the Department of Human Services from the Family Court were not considered to require further investigation. A study completed in 1997 in South Australia found that in 34% of cases involving child sexual abuse there was no investigation by the child protection authority.

3.3 This is not an outcome which is unique to notifications which arise from family law proceedings. Many notifications of abuse and neglect are not followed by an assessment of those concerns involving further inquiry or interview with the child or parents. The most recent figures from the Department of Community Services in NSW, for example, indicate that nearly half of all calls made to its central Helpline do not lead to an investigatory response. This does not mean necessarily that no action occurs. Advice may be given over the telephone, or a referral made to support services, and a record kept in case further notifications are made.

3.4 There are a number of reasons why matters are not investigated by State or Territory child protection authorities. Child welfare authorities do not have a general investigatory role in relation to child protection. Their investigatory role is tied to their statutory functions and organisational mission. The powers that State and Territory child protection authorities have relate to abuse and neglect of children by their parents and other caregivers. The orders that Children’s and Youth Courts can make are to supervise children being cared for by families or to take over the care of children from their parents either for the time being or for the long-term.

3.5 Notifications arising out of family law disputes are generally reports of concern about the safety of a child in a family setting. Even so, this does not necessarily mean that the State or Territory child protection authority needs to investigate it in order to fulfil its statutory function. Whether or not a notification arising out of family law proceedings is investigated by State and Territory child protection authorities depends on a number of factors. These include:

- The seriousness of the reported concern
- The level of information to justify the concern
- Whether the child is currently at risk of abuse
- Competing demands upon scarce resources.

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The Response of Child Protection Authorities

a) The seriousness of the reported concern

3.6 A major reason why the State or Territory child protection authority may decide not to investigate is that the reported concern does not indicate a situation of sufficient seriousness to justify the intervention of the State or Territory authorities.

3.7 Even where the report made under the Family Law Act falls within a statutory definition of child abuse or neglect for the purposes of the relevant State or Territory child protection legislation, it may not be regarded as sufficiently serious to warrant investigation. All State or Territory child protection authorities have to prioritise and to make assessments of risk. As community awareness of the problem of abuse and neglect has risen over the years, and as mandatory reporting laws have been introduced (in most jurisdictions) or professionals have been mandated to report as a matter of organisational policy, so the number of notifications has increased significantly in every State and Territory. Not all such notifications require an investigatory response.

3.8 The fact that an issue is not regarded as sufficiently serious to warrant investigation by the State or Territory child protection authority does not mean that it is irrelevant for the purposes of family law proceedings. The question for State or Territory child protection authorities is whether the matter is sufficiently serious to justify protective intervention using the powers of the child protection legislation if necessary. The question in family law proceedings is usually about the competing claims of each parent in relation to residence or their proposals concerning contact arrangements. These are not the same questions, and it is therefore understandable that child protection authorities have different goals and priorities in comparison with the family law system.

b) The level of information to justify the concern

3.9 Another reason why an investigation may not occur is that while the allegation is a serious one, the information provided by the notifier does not disclose sufficient reason to believe that the child is at risk of the abuse alleged. For example, the caller
may express a belief that the child is being sexually abused, but the evidence to support the belief is insufficient, although there may be indications (such as behavioural changes) which justify the caller’s concern about the child’s wellbeing.

3.10 A risk assessment has to be made on the basis of the information provided. In some situations, insufficient action is taken, and this is often a source of frustration and concern for those making notifications. Nonetheless, there are few child protection experts who would argue that State or Territory child protection authorities should investigate every case where a report is made.

3.11 A State or Territory child protection authority cannot, without good reason, justify an investigation on the basis that the child may be at greater risk of harm than is indicated from the report which has been received or from other information available to it. Formal investigation by child protection authorities is very intrusive, and can cause great upset and alarm. It will often involve home visits, an interview with the child or young person, medical examinations and other forms of assessment. Such investigations should not be made unless a certain threshold indicating the likelihood of abuse has been crossed.

3.12 For this reason, while the notifier may have a reasonable suspicion of abuse, there may not be enough indicia, particularly from the child, to justify an investigation at that stage. At least, when child protection authorities are having to prioritise notifications, they may decide not to investigate a case where the report does not indicate enough information to justify a belief that the child has been abused. Indeed, in certain jurisdictions such as Victoria, a reasonable belief is the threshold for notification and consequently for a Departmental response. The fact that there is not enough information to justify an investigatory response by the State or Territory child protection authority does not mean the issue is of no consequence to courts exercising jurisdiction under the Family Law Act. When child abuse is alleged, and the matter goes to trial, the Court cannot ignore the issue. It must decide whether, on all the information available, there is an unacceptable risk to the child if an order is made in

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37 Children and Young Persons Act 1989 (Vic) s.64.
favour of an alleged perpetrator. This means that for its purposes there needs to be some form of investigation of the allegations.

c) *The reported concern does not indicate that the child is currently in need of protection*

3.13 A matter may not be deemed worthy of further investigation on this ground, either because the allegation relates to events some time in the past or because the child is currently in a situation where he or she is no longer exposed to that risk. It is often so in family law cases that matters which did not come to the attention of child protection authorities at the time when the events occurred become highly relevant in assessing the suitability of a parent to have residence or unsupervised contact. A notification then occurs during the family law proceedings as a consequence of mandatory reporting under s.67Z of the *Family Law Act* (see para 3.19).

3.14 A matter may be highly relevant to decisions about parenting orders without necessarily being important to the mission of State or Territory child protection authorities. It is not the role of these authorities to choose between parents who are in dispute about future arrangements for the care of the children. Their role is intervention where children are currently at risk of harm. This is made explicit, for example, in the *Children and Young Persons (Care and Protection) Act 1998* (NSW). The definition which governs reporting and intervention requires that a child or young person be “at risk of harm”. This standard is met if “current concerns exist for the safety, welfare or well-being of the child or young person”. Such current concerns may exist for example if a young person who is no longer living at home discloses abuse by a parent or step-parent, but the perpetrator continues to live in a house with other children.

3.15 Matters which are “historic” in the sense that there are not major issues of current concern may well be investigated by the police if they are of sufficient seriousness to warrant criminal charges, but it is unlikely that they would be given high priority by child protection authorities. Nonetheless, the incidents may be

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38 *Children and Young Persons (Care and Protection) Act 1998* (NSW), s.23.
sufficiently serious to raise questions about the suitability of a person to have a residence or contact order in their favour.

**d) Competing demands upon scarce resources**

3.16 State and Territory child protection authorities need to prioritise also because in many jurisdictions, the numbers of child abuse incidents reported to the authorities are far greater than their capacity to handle. As discussed above, some form of risk assessment is appropriate in any event. A child protection investigation is intrusive and worrying. It should not be initiated unless there are sufficient concerns about the safety or wellbeing of a child. Even among the cases which do meet this threshold of seriousness, child protection authorities are often reported to be overwhelmed by the numbers of reports and must establish criteria for allocating investigatory resources. A common approach is to allocate the case to a category of seriousness, with the most serious cases being investigated as a matter of urgency and the less serious cases being followed up only as resources permit. Alternatively, referrals may be made to other agencies for support and assistance to the family, without an investigation proceeding.

3.17 The fact that the case is proceeding in the Family Court or the Federal Magistrates Service may indeed be one reason why an investigation is not given priority. If there is no indication that the child is at immediate risk, and the child protection issue is likely to be dealt with in the family law proceedings, then the case is unlikely to be treated as being as urgent as one where the child’s protection depends crucially upon the intervention of the State or Territory child protection authority. Staff involved in intake procedures may also consider that the child protection authority should not get involved, in order to avoid duplication of proceedings. The Women’s Legal Resources Centre in NSW, for example, reports:39

> “Once Family Court proceedings are on foot, when women contact DoCS to notify them of the abuse, it is our experience that DoCS will not act on the notification, citing reasons such as the child is not residing with the

The Response of Child Protection Authorities

abuser or because of the Family Court involvement. The Centre submits that this is a ‘systemic problem’ causing further harm and leaving children exposed and vulnerable to abuse.”

3.18 To the extent that State and Territory child protection authorities do not investigate such matters because there are proceedings under the Family Law Act, there is a Catch 22. The family law system is to some extent predicated on an assumption that State or Territory child protection authorities will investigate all serious cases of intrafamilial child abuse and make the results of those investigations available to the Court. State and Territory child protection authorities may in some cases decline to allocate significant resources to the case because it is already proceeding in the family law system. There is certainly a perception that State and Territory child protection authorities are reluctant to get involved when a matter is in the family law system already.

Mandatory reporting under the Family Law Act

3.19 The problem is exacerbated by the lack of consistency between the terms of the Family Law Act and the terms of State and Territory child protection legislation. The Family Law Act requires the reporting of many incidents which are not reportable under State or Territory legislation. Thus a report may be made, but immediately screened out as not requiring investigation. This problem arises from the terms in which the obligation of mandatory reporting is expressed under the Family Law Act. Section 67Z of the Family Law Act provides:

Where party to proceedings makes allegation of child abuse

(1) This section applies if a party to proceedings under this Act alleges that a child to whom the proceedings relate has been abused or is at risk of being abused.

(2) The party must file a notice in the prescribed form in the court hearing the proceedings, and serve a true copy of the notice upon the person who is alleged to have abused the child or from whom the child is alleged to be at risk of abuse.

(3) If a notice under subsection (2) is filed in a court, the Registrar must, as soon as practicable, notify a prescribed child welfare authority.
3.20 Thus the Act requires reports to be made whenever a child “has been abused” irrespective of the seriousness of the allegation and irrespective of whether current concerns exist about the safety and welfare of the child. Section 67ZA (which imposes an obligation to report on court personnel and others involved in primary dispute resolution roles) is in similar terms. The definition of abuse is not limited to situations where the alleged abuser is a family member. “Abuse”, in relation to a child, means:  

(a) an assault, including a sexual assault, of the child which is an offence under a law, written or unwritten, in force in the State or Territory in which the act constituting the assault occurs; or  

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

3.21 It is not necessary on this definition that the child has been harmed or that the child is at risk of harm. Yet the element of harm or the risk of harm is usually required for action to be taken under State legislation. In Victoria, for example, the child or young person must be at risk of “significant harm” as a result of physical injury or sexual abuse before legal action can be taken on these grounds. Similar thresholds of seriousness also exist in other State laws.

3.22 With such a wide definition of ‘abuse’ under the *Family Law Act*, including historic allegations and allegations of abuse which would not be considered to be of the utmost seriousness, it is not surprising that State and Territory child protection authorities screen out a great many reports from the federal family law system as not worthy of further investigation.

3.23 A further area of inconsistency is in the treatment of domestic violence. While this is not a ground for mandatory reporting (unless the child has been assaulted), Part VII of the *Family Law Act* does place great emphasis on the importance of exposure  

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40 FLA s. 60D.  
41 *Children and Young Persons Act* 1989 (Vic) s.63.
to domestic violence as an issue in decision-making about parenting orders under the
Family Law Act. It may or may not be a ground for reporting under the relevant State
or Territory law. If it is not seen as a reportable ground for intervention by the State or
Territory authority, or the matter is dealt with by referral to support services rather
than through child protection investigation, then a report of concern arising out of
family law proceedings is unlikely to be met with an investigatory response which
could assist the Family Court or Federal Magistrates Service.

**Responsibility for protective intervention**

3.24 Even where a notification of child abuse is investigated, and the abuse
confirmed, this does not mean that the child protection authority will take any action
under its legislation. Indeed the investigation may result in a decision that the matter
should be left to family law litigation.

3.25 The fact that the couple has separated may be influential in the assessment of
risk and in the prioritisation of resources. If the child is living with the alleged
perpetrator or perpetrators of abuse, and the safety issues cannot be resolved by other
means, then intervention may be necessary to remove the child from the home and to
place him or her in alternate care. There may be no such necessity for orders under the
child welfare legislation if the parents have separated and the child can be protected
adequately through orders which deny or restrict contact.

**a) Two views of protective responsibility**

3.26 On this issue, there may be differences of opinion between individual child
protection workers and also between State child protection authorities. One view is
that if the child protection authority believes that the child is in need of protection,
and its legislation provides a means by which the child may be protected, then it
should take responsibility for ensuring that such orders are obtained. The other view is
that where the child can be protected by means of orders sought under the Family Law
Act, then the child protection authority should not bring the matter in the Children’s
Court. On this view, if there is a viable carer and the child is in his or her care, then
the child is no longer in need of the intervention made possible by State child
protection legislation. Residence and contact orders made under the Family Law Act
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may provide the most appropriate means by which to establish a long-term resolution of the child’s legal status.

b) The viable carer approach

3.27 The viable carer approach is enshrined in statute in Queensland, since the definition of a child as in need of protection is that the child has suffered harm, is suffering harm, or is at unacceptable risk of suffering harm; and does not have a parent able and willing to protect the child from the harm.

If there is a parent who is a viable carer, then the child has a parent who is able and willing to protect the child from harm.

3.28 The same approach is evident in Victoria. The Department of Human Services considers that Children’s Court proceedings are only appropriate where neither parent is assessed as likely to care safely for the child. In this State, the Protocol between the Department of Human Services and the Family Court of Australia (1996) provides, among other things, that when the Department is deciding in which court a case should proceed, it is required to consider various factors including: whether there is an appropriate carer or parent willing to apply for Family Court children orders, which court is likely to provide the quickest and most effective solution to secure the welfare of the child, and whether protective concerns can be alleviated by Family Court orders.

3.29 Research by Belinda Fehlberg and Fiona Kelly found that most cases in which there was potential overlap between State child protection proceedings and Family

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42 Child Protection Act 1999 (Qld), s.10.
43 Department of Human Services, Victoria Submission (received 12.11.01), p.1. The Women’s Legal Service in Queensland reports that the Department of Families in that State takes a similar approach: Submission, 12th July 2001, p.5.
Court action resulted in the matter proceeding in the Family Court. They suggested a number of reasons for this.\(^{45}\)

3.30 First, it appeared that the movement from the Children’s Court to the Family Court was based on a belief that Family Court orders offer more stability and finality than orders of the Children’s Court. Family Court orders were often perceived by the Department’s protective workers as easier to obtain and more permanent as there are no rules relating to their duration. In several of the tracked cases transferred from the Children’s Court to the Family Court, explicit reference was made by the Department to the ‘stability’, ‘security’, and ‘durability’ of Family Court orders, and that they ‘secure’ the child’s ‘long term needs’. Family Court orders may extend until the child is 18 years of age. In contrast, in Victoria the majority of Children’s Court orders remain in force for 12 months or less,\(^{46}\) and while extensions can be granted in the case of some orders,\(^{47}\) they rarely last for longer than two years. Furthermore, under the Children and Young Persons Act 1989 (Vic) the child’s parents must not have had care of the child for at least two years before the Department can seek a permanent care order.\(^{48}\)

3.31 A second possible reason for use of the Family Court in Victoria was the speed with which cases could be more finally ‘resolved’, both for the parties and the Department. The time frame between removal of the child from his or her parents and

\(^{45}\) ‘Jurisdictional overlaps between the Family Division of the Children’s Court of Victoria and the Family Court of Australia’ (2000) 14 *Australian Journal of Family Law* 211-233 at 223-224. This discussion is extracted from their article (with permission).

\(^{46}\) The orders found in the Children and Young Persons Act 1989 (Vic) apply for anything from 21 days to two years: see ss 75 (interim accommodation order), 89 (undertakings), 91 (supervision order), 96 (custody to third party order), 98 (supervised custody order), 99 (custody to Director-General order), 106 (guardianship to Director-General order), 110 (interim protection order), 112 (permanent care order).

\(^{47}\) Some Children and Young Persons Act 1989 (Vic) orders can be extended for an additional 12 months or longer if it is in the best interests of the child: see ss 78 (interim accommodation orders), 97 (custody to third party order), 100 (custody to Director-General), 107-8 (guardianship to Director-General).

\(^{48}\) Children and Young Persons Act 1989 (Vic) s 112(1)(a).
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The making of Family Court orders was short, averaging about 9 months (with a range of 2 months to 2 years). In cases where residence orders were made in favour of non-parents, the average time between removal of the child from the parent(s) and Family Court orders being made was longer – 14 months. In most cases, the speed with which orders were made was due to the fact that they were consent orders – in other words, orders made by the court following agreement by parties - but it was still the case that the Department was achieving via Family Court orders what it could not achieve under the Children and Young Persons Act.

3.32 Third, by encouraging a viable carer to apply for Family Court orders, the Department could take a much less active role than it would be obliged to take in Children's Court proceedings, where the Department is always the applicant.

3.33 The circumstances in Victoria are not necessarily represented in other States and Territories, so the findings of this research are not generalisable. Nonetheless they give an understanding of why in at least one state, so many matters are left to the Family Court. Some of the circumstances exist in other jurisdictions.

3.34 Leaving the matter to litigation in the Family Court may, however, not result in the outcome which the Department considers is optimal for the child. Because family law proceedings are private proceedings, they may be resolved by consent at any time. Those consent orders may not be protective of the child.

**Case Study 1**

In a case in Victoria, the mother suffered from alcohol abuse and the child, who was in the mother's care, was removed and placed with the mother's sister. At the time of removal the Department advised the mother that it no longer supported the child being in her care. Subsequently, the Department identified the father as a 'viable carer' and, in July 1997, withdrew its Children's Court application with the father's consent. Following the Department's withdrawal, the father initiated a Family Court application and was granted interim orders for residence in February 1998. However, while the father was successful in obtaining interim residence orders in the Family Court, the final orders, made by consent in March 1999, reversed the interim decision and the child was returned to her mother. The Family Court file

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49 From Fiona Kelly and Belinda Fehlberg, above n. 20, at 48-49.
suggested that the Department had no further involvement in the case, despite the fact that the identified ‘viable carer’ was not ultimately successful (albeit by consent) in the Family Court, and the child was returned to a carer from whom the Department had twice had her removed, and whose situation had not changed significantly.

3.35 A further difficulty in leaving it up to a relative to pursue orders under the Family Law Act is that the relative may not proceed with the application.

Case Study 2

This case, in Victoria, involved a 15 year old girl who was subjected to sexual abuse at the hands of her mother’s boyfriend, and witnessed ongoing domestic violence between her mother and her mother’s partners. After several years in and out of community placements, the girl was moved to her maternal grandmother’s care by the Children’s Court. Due to the mother’s inability to care for the child, the Department of Human Services (DHS) supported the grandmother in seeking residence in the Family Court and withdrew from the case once the grandmother made a Family Court application. The Family Court requested that the Department intervene but it refused saying that the matter had been investigated thoroughly and the file had been closed.

Soon after filing for residence, in an interview with Family Court counselling, the grandmother told the counsellor that she did not want residence and that, ‘DHS had insisted she make the application’. The case was included in the Magellan Pilot project and the matter was listed for a Compliance Hearing but prior to the hearing the grandmother filed a notice of discontinuance and on the day of the hearing only the child representative appeared in court. On the Compliance Hearing record sheet it was written, ‘Grandmother has discontinued and mum and child have ‘disappeared’. Enquiries needed.’ There is no record in either the Family Court or Children’s Court files of any enquiries being made, or of what happened to the child. The child was therefore left without court orders providing her with a ‘carer’, despite a clear indication that this was necessary.

3.36 Where the Department decides that the case is best dealt with by transferring it to the Family Court, it is left up to non-abusing parents and relatives to pursue Family Court orders. Kelly and Fehlberg note that of the 113 cases examined, there were 80 cases where movement to the Family Court was recommended. From these 80 cases there were five cases where movement did not occur. This was due to the viable

50 ibid
The Response of Child Protection Authorities

carer’s unwillingness to go to the Family Court. In three of these cases the lack of action was attributed to the mother’s wish to resume full-time care of the child. In another case, cost was cited as a reason for not applying to have orders varied so as to allow supervised contact. This was a case where the Department held serious concerns that the child was at risk of sexual abuse by his father. As a result the Department obtained an order from the Children’s Court providing for supervised access.51

c) Evaluating the two views

3.37 As has been seen above, there are two quite different approaches to the issue of the government’s responsibility to take child protection proceedings. On one view, it is always the government’s responsibility if there are serious child protection concerns which can be addressed under State or Territory legislation. On the other view, the government should not get involved if there is a viable carer and appropriate orders can be made under the Family Law Act. Both approaches may be valid in different situations. Child abuse concerns are heterogeneous. An example of where the viable carer approach may be entirely appropriate is where the child protection authority has found that a single mother with a serious mental illness or a problem with drug addiction, is unable to care for her young children adequately. In such a case, if the child protection authority identifies viable alternative carers, such as an aunt and uncle or grandparents, there is unlikely to be any need for orders to be made under State child protection legislation. It will often be more appropriate that a parenting order is sought under the Family Law Act. Indeed, it may well be that the outcome of the child protection authority’s involvement is that such arrangements are made by consent.

3.38 There are nonetheless other cases where, although a child might adequately be protected through orders made under the Family Law Act, an application for such an order will be vigorously contested, in which case the financial and emotional burden falls upon the viable carer to take action through the Family Court or Federal Magistrates’ Service. This may be so, for example, where there are grounds for

51 ibid at 54-55.
serious concern that a child may be exposed to an unacceptable risk of physical violence or sexual abuse if contact is allowed. In such a situation, if the child protection authority takes the view that the matter should be left to courts exercising jurisdiction under the *Family Law Act* because there is a parent willing to act to protect the child, then the government’s duty of child protection is privatised. As the Women’s Legal Service in Queensland noted, in some cases women who have been victims of violence and who have faced extreme difficulty over the years of the relationship in protecting themselves and their children, are left with the responsibility of trying to protect their children through the family law system.\(^{52}\)

3.39 As the case studies demonstrate, the fact that a matter is left to litigation under the *Family Law Act* does not mean that the child will be protected. It may not get as far as a hearing. The case may be resolved by consent, a relative may withdraw an application, or the protective parent may run out of money and give up. Consequently, there are great risks in this strategy taken by State and Territory child protection authorities in leaving the matter to private litigation.

*d) The significance of the legislative framework*

3.40 Apart from issues of policy and resource allocation, the decision about whether a child protection concern should be pursued under State or Territory child protection legislation or under the *Family Law Act* may depend on the powers available under the relevant State or Territory laws to make long-term orders which will resolve the protective concerns. In some jurisdictions, for example, Queensland, it is only possible to make orders placing the child in the custody or guardianship of someone other than a parent.\(^{53}\) In other jurisdictions, for example the ACT\(^{54}\) and NSW,\(^{55}\) it is possible to make orders regarding parental responsibility in favour of one parent to the exclusion of the other on a long-term basis. For example, section 79 of the Children and Young Persons (Care and Protection) Act 1998 (NSW) provides:

\(^{52}\) Women’s Legal Service, Queensland submission, 12\(^{th}\) July 2001, p.6.

\(^{53}\) *Child Protection Act* 1999 (Qld), ss.61,62.

\(^{54}\) *Children and Young People Act* 1999 (ACT), ss.206,207, 257.

\(^{55}\) *Children and Young Persons (Care and Protection) Act* 1998 (NSW), ss. 79, 86 (set out in text).
(1) If the Children's Court finds that a child or young person is in need of care and protection, it may:

(a) make an order allocating the parental responsibility for the child or young person, or specific aspects of parental responsibility:

(i) to one parent to the exclusion of the other parent, or

(ii) to one or both parents and to another person jointly, or

(iii) to another suitable person, or

(b) make an order placing the child or young person under the parental responsibility of the Minister.

3.41 Section 86 provides that it may also make various orders in relation to contact. These powers are not the same as under the Family Law Act since the focus is on protective concerns. The orders which may be made are:

(a) an order stipulating minimum requirements concerning the frequency and duration of contact between the child or young person and his or her parents, relatives or other persons of significance to the child or young person,

(b) an order that contact with a specified person be supervised,

(c) an order denying contact with a specified person if contact with that person is not in the best interests of the child or young person.

3.42 Most other jurisdictions do not have such flexible provisions and so the long-term welfare of the child in the care of a parent or relative may not be able to be secured under State or Territory legislation as well as is possible under the Family Law Act. Time limits on orders are a particular issue in certain States. For example, in South Australia, a guardianship order may be made until the age of 18 in favour of the Minister “or such other person or persons (not exceeding two) as the Court thinks appropriate in the circumstances of the case”, but it should only normally be made once another order has been in force for at least two years. Most such orders are
The Response of Child Protection Authorities

limited to twelve months in duration.\(^{56}\) Victoria also has time restrictions in its legislation.\(^{57}\)

\(^{56}\) Children’s Protection Act 1993 (SA) ss. 38(1)(d), 38(2).

\(^{57}\) Children and Young Persons Act 1989 (Vic).
CHAPTER 4
WHEN NEITHER FEDERAL NOR STATE SYSTEMS PROTECT CHILDREN

When the child protection authority does not investigate or take action

4.1 As has been seen, there are many reasons why child protection authorities may not investigate allegations of child abuse made pursuant to the requirements of the Family Law Act. The allegations may not be sufficiently serious, insufficient information may have been given to form a reason to believe the child might be at risk of abuse, they may not disclose current concerns, or resources may not permit the investigation of the complaint. Furthermore, even if the report is investigated, the child protection authority may not take action under its legislation. Whether it then provides much assistance to the Family Court or the Federal Magistrates Service by way of a comprehensive report, or whether child protection officers give evidence, varies considerably from one State or Territory to another and can vary within a child protection authority in a State or Territory.

4.2 A common complaint has been that State child protection authorities have provided very little information which is of use to the Court and that its input to the fact-finding process is primarily through compliance with subpoenas of its records. Fehlberg and Kelly found that of the 62 cases that were able to be tracked in the Family Court where the Department encouraged a viable carer to take action, the Department appeared in only six cases, three times appearing amicus curiae. In the remaining 56 cases, the Department played no formal role in the Family Court proceedings.\(^5^8\) This would not necessarily matter if comprehensive information were made available to courts exercising jurisdiction under the Family Law Act. However, it is often the case that little information is provided. A response to an inquiry to the effect that the matter was investigated and found not to be substantiated, does at least

\(^{58}\) Fiona Kelly and Belinda Fehlberg, above n. 20, at 47-48.
provide some evaluation of the allegation, even if there is little detail. A response which states that no further action was required is filled with ambiguity, for it may indicate nothing more than a conclusion that the matter could be resolved by orders made under the Family Law Act in favour of a viable carer.

4.3 The Magellan Project in Victoria resulted in much better information being provided to the Court from the child protection authority in that State. Rather than providing a letter with one of four boxes ticked, as before, the Department of Human Services provided detailed reports on the results of its investigations.\textsuperscript{59} It remains to be seen however, whether it is possible to sustain that level of co-operation and resource allocation in more than a pilot project.

4.4 The Magellan Project has been a very important initiative, but for the reasons given in Chapter Three, it cannot be expected that State child protection authorities will provide an investigation and reporting service for every allegation of serious abuse which comes to their attention pursuant to the mandatory notification requirements of the Family Law Act. The mission of child protection authorities is governed by their legislation. That legislation does not require them to be an investigatory service for all allegations of abuse which may be notified to them.

4.5 The consequence of this, is that often private litigants under the Family Law Act must bear the burden of proving their concerns about child abuse, or at least demonstrating an unacceptable risk, in order to protect their children from harm. That burden is a severe one. Such cases are not like other cases concerning residence and contact. Litigation in such cases does not result from an unnecessary intransigence. Such cases cannot be resolved easily by mediation or counselling, for such dispute resolution methods presume the possibility of compromise. Where a parent believes that her or his child is at serious risk of abuse in another’s care, the most natural protective instincts of parenthood preclude the possibility of accepting compromises which would expose the child to such risks. The natural progression of such cases is therefore towards litigation, rather than settlement, until such time as some

\textsuperscript{59} Thea Brown, Rosemary Sheehan, Margarita Frederico, Lesley Hewitt, above n. 9, 1.
independent assessment occurs, and options emerge for resolving the child protection concerns.

4.6 For parents who must take responsibility for initiating the litigation, the difficulties are considerable. Unsupported by any system within the federal sphere for the protection of children, they must find a solicitor to prepare their case for them or try to litigate the case themselves. For most members of the public, finding a solicitor with the relevant experience and expertise can be a daunting task. Such cases are typically handled by suburban family law practitioners who vary greatly in their knowledge and experience of child protection issues. The same difficulties encountered in making an allegation of child abuse in family law proceedings apply to parents who contest an allegation of abuse made against them. With no system in place which ensures that the matter will receive an adequate professional assessment, all private litigants are at a disadvantage.

Case Study 3

A mother made a notification to the Department of Community Services in New South Wales that her son L, then just under six years old, had disclosed sexual abuse by his father. The notification was the subject of a joint investigation by the Department and the police, which resulted in the abuse being confirmed. The father was charged.

At the time of the notification, L was living with the mother and her new husband. The father had made an application in the Family Court for a residence order. After interviewing the child, the Department’s officer recommended that the case be “confirmed, referred and closed” because a Family Court hearing had adjourned the case for one month with L in the care of his mother. This meant that the case was not registered as involving continuing child protection concerns and was not allocated to any caseworker. The Sexual Assault Service to which the child was referred urged the Department to intervene in the family law proceedings to ensure that L had no contact with his father, because the mother had run out of money to

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60 Women’s Legal Service, Queensland, Submission, 12th July 2001, p.6.
61 This account is taken from a report by the NSW Ombudsman, Department of Community Services: Investigation concerning the action taken following the confirmation of abuse of L and the adequacy of the department’s policies and procedures for deciding whether or not to join Family Court proceedings, April 2002. This account is derived from that report, provided by the complainant, at pp 1, 6-8, 10, 30, 32-33, 38 and 45.
pay for legal representation. It recorded that the departmental officer responded to this request by insisting that the Department no longer had any role.

In the Family Court proceedings, a separate representative was eventually appointed. The child protection specialist for the Department wrote to her later that year stating that “the child protection concerns are significant” and urging that there should be no contact with the father. Yet the Department took no legal action in the Children’s Court and nor did it intervene in the family law proceedings, even after the Family Court ordered contact for a three week period. Eventually the criminal proceedings were dismissed after L, under cross-examination, retracted his disclosure about the abuse which formed the subject-matter of the charges.

The Department continued to have concerns about the protection of the child, but only agreed to intervene in the family law proceedings after the intervention of the Ombudsman. At the time of the Ombudsman’s report, the mother calculated that she had incurred debts amounting to some $60,000 as a consequence of the court proceedings on legal costs, travel bills and telephone costs. The stress of the proceedings led to a family crisis, and, since they were on welfare benefits, the Department had to provide substantial financial assistance to the family to avoid homelessness.

The Department’s intervention in the proceedings led in due course to the settlement of the case. Consent orders were made in August 2002 providing that the father would not have direct contact with the child.

4.7 Another problem for parents seeking to protect their children through the Family Court or Federal Magistrates Service is that they are much more likely to have their motives questioned than would State authorities which bring a child protection concern to the Court. It is assumed that the State has no interest other than the protection of the child in bringing the matter to the Court. A parent seeking to protect the child through the family law system can be criticised for so doing for many reasons. It may be countered that the parent is alienating the child from the other parent through the child abuse allegations, or that the child abuse allegation is a weapon in the conflict between the parents, or has been introduced to gain a strategic advantage in a dispute over residence.62 It is often said that allegations of abuse are

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62 For research on such allegations in Queensland, see Berns, S, “Parents behaving badly: Parental alienation syndrome in the Family Court – magic bullet or poisoned chalice” (2001) 15 Australian Journal of Family Law 191.
easier to make than to refute. Claims of parental alienation syndrome or that an abuse allegation has been made falsely in order to gain a strategic advantage are also easier to make than to refute. Indeed, attack can be the best form of defence in response to an allegation of child abuse. Thus, whatever the truth of the matter may be, child protection cases brought by private litigants through the family law system can be mired in claim and counterclaim which makes the truth difficult for courts to discern.

The problem of legal aid

4.8 Legal aid is another major issue. If there has not been a proper investigation by State authorities, then this can prove to be a major barrier in obtaining legal aid, because the parent, even if financially eligible for legal aid, may be unable to satisfy the merits test for obtaining public assistance. The Women’s Legal Service in Queensland noted, for example that women in that State have extreme difficulty in obtaining legal aid for court proceedings in the Family Court if the abuse has not been substantiated by the Department of Families or otherwise by medical evidence. The only legal aid they are likely to get in such circumstances is aid for a conference or mediation, and contact is an almost inevitable outcome.  

4.9 Children are potentially at grave risk from this. If the State or Territory child protection authorities do not take responsibility for the litigation because the child can be adequately protected by the denial or restriction of contact under the Family Law Act, and a parent cannot get Legal Aid to conduct the family law proceedings because there has been no independent verification of the abuse, then the child may be protected by neither system. Submissions to the Family Law Council inquiry indicate that this is indeed occurring, and this systemic failure could have the most serious and damaging consequences for children’s lives. The problem that neither system operates to protect the child is a very serious one.

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63 Women’s Legal Service, Queensland, Submission, 12th July 2001, p.6. See also An Unacceptable Risk: A Report on Child Contact Arrangements when there is Violence in the Family, Kathryn Rendell, Zoe Rathus, and Angela Lynch, Women’s Legal Service, Brisbane, November 2000 (Abuse Free Contact Group, Queensland), ch. 5.
The risks to children from system failures

4.10 In some instances, children have been killed in circumstances where, perhaps, better co-ordination might have saved their lives. One threat is from murder-suicides.

Case Study 4 64

In a case in New South Wales, a 3 year old girl, Marissa, was killed by her mother in the context of a family law dispute. Marissa and her mother came to the notice of the Department of Community Services after Marissa’s mother requested respite care for Marissa when she was one year of age. The child was removed from the mother and a care application was lodged under s.60 of the Children (Care and Protection) Act 1987 (NSW).

The Children’s Court found the child was in need of care, and Marissa’s mother accepted undertakings for weekly supervision and support for six months. From that time, the Department worked extensively with Marissa and her mother. Services provided included a range of early intervention support for Marissa’s developmental difficulties and parenting and mental health services for Marissa’s mother. A temporary foster care placement was also required. The case was closed after the Children’s Court order expired but support continued through the early intervention program and the Department of Community Services’ disability program.

However, 13 months after the case was closed, Marissa’s father reappeared wanting contact and residency rights for Marissa. Marissa’s parents had been separated since Marissa’s birth, but during their relationship, the Police had been called to a number of domestic violence incidents, and Marissa’s mother had taken out an Apprehended Violence Order against Marissa’s father. Following Marissa’s father’s reappearance, a seven-month Family Court dispute ensued.

In that time, Marissa’s mother was reported to the Department of Community Services twice, once in relation to a suicide threat made two weeks after the reappearance of the father. Over the next few months, Marissa’s mother withdrew Marissa and herself from services, removing Marissa from childcare and withdrawing from the early intervention services they had both been receiving for a considerable time. The mother failed to keep appointments with Department-appointed professionals. This behaviour was also reported on one occasion to the Department. The Department took no further protective intervention in response to the reports.

During this time, Marissa and her mother were seen by a number of professionals, including the Family Court counsellor, who expressed concerns about the mother’s behaviour and the welfare of the child. The Family Court was aware of the family’s involvement with Department of Community Services, as there were telephone conversations between the Court Counsellor and the child protection worker within the Department. However no formal notifications were made to the Department of Community Services about these concerns. Even though the Department was aware of the mother’s behaviour, at no time during this seven month period were Marissa and her mother sighted by the Department. There was no case conference convened to assess how Marissa could be protected, given the mother’s rejection of services. Marissa was killed by her mother soon after the Family Court awarded the father interim supervised contact with Marissa. The most recent notification on Marissa had not been finalised at the time she was killed, three months later.

4.11 The risk to children in such circumstances has been well documented. A 1993 study found that 82% of homicides involving family members had been preceded by a history of violence. Another study based on 1989-90 data suggests that in ten percent of all homicide cases in Australia a parent kills his or her child. Between January 1996 and July 1999 ten children (from seven families) died in New South Wales in the context of family dispute and breakdown. The common precipitating factor in all ten deaths was the breakdown of the spousal relationship or conflict between the spouses, leading to the parent killing the child. In some cases, there was a history of domestic violence.

4.12 Another grave threat to children comes from the pervasive belief that abuse allegations in the context of family law disputes are motivated by malice.

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65 Elizabeth Hore, Janne Gibson and Sophy Bordow, *Domestic Homicide*, Family Court of Australia, Research report No. 13, March 1996; *Fatal Assault of Children and Young People*, NSW Commission for Children and Young People, June 2002, see chapter 6 ‘Family Dispute and Breakdown’.

66 Ibid, 17.

In this case in New South Wales, a young child was murdered by his father following an adverse ruling from the Family Court. There was a constellation of warning factors of evident danger to the child. The father had threatened to kill the mother and child if she left the relationship. The father was reported to have been violent since he was 16 years of age. He had been convicted of several Driving Under the Influence offences, and had Apprehended Violence Orders taken out against him by the mother. After the birth of the child, the father became increasingly paranoid and controlling. The Family Court subsequently reduced the father’s previous contact arrangements and he became distressed. He killed the child on their first contact visit after the Court ruling.

The Department of Community Services in NSW failed to investigate the family even though there were three notifications from different sources regarding the child. None of the notifications were investigated, the notifications were registered as unconfirmed, and the case was filed with no further action taken on the notifications. The Department of Community Services appeared to label the notifications as malicious because they were made by the parent in the context of a Family Court dispute. Concerns about the child’s safety were expressed to the Department by the mother and by a hospital worker who notified after the child was admitted with a fractured clavicle. The Department discounted the mother’s fears, stating that the issues related to a custody matter and that she should see her solicitor. The Department did not seem to take the history of violence between the parents and threats by the father to kill the child seriously. For example, a Department of Community Services briefing note, dated a month before the death, indicated ‘three notifications since (date), issues are of a “custody nature” and are of low or no risk to the child’. As a result the child’s safety was not assessed and the allegations of child maltreatment were not investigated.

4.13 This case illustrates the grave danger of discounting child abuse concerns because there is a family law dispute. While such a case would not necessarily have been dealt with in the same way in all States and Territories, there seems to be a pervasive view at least in some quarters that child protection concerns expressed by parents who have separated are less credible than other reports of abuse and more likely to be motivated by malice or a perception of strategic advantage. The preponderance of the research does not support this perception. While some small studies of child sexual abuse cases in the United States published in the 1980s

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suggested that there was a higher incidence of erroneous allegations in family law disputes, other research on child abuse allegations with much larger sample sizes does not support this view.

4.14 The notion that child protection concerns should be automatically discounted because they arise in the context of a family law dispute is a dangerous one for children. All reasonable concerns that a child is at risk of serious harm need to be investigated and evaluated on their merits, irrespective of the context in which the report has arisen.

The expense of litigating through the family law system

4.15 Even if the parent who is seeking to protect a child in a family law case finds legal representation, investigation of the protective concerns through preparing for litigation is likely to be inefficient and extremely expensive. The solicitor must marshall the available evidence by means of affidavits. Such affidavits are often

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71 In the two Australian studies, for example, the rate of unsubstantiated cases of abuse, as assessed by State child protection workers, was no higher among couples involved in family law disputes than in relation to notifications of abuse generally: Brown et al, (1998); Marie Hume, ‘Child Sexual Abuse Allegations in the Family Court’ Masters Thesis, Faculty of Humanities and Social Sciences, Univ. of South Australia, 1997, cited in Brown et al, 1998. A large US study on sexual abuse reached the same conclusion. N Thoennes and P Tjaden, ‘The Extent, Nature and Validity of Sexual Abuse Allegations in Custody/Visitation Disputes’ (1990) 14 Child Abuse and Neglect 151. See also K Oates, D Jones, D Denson, A Sirotnak, N Gary, and R Krugman, ‘Erroneous Concerns About Sexual Abuse’ (2000) 24 Child Abuse and Neglect 149-157. In a review of other studies, the authors found that 2%-8% of allegations were judged fictitious, the highest number of fictitious allegations being made by adolescents.
lengthy and cover all possible issues. These are not limited to the concerns about abuse, although that may well be the central focus of a case to deny or restrict contact. Given the range of issues which may be relevant in determining the best interests of a child, the lawyer needs to address all those potential issues in gathering the evidence. Because litigation is adversarial by definition, these costs must be borne on two sides – by the parent making the allegation and by the parent denying it.

4.16 Public funds are often expended in such cases through the legal aid system, either in supporting one or other parent or in funding a separate representative for the child (and in some cases all three). In the Magellan Project, parents were assessed for legal aid on the normal means and merit criteria. 67% of the parents were legally aided. The Magellan Project demonstrated the benefits of having a comprehensive assessment of those allegations by an independent investigating authority early in the process, as well as other services such as the appointment of a separate representative and family reports where needed. In the Magellan Project, 87% of cases were resolved without the need for a hearing in contrast to only 70% of cases in their first study. Since the Magellan Project attracted the cases involving more serious allegations of abuse, this is a good indicator of the success of early independent investigation and assessment. Even if the conclusions of an investigation or assessment are challenged, a report of this kind will at least narrow the focus of disagreement between the parties and will set the agenda for the marshalling of further evidence to challenge the findings of the report.

Independent assessment in the Family Court

4.17 In most cases where child abuse allegations proceed towards trial, there will be some form of independent assessment of the allegations of abuse eventually. This is usually provided by an expert appointed by the Court under Order 30A who is typically a child psychiatrist or psychologist. Many of these reports are of course very useful to the Court, but submissions to the Council indicate concerns about the quality and reliability of some such reports. In addition, a Family Court Discussion Paper has recently examined the nature and use of experts generally (that is, not only court-
appointed experts) and proposed several ways in which procedures could be improved. The four areas of most significance identified by the Court were partisanship or lack of objectivity, experts exceeding their area of expertise, the lack of clarity of evidence, and the consequent costs and delays experienced by parties.

4.18 In the Family Court these reports are often funded wholly or in part by Legal Aid, and are paid for on the hourly rates of these medical professionals. Perhaps for reasons of cost, many such assessments proceed by way of interview in the offices of the professional concerned and may be of relatively brief duration. There are limits to the amount of information which can be gleaned in such a manner. The investigations conducted by child protection professionals in State child protection services or in the Police Service are usually field investigations. A child may be interviewed in a safe neutral environment such as a school, questions may be asked of teachers, school counsellors, and others who have contact with the child and who might have material information to provide. It is the methodology of investigation rather than clinical assessment.

4.19 While the practice varies from State to State, generally Order 30A reports are only likely to be ordered if the matter is proceeding towards trial, and such orders are often made at a late stage of the case management process. In many other cases, there may be no investigation at all of the protective concerns because the parent cannot obtain legal aid and cannot afford the immense cost of private litigation, or because he or she is unable to navigate the complex legal system sufficiently to bring a case under the *Family Law Act*.

4.20 That cases do not proceed for these reasons does not mean that the concerned parent takes no action. He or she may well take action, but outside the law. This may take the form of refusing contact, despite orders requiring it, abducting the child, or otherwise going into hiding. Unresolved child protection concerns often lead to desperation. And these actions can lead to further harm to children and costs to the

72 Thea Brown, Rosemary Sheehan, Margarita Frederico, Lesley Hewitt, above n. 9, at page 67.
74 ibid., 7-8.
public purse in responding to the situation. The Women’s Legal Resources Centre (NSW) submission illustrates the problems women face in situations where they have been forced to compromise about contact because they do not have the means to litigate and have had no independent assessment of their concerns:75

“At times facing the pressure of a stalemate with little supporting evidence, mothers do agree to consent orders for contact with the child and the father. These contact orders soon become unworkable as the mother witnesses the emotional effects on her children who continue to have contact with the alleged abuser. The contact arrangements (whether by consent or otherwise) leave the mother at risk of contravention proceedings in the Family Court, which incur serious penalties.

The experience of this organisation is that mothers are distressed at being caught in this Catch 22 situation. If they have grave concerns about the ongoing safety of their child they withhold contact. The potential breach of court orders places them in a situation where their actions may be seen as equally abusive in terms of them denying their child contact with the other parent. If they agree to contact, it is our experience that they risk having the character of their protective acts attacked in cross-examination for making the child available if they had concerns about their welfare and safety.

75 Women’s Legal Resources Centre, NSW, Submission, 29th June 2001, pp.13-14.
CHAPTER 5

PROPOSAL FOR

FEDERAL CHILD PROTECTION SERVICE

Introduction

5.1 The adequacy of the response of the family law system to cases involving allegations of child abuse or family violence is a matter of great concern for people in the community. There is perhaps no more pressing issue in family law today. The Family Law Pathways Advisory Group noted that:

“when child abuse is alleged, there are presently few clear pathways for families trying to protect their children from further abuse” and that “the outcomes for children involved in matters before the Family Court of Australia where child abuse is alleged have in the past been very poor.”

5.2 This is not a criticism of the Family Court. The problem is that courts can only act on the evidence which is presented to them, and it is in the quality of the evidence of abuse that the major problems lie, especially in these complex cases involving younger children. The Family Law Pathways Advisory Group noted the progress which has been made through the Magellan Project, but it observed also that the Family Court cannot achieve improvements on its own. The Group recommended urgent action by the Council of Australian Governments.

5.3 It is clear from all the research evidence, and the submissions made to the Family Law Council, that the division of responsibility for child protection between State or Territory and federal jurisdictions is a major factor which impedes the work of the family law system in protecting children. Because these problems are systemic, it is possible to find systemic solutions, and vitally necessary to do so.


77 ibid, recommendation 28, p.84.
Proposals for Federal Child Protection System

5.4 The Council is of the view that the establishment of a capacity to provide early independent assessment of child protection concerns arising in family law proceedings is essential for the early and successful resolution of such cases and that it will have benefits for children and families, as well as for the family law system as a whole, that greatly outweigh the costs which will be incurred. The establishment of such a service will also have numerous benefits for the States and Territories in reducing pressure on their child protection services arising from the numbers of notifications which are inappropriately generated through the family law system.

The Need for a Federal Child Protection Service

5.5 For the reasons given, there is a very great need for the Family Court of Australia and the Federal Magistrates Service to have their own investigatory capacity. When the Family Court was established in 1976, it was recognised that the proper resolution of family disputes required the Court to have ancillary services to assist parents to resolve the issues for themselves. The Family Court Counselling Service was established to meet this need, and eventually mediation services were established within the Court as well. These services, together with the work of producing Family Reports, have played a vital role in the management of cases involving children and in the resolution of disputes without the need for litigation.

5.6 The Family Court does not have an investigatory capacity, and nor does the Federal Magistrates Service. The Family Court’s Mediation Service is designed to promote conciliation, not fact finding, and its existing staff are fully occupied with this important role. There is nonetheless a vital role for a federal child protection service established independently of the Court which can provide information and evidence to the Court. Such evidence would of course be capable of being tested in family law litigation just as the investigations of police and child protection staff are subjected to examination in criminal trials and contested child welfare proceedings.

Recommendation 1

The Federal Government should establish a Child Protection Service.
5.7 An effective Child Protection Service will benefit all those involved in family law litigation where child abuse is alleged. Not only will it assist parents who believe that their children are being abused or fear that they are at risk of abuse in the care of the other parent. It will also be beneficial for parents who believe that an abuse allegation is motivated by malice or by perceived strategic advantage in the family law case, or who otherwise deny the allegations. A child protection investigation will allow for an investigation of the allegations early in the process, and exoneration through such an investigation will do much to relieve the stress that false allegations of serious wrongdoing cause, whatever may have been the motivation for the allegations.

5.8 The establishment of a federal Child Protection Service and consequent changes to the requirement of mandatory reporting of child abuse concerns in family law matters will also benefit State and Territory child protection authorities. It will allow them more time to concentrate on their core responsibilities under their legislation, and will relieve the pressure of dealing with complaints about inaction in family law cases where it was a legitimate decision not to get involved.

5.9 Not only would a federal child protection service ensure that the Court was provided with an independent evaluation of the child abuse issues in all cases where no investigation had yet occurred, but evidence from the evaluation of the Magellan Project indicates that such a service could lead to a more effective assessment of child abuse concerns within the framework of decision-making under the Family Law Act.

5.10 One issue which arose from that research was that Family Reports often produced much more information about child abuse than had resulted from the investigation of the State child protection authority. The authors of the evaluation suggested that one of the reasons for this is that the court counsellors were operating within the framework that the Court must decide whether the child would be exposed to an unacceptable risk by the parenting order sought. This is a different test, and

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78 The evaluators found that in 73% of cases where family reports were completed (59% of the total sample of cases), new information emerged. In some 23% of cases where new information was provided, the information revealed was about child abuse. ibid, p. 53.
Proposals for Federal Child Protection System

involves a broader approach, than the test required for substantiation under the Children and Young Persons Act 1989 (Vic). It also allows for greater consideration of the relevance of exposure to domestic violence on the wellbeing of the child.\(^{79}\)

5.11 The establishment of a Child Protection Service is consistent with the recommendations of the Family Law Pathways Advisory Group for early intervention and proper support along the most appropriate pathway for the case.\(^{80}\) It is also entirely compatible with the successful approach adopted in the Magellan Project to the resolution of child protection cases. It replaces reliance on investigations and reports from State and Territory child protection authorities with a specialist federal service which can investigate the matter if no investigation has previously been conducted or no report is otherwise available. This ensures that the proper resolution of cases within the family law sphere is not dependent on the resource allocation decisions and priorities of State and Territory child protection services which do not have the same organisational mission and which are subject to competing claims on their resources. Additional features of the Magellan Project, notably the appointment of separate representatives for children and the use, where necessary, of family reports, are also likely to assist in achieving the goal of producing better outcomes for children and families.

5.12 The Child Protection Service should be a national service. The problems identified above arising from the different roles of state child protection authorities and the family law system arise also in Western Australia, although the existence of a State Family Court might reduce the extent of the problems. The Family Court of Western Australia has the power to make orders for the care and protection of children pursuant to child welfare legislation, but there is a separate Children’s Court in which almost all care applications are commenced. Accordingly, the position in Western Australia substantively replicates the position in other States and Territories, and the same issues arise that abuse allegations which may be significant in a matter

\(^{79}\) ibid, p.42.

\(^{80}\) Its recommendations concerning child abuse are noted above. See also the emphasis on early and timely intervention in relation to concerns about domestic violence: Recommendation 18, p.66.
under the *Family Law Act* are not necessarily of the highest priority in the mission of the child protection authority.

**Recommendation 2**

The Child Protection Service should be a national service.

**The Operation of a Federal Child Protection Service**

5.13 What would the objectives be of a Federal Child Protection Service, how would it be structured, and what would be its role in the resolution of family law proceedings?

a) *The objectives of a Child Protection Service*

5.14 The objectives to be achieved in establishing such a child protection service ought to be as stated in the following recommendation:  

**Recommendation 3**

The objectives of the Child Protection Service should be:

1. To investigate child protection concerns and provide information arising from such investigation to courts exercising jurisdiction under the *Family Law Act*.

2. To ensure, in the course of its work, that children and families are not subjected to unnecessary investigation, assessment or stress.

3. To avoid unnecessary duplication of resources and effort in the investigation and determination of matters involving both family law and child welfare law issues.

4. To promote the development of a co-operative approach between State and Federal agencies in responding to concerns about child abuse and neglect.

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81 Some of these objectives are based on the Family Law Council Report, *Child Sexual Abuse*, (September 1988), para 4.1.
b) The structure of the Child Protection Service

5.15 The Child Protection Service (CPS) should be an independent body with the primary role of investigating child protection concerns arising in cases brought under the *Family Law Act* 1975. In addition to its primary role in family law, it could be used by the Commonwealth in other ways where child protection issues require investigation. An example is where child protection concerns arise about children held in detention facilities pursuant to immigration legislation.

5.16 While it is often appropriate to graft new services onto existing services in order to minimise infrastructure costs, there are good reasons why this service needs to be an independent body (although it might be co-located with existing services - see below). Arguably, an investigation service should not be established under the auspices of either the Family Court or the Federal Magistrates Service, because if an ancillary service within the court structure were to have a fact-finding role, that might be seen to be incompatible with the role that judicial officers have in private litigation. Such a service ought for this reason to be independent of the Family Court or the FMS.

5.17 The CPS would need to be staffed by people with a background in child protection and social welfare. Their previous experience might have been in health, social work, counselling, law enforcement or in other services concerned with the protection of children. The CPS should be able to call upon the services of other professionals, such as paediatricians, psychiatrists, drug and alcohol counsellors and experts in intellectual disability, who may be able to assist in aspects of a child protection investigation. A child protection service needs to have the capacity for a multi-disciplinary approach. It also needs the capacity to respond to cases involving families from a non-English speaking background and to be sensitive to other cultural issues, for example, in the Aboriginal community.

5.18 While a separate representative for the child ought to have a distinct role from that of the Service, it is anticipated that such a representative would usually want to
co-operate closely with the Service. So for example, if subpoenas need to be issued to access files, this could be done through the child’s representative.\textsuperscript{82}

**Recommendation 4**

The Child Protection Service should be an independent service staffed by people with a background in child protection and social welfare and should embrace a multidisciplinary approach.

5.19 In the larger urban centres, it may be most cost-effective and efficient to have a Service staffed with a core group of full-time or part-time continuing staff, supplemented by other staff on a contract or fee for service basis. In smaller centres, and in rural areas, the work of the CPS might best be conducted mainly by staff engaged on a contract or fee for service basis, supported by a small administrative unit. There is no reason in principle why State or Territory child protection services should not be contracted to conduct such investigations, particularly in rural and remote areas. However, there could be difficulties if this were adopted as a general course. Council considered whether the objectives sought to be achieved through a federal child protection service could equally be achieved by contracting with the State and Territory child protection authorities to conduct investigations and to write reports in family law matters, but considered that there might be difficulties in achieving timely outcomes if this work were to compete in priority with the other urgent work of State and Territory child protection authorities. Furthermore, there might be difficulties in distinguishing between the work which the authorities need to do pursuant to their own legislative mandate without special federal funding, and the work contracted through arrangements with the Federal Government.

\textsuperscript{82}The Family Law Council is undertaking a review of the role of the child’s representative in family law matters and this report could give further consideration to the relationship between the work of the CPS and children’s representatives.
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Recommendation 5

The Child Protection Service should be comprised of a mix of core permanent staff and draw on a mix of contract, fee for service and part-time staff to service rural, regional and remote areas, the needs of indigenous communities and other cultural groups.

5.20 The role of the CPS would be investigatory and not therapeutic. While it might play an important role as a catalyst for the provision of services to children and families, it would do this work by referral to existing State and Territory services. Its engagement with each child and family would therefore be limited to the time needed to make an assessment of the child protection concerns and any other matters on which it is asked to report. In this respect, its role would be similar to that of counsellors preparing Family Reports.

c) Co-location options

5.21 The co-location of agencies can improve their operations. Agencies that have similar clientele benefit in many ways from having easy access to and information exchanges with agencies in close proximity. Cost savings in the establishment of the CPS can be achieved through co-location. There are several options for co-locating the CPS. These include the Health Department, Family and Community Services offices and the Family Court’s Mediation Service. On balance, co-location with the Mediation Service may offer the most significant advantages to the operations of the CPS.

5.22 Since its inception, the Family Court’s Mediation Service has successfully managed its separate confidential counselling and reporting roles within the one service, and so there seems no practical reason why the CPS should not be co-located with the existing services involved in primary dispute resolution in family law. An alternative to co-location is to share corporate services with another agency or agencies, while being separately located. From an organisational point of view, the Child Protection Service could be placed under the umbrella of the Attorney-
Recommendation 6
The Child Protection Service should be co-located with appropriate matched services to maximise its effectiveness.

d) Case management and referrals to the Child Protection Service

5.23 At what point in proceedings for a parenting order should a referral be made to the CPS, and in what circumstances? The evidence from the Magellan Project would indicate that the earlier there is an independent investigation of the child protection concerns, the more likely it is that the parties will be able to work out a resolution of the case. As has been noted, child protection cases represent a substantial portion of all the cases going to the later stages of litigation in the Family Court.

5.24 It is not surprising that child protection cases tend not to settle, if at all, until late in the proceedings. If there is no independent assessment, such as an Order 30A report, there is no basis on which the issues in dispute can find resolution. The parties, or one of them, may not accept the validity of the conclusions of an independent report, but to the extent that the Court is likely to place weight on the conclusions of an independent and professional assessment, the report can provide a catalyst for settlement. Even if the independent report does not lead to a settlement, it may narrow the issues.

5.25 For these reasons, there are likely to be significant benefits for the welfare of children, as well as significant savings in court time, if the independent report is requested from the CPS early in the process of case management.83 In parenting matters the Case Assessment Conference is a key early event in the Family Court. It comprises a deputy registrar and/or a counsellor examining the dispute with the parties and, if represented, their lawyers. Broadly speaking, the aim is three-fold: to

83 In the Family Court of Australia, this is regulated by Practice Direction No.2, 2001.
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inform, to resolve the dispute, and where this is not achieved, to assess how to progress resolution of the dispute.

5.26 Various procedural orders may be made as a consequence of the Case Assessment Conference. It may therefore be appropriate at this stage or at such other first court event, for a referral to be made if the Deputy Registrar or other court officer identifies the need for an investigation. The results of the CPS investigation may subsequently assist with any conciliation/mediation conferences which have been ordered. Similarly, in the Federal Magistrates Service, the referral to the CPS could be considered on an application or direction made following the initial filing of the application.

5.27 There is no reason why a referral should not be made at any later stage in the proceedings, for example, if child abuse allegations emerge after the initial filing of the case, if a different view of the seriousness of the concerns is taken after further consideration, or if new relevant material is considered to warrant a referral.

5.28 Investigations should only be initiated following referral from Court personnel. This ensures that the resources of the CPS are properly used within a coherent case management system.

e) The threshold for a CPS referral

5.29 When would a referral need to be made? It is suggested that there are two tests which could be applied to this question. The first is the test of relevance to the proceedings, and the second, that the information is unlikely to be available through other means.

5.30 There will be no need for a referral to the CPS unless the child abuse allegation is likely to be a major disputed issue in any subsequent proceedings. If the allegations of abuse raise serious concerns about the well-being of the child or children while in the care of a party seeking a residence or contact order, then it is likely to be a major issue which will need to be dealt with for the dispute to be resolved.
5.31 The second criterion is that there is a need for the investigation of allegations of child abuse because evidence is not likely to be presented to the Court through other means. The purpose of this criterion is to avoid duplication. In some situations, there will be evidence available through other means. The matter may have been carefully investigated by child protection authorities or the police, the child may have been assessed at a hospital child protection unit, or there may be other evidence which is readily available and which is already being marshalled by lawyers for the parties and/or the child’s representative.

5.32 Where there is already ample material on which a Court might make a decision, or it is known that such material could be obtained by subpoena or otherwise, then a referral to the CPS may be unnecessary. It may also expose the child to further questioning or examination, without the likelihood of much benefit in terms of information which will assist in resolving the matter. This is a form of ‘systems abuse’ which ought to be avoided.

f) Could other matters be addressed as well as the child protection concerns?

5.33 It will be up to the decision-maker to determine whether the CPS should be asked to report on matters other than the child protection issues. As the High Court noted in *M v M*[^84^], the ultimate issue which the Court must determine is what is in the best interests of the child. Other issues are likely to bear upon this question apart from the issue of alleged abuse or neglect. In some situations, it might be appropriate for the decision-maker to ask the CPS to investigate issues which might otherwise be the subject of a short-form Family Report, if it was most convenient to consider those questions as part of the same process. To this extent, there might be some overlap with the work of the Court counsellors, but it is to be expected that the CPS will attract some staff with experience as court counsellors, or who would otherwise be suitably qualified to address issues going beyond the immediate child protection concerns.

[^84^] *(1988) 166 CLR 69.*
5.34 In other situations, it may be appropriate to refer the child protection concern to the CPS early in the process and to order a Family Report on other issues only if the matter is not resolved following the CPS investigation. This was the approach adopted in the Magellan Project. A Family Report was ordered where the child protection investigation and the appointment of a separate representative for the child had failed to resolve the matter.85

**g) Would the CPS replace Order 30A experts in child protection cases?**

5.35 It is envisaged that the need would remain for Order 30A experts in some child protection cases, particularly very complex cases requiring expert assessment. However, far fewer cases would require an Order 30A report, and where one was needed, the issues would be more narrowly defined. In this light, O30A reports would be seen as supplementary to the CPS investigation.

**h) Post-order supervision and assistance**

5.36 Another role which the CPS could play is in post-order protective supervision of the child. Under s.65L of the *Family Law Act*, an order may be made by the Court concerning supervision following the making of a parenting order. Section 65L provides:

(1) If a court makes a parenting order in relation to a child, the court may also, subject to subsection (2), make either or both of the following orders:

(a) an order requiring compliance with the parenting order, as far as practicable, to be supervised by a family and child counsellor or a welfare officer;

(b) an order requiring a family and child counsellor or a welfare officer to give any party to the parenting order such assistance as is reasonably requested by that party in relation to compliance with, and the carrying out of, the parenting order.

(2) In deciding whether to make a particular order under subsection (1) in relation to a child, a court must regard the best interests of the child as the paramount consideration.

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85 Thea Brown, Rosemary Sheehan, Margarita Frederico, Lesley Hewitt, above n. 9, page 53.
In an appropriate case, where child abuse issues have been an important factor in dispute between the parties, the CPS may be best placed to provide that further protective supervision and assistance.

i) Co-ordination between the CPS and State and Territory authorities

5.37 The establishment of the CPS would require clear lines of responsibility to be established so that the best use is made of available information before initiating an investigation, the best use is made of available and limited resources, and also so that children would not be subjected to multiple interviews. Such co-ordination is likely to benefit both the CPS and State and Territory child protection authorities, who currently spend a great deal of time responding to the subpoena of files for the purposes of family law litigation.

5.38 Procedures would need to be developed to co-ordinate the activities of State authorities and the CPS to avoid overlapping investigations. Much initial information will be able to be provided by the parties themselves, as part of the process of applying for a referral to the CPS, and that application process is also a way of dealing with issues about information exchange between State or Territory authorities and the Court. It would be expected that when a case is referred to the CPS for investigation, the referral file would include information provided by the parties on whether the matter has previously been investigated and by whom. If the child has been seen by a hospital, or the matter has been investigated by the State or Territory child protection authority or by the police, then such information is likely to be known by one or both parents, although in some cases the information they are able to provide may be incomplete.

5.39 The disclosure of such information may be restricted by privacy provisions in legislation or by the policy of the relevant State or Territory authorities, but the consent of a parent or both parents can be sought as part of the application to the Court for a referral to the CPS, or obtained from one or both subsequently. In some situations it may be necessary to proceed by way of subpoena which can be issued either by the Court of its own motion or by application of one of the parties.
5.40 Thus, in most cases information will already be available to the CPS at the inception of the investigation about any previous investigation of the matter (indeed such information will often be available to the Court in deciding whether to refer the case to the CPS). Protocols between the CPS and the State and Territory child protection authorities may also assist in exchange of basic information based upon computer records about whether the family is known to one or other Service. This will assist both the CPS and State or Territory child protection authorities as it is important for both to be aware, on receipt of a notification of abuse or neglect, whether another investigation has already been conducted.

5.41 Protocols for co-operation between the CPS and State or Territory child protection authorities may also assist in reducing the need for the issue of subpoenas, with consequent saving of time for the State and Territory child protection authorities. One means of ensuring a rational use of information is to have an agreed test for relevance before the CPS requests a file from State authorities. One method of ensuring the relevance of and need for transferred information, and also of minimising file preparation work is to develop a two step process based on an initial filtering system in which information is provided to the CPS on what is available, which will allow assessment of the validity, saliency, and currency of information held on file. Then if it is clear that there is information which is relevant on the file, it may be requested or if need be because of privacy legislation, subpoenaed. Initial review by the CPS will not necessarily prevent parties issuing their own subpoenas if the matter is proceeding towards a hearing, but they may be less inclined to do so if the CPS report indicates what material it has relied upon from such a file.

**Recommendation 7**

The establishment of a Child Protection Service should be accompanied by the development of Protocols for co-operation between it and State or Territory child protection authorities.
i) Should mandatory notification to State and Territory child protection authorities remain?

5.42 Some consequential modification to the mandatory notification system pursuant to s67Z and s67ZA, providing for the mandatory notification of specified child abuse concerns to State and Territory child protection authorities, will be necessary if the CPS is established. The current mandatory reporting requirement does not allow for any discretion on the part of the person required to make the report by way of an assessment of the seriousness of the report of child abuse, or the need for an investigation by State and Territory child protection authorities.

5.43 If the CPS is established, it would be inappropriate to keep referring all cases to the State and Territory authorities since this would merely invite duplication. However, there will nonetheless be some situations in which reporting should occur. Significantly, the CPS will not have the range of emergency powers vested in State agencies which are able to be invoked where a child is believed to be at risk of immediate harm. It follows that where immediate harm is in prospect, mandatory notification would be appropriate so as to engage the possibility of using the emergency powers that flow from notification. In other cases, notification should be permitted by statute to ensure that court personnel have legal protection for reporting in circumstances where there might otherwise be concerns about a breach of confidence.

5.44 A reform along these lines will reduce the number of notifications made to State or Territory child protection authorities when such notifications are unnecessary. This will benefit the child protection authorities by reducing the amount of work involved in receiving and filtering reports of abuse. In many cases, the matter is already known to the State or Territory authority before family law proceedings are commenced. In the Magellan Project, 36% of cases were already known to the Victorian Department of Human Services.86 The current system of mandatory reporting leads to an over-

86 Thea Brown, Rosemary Sheehan, Margarita Frederico, Lesley Hewitt, above n. 9, page 37.
reporting which creates unnecessary workload, both for personnel in the family law system and for State and Territory child protection authorities.

**Recommendation 8**

The establishment of a Child Protection Service should be accompanied by consequential modification to the mandatory notification system pursuant to s67Z and s67ZA, providing for the mandatory notification of specified child abuse concerns to State and Territory child protection authorities.

**Amendments to allow information exchange**

5.45 Section 67ZA(6) provides that Court personnel, arbitrators, and family and child counsellors and mediators who have made a notification to the child protection authority pursuant to the reporting provisions of the *Family Law Act*, “may make such disclosures of other information as the person reasonably believes are necessary to enable the authority to properly manage the matter the subject of the notification.”

5.46 The purpose of this section is to make clear that these persons may provide information which might otherwise be covered by an obligation of confidentiality or by the *Privacy Act 1988* (Cth), and it remains appropriate for this purpose. However, it has the implication that relevant court personnel from the Family Court and Federal Magistrates Service may only provide such information where there has been a notification, because without the specific authorisation of s.67ZA(6) of the *Family Law Act*, such information sharing would probably be a breach of the *Privacy Act*. This is an unnecessary restriction upon proper case co-ordination between the Courts and child protection authorities in managing cases. There is no point in a notification as a precondition of information sharing when the matter is already known to the child protection authority and the issue is one of case coordination or the provision of relevant information to assist in a child protection investigation.

5.47 There will also need to be an enabling provision so that those personnel covered by section 67ZA may provide relevant information to the Child Protection Service, to enable it to carry out an investigation in fulfillment of its responsibilities. For these reasons, it is necessary that s.67ZA should be amended to provide that the FCA and FMS can share such
information as is reasonably necessary with the CPS wherever abuse issues arise in proceedings.

**Recommendation 9**

Section 67ZA of the *Family Law Act* should be amended to provide that the courts exercising jurisdiction under the *Family Law Act* can share such information as is reasonably necessary with child protection authorities and the CPS whenever abuse issues arise in proceedings, and ensuring that there is no need for notification to a child protection authority as a precondition for such information sharing.

**The Cost of Delivering the Child Protection Service**

5.46 Child protection is a fundamental duty of government, and the experience of recent years has shown that it is not a responsibility which can be left entirely to State and Territory governments. The Federal Government does have a very important role in the protection of children when issues arise in the context of family law proceedings. The establishment of a Federal Child Protection Service is necessary even if it involves some expenditure.

5.47 Nonetheless, it is important to emphasise the savings which might be achieved for the family law system as a whole by an effective investigation service providing expert assessment for the courts exercising jurisdiction under the *Family Law Act* and which promotes the earlier resolution of such cases. Child abuse cases are disproportionately represented in the cases which go to hearing in the Family Court. Prof. Thea Brown and her colleagues found that 30% of the child abuse cases went to hearing in their initial study.\(^87\) If hearings in child protection cases can be reduced either in number, or in length, or both, there will be significant savings in court time. Even with cases which go to hearing, the provision of a report from the CPS giving a detailed assessment of the child abuse allegations and related issues, is likely to be of great benefit to the Court and may lead to a reduction in hearing times. If there is a reduction in the number and length of hearings in the Family Court and the FMS, then

\(^{87}\) ibid. p.64.
the courts will be able to reduce delays and to provide a better service in other kinds of cases.

5.48 One of the main benefits of a child protection service which is effective in the resolution of cases is that it will allow the legal aid dollar to go further. Given the substantial proportion of parents involved in such cases who are legally aided, and the necessity of appointing a separate representative for the child in many such cases, there ought to be significant advantages for the Commonwealth’s legal aid provision from an effective child protection service. An additional source of savings will come from a reduced reliance on Order 30A experts. Broad indications of the potential savings to the legal aid budget can be gathered from the evaluation of the Magellan Project, although the precise level of savings is not clear. 88

5.49 Other benefits are likely to be gained from improved services for the resolution of such cases. Brown and her colleagues found that a substantial number of children in their first study were experiencing significant distress. 28% had severe emotional or psychiatric problems. In the Magellan project, this was 4%. 89 While this result needs to be interpreted cautiously, it may well be that the reduction in the time spent in the legal process, together with the reduction in family tensions resulting from a case which was more actively managed, could provide some explanation for the differences. Such benefits to the mental health of children cannot be reduced to monetary figures. Nonetheless, one of the monetary savings from improvements in children’s wellbeing and in the better detection of child abuse may be in the country’s health budget. To the extent that better provision for investigation may help both parents involved in this highly stressful and emotive kind of litigation, there may also be improvements in the physical and mental health of the adults involved.

88 Ibid. pp. 68, 75 reported that the average amount of legal aid expenditure for the 97 cases costed for the project was $13,770. A group of 20 similar child abuse cases which were used as a comparison cost an average of $22,626. However, the extent of the savings has been questioned by Victoria Legal Aid (see minutes of Family Law Council meeting, 22nd March 2002, Melbourne and also letter to Chairperson dated 22 April 2002 attaching Victoria Legal Aid’s response to the report).

89 Ibid. p.36.
Conclusion

5.48 The Council recommends that the Government should establish a Federal Child Protection Service to investigate serious child abuse concerns arising in family law proceedings where there has not been an adequate assessment of the child protection issues through other means.

5.49 This recommendation is fully consistent with the approach adopted in the Magellan Project. Furthermore, it is not intended in any way to take over the proper role of State and Territory child protection authorities in the response to child protection concerns nor to interfere with the processes already existing in the States and Territories. Rather, such a service would be complementary to the work of State and Territory child protection authorities and confined to situations in which matters are already proceeding under the Family Law Act.

5.50 Council’s advice is founded on the recognition that the child protection authorities in the States and Territories see themselves as having circumscribed roles in child protection related to their legislation and their organisational mission. Consequently, it is not necessarily appropriate for them to investigate all child protection concerns arising in family law proceedings and nor is it always the optimal course of action for them to bring proceedings in the Children’s Court or Youth Court when matters can be better dealt with under the Family Law Act.

5.51 The case for establishing a new government service is not an easy one to make in an environment where there is an emphasis on cost-reduction and outsourcing. Child protection is an issue which lies at the heart of the responsibilities of government. The problems in the existing system are serious, and the reliance on State and Territory child protection services is to some extent misplaced. The establishment of a federal child protection service is, in financial terms, a modest initiative. Its benefits to the health and wellbeing of families where there are child protection concerns could be incalculable.
CHAPTER 6

IMPROVING COORDINATION BETWEEN STATE AND FEDERAL JURISDICTIONS

Introduction

6.1 The interaction between the *Family Law Act* and State and Territory child and family legislation would also be enhanced by a range of complementary initiatives. While the CPS will provide an opportunity for better coordination, there are also other steps that will assist in communication about and caring for children in need of protection.

The CPS and state child protection authorities

6.2 While the establishment of the CPS will go a long way towards ensuring that in cases of alleged child abuse or domestic violence affecting children, the Court has an early independent assessment of the child protection concerns, this does not mean that State and Territory child protection authorities should always refrain from getting involved in dealing with such cases. Far from it. There will be many situations where they will have an appropriate role in assisting in the protection of children subject to family law disputes, for example:

- By taking emergency action pursuant to state laws to protect a child from the risk of immediate harm.

- By taking action in the Children’s or Youth Court under state laws, in preference to a proceeding under the *Family Law Act*.

- By providing a report to the Court on the Department’s involvement in addressing the child protection concerns.

- By intervening formally in the family law proceedings to present evidence and to seek particular orders.
6.3 As was noted in Chapter Three, the current practice in some states of leaving it to a viable carer to seek orders under the *Family Law Act* may be appropriate in some cases, especially where all that is needed is to formalise an agreed arrangement. However, in other cases it will represent an abrogation of the public responsibility to ensure that children are protected. Even with a Child Protection Service, and legal aid for the poorest of Australian families, a parent may find it very difficult to take responsibility for presenting a case to court. There may be language problems, problems understanding the legal system, or problems receiving or maintaining legal aid. Victims of domestic violence or other abuse may also find it very difficult to take responsibility for a legal battle with the perpetrator when they remain fearful of the former partner’s propensity for violence. For these reasons, if the child can be adequately protected through orders made under the *Family Law Act*, then in some cases it may be very important for child protection authorities to take the lead in presenting the case for orders which will protect a child.

6.4 In order to achieve a proper balance between private and public responsibility, and to ensure the harmonious and efficient interaction between the State and Federal systems, three reforms are needed:

I. Agreements on when it is appropriate for State and Territory child protection authorities to take legal action;

II. Changes to state laws, and to the *Family Law Act*, to ensure that appropriate orders can be made in favour of a parent or relative at the request of the child protection authority in child welfare proceedings.

III. The clear establishment of a One Court principle to ensure that uncoordinated action is not taken both in the state and federal arenas.

**Agreements on when it appropriate for State and Territory child protection authorities to take legal action**

6.5 It is already recognised that, in family law litigation, there are situations where the interests of the child may not adequately be presented by the parents involved in the dispute. In *Re K* (1994) FLC 92-461, the Full Court of the Family Court indicated
that there were a number of situations in which a separate representative should be appointed for the child. In its decision the Court stated:

In relation to appointments of separate representatives we consider that the broad general rule is that the Court will make such appointments when it considers that the child's interests require independent representation.\textsuperscript{90}

6.6 In this context, the Court, subject to the broad general rule, suggested the following guidelines on when appointment should normally be necessary:\textsuperscript{91}

(i) cases involving allegations of child abuse, whether physical, sexual or psychological;
(ii) cases where there is an apparently intractable conflict between the parents;
(iii) cases where the child is apparently alienated from one or both parents;
(iv) where there are real issues of cultural or religious difference affecting the child;
(v) where the sexual preferences of either or both of the parents or some other person having significant contact with the child are likely to impinge upon the child's welfare;
(vi) where the conduct of either or both of the parents or some other person having significant contact with the child is alleged to be anti-social to the extent that it seriously impinges on the child's welfare;
(vii) where there are issues of significant medical, psychiatric or psychological illness or personality disorder in relation to either party or a child or other persons having significant contact with the children;
(viii) any case in which, on the material filed by the parents, neither seems a suitable custodian;
(ix) any case in which a child of mature years is expressing strong views, the giving of effect to which would involve changing a long standing custodial arrangement or a complete denial of access to one parent;
(x) where one of the parties proposes that the child will either be permanently removed from the jurisdiction or permanently removed to such a place within the jurisdiction as to greatly

\textsuperscript{90} ibid 80,773
\textsuperscript{91} ibid 80,773 to 80,775
restrict or for all practicable purposes exclude the other party from the possibility of access to the child;

(xi) cases where it is proposed to separate siblings;

(xii) custody cases where none of the parties are legally represented; and

(xiii) applications in the Court's welfare jurisdiction relating in particular to the medical treatment of children where the child's interests are not adequately represented by one of the parties.

6.7 In many situations, the appointment of a separate representative will satisfy the need for someone other than the parent to present the child protection concerns to the Court. A separate representative who shares the child protection authority’s view of the child protection concerns will marshal the evidence, and cross-examine witnesses in much the same way as would a lawyer for the State or Territory child protection authority. However, it cannot be assumed that this representation will occur if a case is left to run in the Family Court or Federal Magistrates Service. As the various case studies and research findings cited earlier in this Report demonstrate, much can go wrong if an assumption is made that proceedings will be taken under the *Family Law Act* and the case closed. The risks and problems are as follows:

- The parent or relative may not in fact begin proceedings
- The parent or relative may settle the case or withdraw from proceedings without the child protection concerns being resolved
- A separate representative may not be appointed by the Court
- Legal Aid may decline to fund a separate representative (*Re JJT; ex p Victoria Legal Aid* (1998) 195 CLR 184)
- The separate representative may take the view that the child protection concerns are erroneous and may therefore adopt a different view of the best interests of the child than the child protection authority
- The parties may settle the case in a way which arguably compromises the safety of the child and this agreement is acquiesced in by the separate representative.
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6.8 For these reasons, it is arguable that the prima facie position should be that if the State or Territory child protection authority believes that a child has been abused or is at risk of abuse, and needs to be protected through legal orders, it should either

- remain involved in the case until it is satisfied that the parent and/or the separate representative is able and willing to seek the orders necessary to protect the child or

- take action under its own child welfare legislation.

6.9 In some situations, it may be possible for the child protection authority to seek orders in its favour under the Family Law Act. In Faulkner v McPherson and the Department of Community Services (unreported, Family Court of Australia, 11 August 1995) the Full Court (Lindenmayer, Finn and Joske JJ) held that an order could be made under the Family Law Act giving custody to the Director-General of the Department of Community Services, where a child was in need of care and protection and neither parent was a suitable carer. Under the terms of the Family Law Act as it then stood, a custody order could be applied for by a person other than a parent and made in favour of someone other than a parent. Those provisions, in different form, continue in the Family Law Act following the amendments made in 1995. The relevant provisions are now ss. 64C and 65C.

6.10 Such an order could be made, even though the Director-General would not personally be providing such care, because the Children (Care and Protection) Act 1987 (NSW) specifically contemplated that a child might be placed in the care of the Director-General under the Family Law Act, and therefore the powers of delegation in that Act applied. This provision has been re-enacted in the Children and Young Persons (Care and Protection) Act 1998 (NSW), s.135(1)(c)(i) and (4)(c).92 In Western Australia, the Family Court Act 1997 contains an explicit provision allowing

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92 The Children and Young Persons (Care and Protection) Act 1998 defines a child in out-of-home care as including a protected person (s.135(1)(c)(i)). Section 135(4) defines a protected person as … (c) a child or young person in respect of whom the Minister or the Director-General has parental responsibility, either wholly or partially, pursuant to an order in force under the Family Law Act 1975 of the Commonwealth.
the Family Court of Western Australia to make orders under the Child Welfare Act 1947.\textsuperscript{93} It is seldom used, as the child protection authority in that State prefers to bring child protection proceedings in the Children’s Court.

**Changes to state laws, and to the Family Law Act, to ensure that appropriate orders can be made in favour of a parent or relative in child welfare proceedings**

6.11 To ensure that in appropriate cases, State Courts can deal with all the child protection issues and make appropriate long-term orders, they would need to have the power to make final residence and contact orders. One way of achieving this is to allow them to make orders under the *Family Law Act*. However, there are some complexities about this.

6.12 Under Part VII of the *Family Law Act* jurisdiction is conferred on courts of summary jurisdiction.\textsuperscript{94} The exception is proceedings under section 60G for leave for a parent to commence proceedings to adopt the parent’s own child.

6.13 However, under section 69N, courts of summary jurisdiction are effectively deprived of most of the jurisdiction conferred by section 69J. Section 69N provides that a court of summary jurisdiction cannot hear defended proceedings for a parenting order, other than a child maintenance order, without the consent of all the parties. If the consent is not given the court is obliged to transfer the proceedings to the Family Court, the Family Court of Western Australia, or the Supreme Court of the Northern Territory, as the case requires.

6.14 Hence, the first option would involve amending section 69N to enable Children’s and Youth Courts to make orders under the *Family Law Act* when those courts are exercising their State law welfare jurisdiction. The difficulty with this proposal is that the rules of evidence in child welfare law proceedings generally differ

\textsuperscript{93} *Family Court Act* 1997 (WA) s.36(6). This provides: “Where a child the subject of proceedings appears to be a child in need of care and protection within the meaning of the Child Welfare Act 1947 the Court has, in relation to the child, in addition to the powers conferred by this Act, all the powers of the Children's Court.”

\textsuperscript{94} see section 69J.
from those operating under the *Family Law Act*. The *Evidence Act 1995 (Cth)* governs *Family Law Act* proceedings in all States and Territories apart from Western Australia, but it does not govern child welfare proceedings in the States and Territories which typically operate on less strict rules of evidence. It would be unworkable to have part of the proceedings, that directed to the establishment of whether a child is in need of protection, governed by one set of evidential requirements while the issue of whether a parenting order is made under the *Family Law Act* is governed by a more restrictive body of evidential requirements.

6.15 No such difficulties would arise if Children’s and Youth Courts, or other courts exercising jurisdiction under state or territory child welfare laws, were empowered to make consent orders under the Commonwealth *Family Law Act*. At present, Children’s Courts and Youth Courts, which have an independent statutory existence from the State or Territory Magistrates’ Court, do not have the jurisdiction which Magistrates’ Courts have to make consent orders under the *Family Law Act*. A provision of this kind would allow appropriate orders to be made where the parties agree. It would avoid issues as to which evidentiary scheme should apply, the more formal requirements of the Family Court as opposed to the more inclusive practice generally applied in Children’s Courts and Youth Courts.

**Recommendation 10**

The *Family Law Act* should be amended to allow Children’s and Youth Courts to make consent orders regarding residence and contact in certain circumstances.

6.16 The second option is that States and Territories should be encouraged to amend child and family services legislation to create a power to make final residence and contact orders with respect to children in proceedings brought by the appropriate State government agency, as an outcome of a child protection proceeding. This would enable the State courts to make a wider range of orders than is currently available to them. Orders would allow the prohibition of, or restriction of, contact between a child and an abusive parent and give the non-offending parent a residence order in relation to the child, equivalent to that which could otherwise be obtained under the *Family Law Act*. 
6.17 This is already the case in substance in NSW\textsuperscript{95} and the ACT.\textsuperscript{96} In contrast, South Australian and Victorian Courts can only make short term orders, and in Queensland the State Court can only make orders in respect of people other than the parents.\textsuperscript{97} The result is that cases are taken to the Family Court because the Children’s Court cannot make long term orders. As the research shows, one reason why welfare agencies withdraw from the Children’s Court in favour of Family Law Act proceedings is because they cannot obtain long term orders under the State or Territory child protection legislation.

6.18 Council has considered the constitutional implications of this proposal. A threshold issue is whether the Family Law Act covers the field with respect to residence and contact orders. If State or Territory legislatures purported to enact such laws, would those laws be inconsistent with the Family Law Act under section 109 of the Constitution?\textsuperscript{98} Section 69ZK of the Family Law Act expressly provides for the continued operation of certain State laws. Subsection 69ZK(2) indicates that the Commonwealth does not intend to cover the field with respect to children under the care of a person under a child welfare law and that the child welfare law operates to the extent specified in that provision. It expressly provides for the continued operation of orders made by courts under child welfare laws (as defined). Orders so preserved are those made under provisions of State and Territory laws specified in Schedule 5 to the Family Law Regulations. In practice, the only problem of inconsistency is if an order of a State court is inconsistent with a prior order of the Family Court or Federal

\textsuperscript{95} Child and Young Persons (Care and Protection Act) 1998. Section 79 provides that if “the Children’s Court finds that a child or young person is in need of care and protection, it may: (a) make an order allocating the parental responsibility for the child or young person, or specific aspects of parental responsibility: (i) to one parent to the exclusion of the other parent…”. This carries with it the entitlement to decide the residence of the child. Such an order could be combined with an order in relation to contact under s.86.

\textsuperscript{96} Children and Young People Act 1999, ss 206, 207, 255, 257.

\textsuperscript{97} Child Protection Act 1999 ss.61,62.

\textsuperscript{98} By virtue of section 109 of the Commonwealth Constitution, a State law will be inconsistent with a Commonwealth law for the purposes of section 109 if it is either “directly” or “indirectly” inconsistent with that law.
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Magistrates Service. The High Court indicated in *P v P* (1994) 181 CLR 583 that where it is the intention of the Federal Parliament that State and Federal jurisdictions exist concurrently, then an order made pursuant to state law is only invalid to the extent that it is inconsistent with the order of the Family Court (at 603-05). Conversely, where a state order exists first, then s. 69ZK(1) operates to impose restrictions on the power of the court exercising jurisdiction under the Family Law Act.

6.19 To avoid any residual doubt on the constitutionality of such provisions, it is advisable to insert a new provision into the *Family Law Act* making it entirely clear that State and Territory courts may make orders with respect to residence and contact under State and Territory child welfare laws children in proceedings brought by the appropriate State government agency.

**Recommendation 11**

Section 69ZK should be amended to make clear beyond doubt that residence and contact orders made pursuant to child welfare legislation as an outcome of proceedings brought by a child protection authority for the protection of a child are not inconsistent with the *Family Law Act* 1975.

6.20 Giving the power to all State and Territory courts to make orders concerning residence and restricting the contact of a parent who may endanger the wellbeing of a child is entirely consistent with the philosophy of State and Territory child protection legislation. It is fundamental to the legislation of all States that intervention in the lives of families should be no greater than is necessary to secure the objective of protecting children from harm. That is, the Court should adopt the least intrusive form of intervention necessary in the circumstances. In some situations, the objective can be achieved by the denial of contact to one parent in the context of the parents’ separation, together with a residence order in favour of the other parent. The removal of parental responsibility from both should only be justified where neither parent is adequate to care for the child and to protect him or her from harm. The inability under
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some State and Territory laws to make such orders results in over-intrusive interventions. It is not uncommon, for example, to find instances where the Court has ordered that the child should be placed in care, with the consequence that parental responsibility passes from the parents to the State. Yet the child protection authority “places” the child back with one of the parents. This practice would usually be unnecessary if the Court could make orders concerning residence and contact as an outcome of proceedings in which it has been proven that a child is in need of care and protection.

6.21 There are two possible objections to the enactment of powers in State and Territory legislation to grant residence and contact orders beyond the possible constitutional issue which has been identified. The first is that it could create problems with variation and enforcement of the contact orders. The second is that it might tie up State court resources on what are essentially private law matters.

6.22 The answer to the first objection is that an order made under child welfare legislation could later be dealt with as a Family Law Act issue if there is a need to resolve what is essentially a private dispute between the parents without raising the same child protection concerns which led to the initial proceedings. This could happen in one of three ways. Firstly, an order could be limited in time, say for two years, with the consequence that an order could be sought under the Family Law Act which would have effect on the lapsing of the child protection order. Secondly, if issues arose between the parties which did not involve significant child protection concerns, then the State or Territory authority could give its permission, in accordance with s.69ZK(1) to proceedings being brought under the Family Law Act. Thirdly, an issue about variation or enforcement could be dealt with under the State or Territory child welfare legislation. If substantial child protection concerns remain at the time the issue arises, then it may indeed be the most appropriate course for any variation applications to be dealt with under the relevant provisions of child welfare legislation.

6.23 The answer to the second objection is that child protection proceedings are initiated only by child protection authorities. There is no danger then, of State courts being caught up in private residence and contact disputes because the initiation of such proceedings would be entirely a matter for the child protection authority, and
their continuance is usually also a matter for that authority. The making of an order concerned with residence and contact could only occur, under Council’s proposals, as a disposition available to the Court if grounds for a care order have been proven. In these circumstances, it is difficult to see any circumstances in which the resources of State or Territory authorities could be diverted to dealing with residence and contact issues which did not give rise to significant child protection concerns.

6.24 The enactment of provisions allowing for the making of residence and contact orders as an outcome of a child protection proceeding has the great advantage of allowing maximum flexibility within the present state-federal arrangements to deal with all substantive matters through proceedings in one court. In this way, the most appropriate orders could be made depending on the circumstances of the case without the need to initiate proceedings in another court to ensure the child’s best interests are addressed. Such movements between courts are contrary to the child’s best interests, administratively cumbersome, and costly. The efficacy of such a reform could be further enhanced if all States and Territories used the language of parental responsibility, residence and contact in a way which is consistent with the Family Law Act rather than continuing with the language of custody and access which is now outmoded.

**Recommendation 12**

States and Territories should be encouraged to amend their laws to make it possible for Children’s and Youth Courts to make orders concerning residence and contact as an outcome of child protection proceedings brought by the child protection authority.

**The One Court principle**

6.25 When the federal system, in the form of courts exercising jurisdiction under the *Family Law Act*, and State systems, in the form of Children’s Courts and the relevant child protection agency, have the same client presenting the same child abuse problem, this is what is termed a ‘jurisdictional overlap’. This comes about because child protection is a matter for State law and disputes concerning children are dealt
with under the Commonwealth’s *Family Law Act*. Of course child protection issues can arise in disputes whatever the forum.

6.26 In the course of its inquiries the Council has gathered an extensive database concerning how jurisdictional overlaps occur in the area of family violence and child protection and the sorts of problems that are manifested in these circumstances. The Discussion Paper Number Two devoted a chapter to this topic. It outlined the current approaches to dealing with instances of overlap in child protection. The problems with the operation of these approaches have been extensively canvassed, particularly the reliance placed on follow-up by child welfare authorities after notification by the Family Court. Data suggested such follow-up was often not forthcoming.

6.27 Submissions received in response to that report added to this knowledge-base. What all this information made clear was that perhaps counter-intuitively, when two systems were involved, the results for those involved - ostensibly trying to be helped - were in fact often worse than if only one system had had carriage of the matter.

**Case Study 6**

This was a case in Victoria. Prior to the involvement of the Department of Human Services and the Family Court, there had been allegations over eight years regarding the father’s violence, including physical and sexual assault of the mother and physical abuse of the children. On numerous occasions the mother went into a refuge with the children, and on several occasions she made complaints to the police but then withdrew them. Departmental involvement began in 1995 when a notification was made regarding the children being exposed to domestic violence. No action was taken.

The parents separated in March 1996 and sought parenting orders in the Family Court. The father succeeded in gaining interim residence and the mother was given contact. The father’s success seemed to be based on the mother leaving the children in his care, moving into a refuge, and not exercising any contact with the children during this time, though the judge’s reasoning was not clear. The mother made further applications in the FCA claiming she was too scared to exercise her contact rights and she rarely saw the children. Over the next three years there were numerous notifications to the Department by both of the parents alleging

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abuse of the children, most of which were investigated but dismissed by the Department. The father also over this period attempted in the Family Court to reduce the mother’s contact with the children but was unsuccessful.

In July 1999 the mother failed to return the children from a contact visit because the children said they were being physically abused by their father and that they had witnessed domestic violence within his home. The father was granted a recovery order in the Family Court, yet on the same day a protection application was issued in the Bendigo Magistrates Court and the children were put on an interim accommodation order to their mother. Also on that day another FCA Report was released stating that the children needed regular contact with their mother and that the two older girls ‘have become inappropriately involved in their parents’ dispute’.

Two weeks later a Children’s Court Report recommended that the children return to their father as there was not sufficient evidence to remove them. It was stated, however, that ‘given the many times the children have been interviewed by DHS and by Family Court counsellors, as well as the many counselling sessions which [one of the children] had at the Centre Against Sexual Assault, uncontaminated evidence from the children is unlikely to be obtained.’ Despite the Department’s recommendation, the interim accommodation order to the mother was extended. In the meantime, Family Court proceedings were adjourned due to the Children’s Court involvement.

A month later, on the same day, a Family Court order was made giving the father residence, and a Children’s Court interim accommodation order to the mother was extended. Two weeks later the interim accommodation order was extended to allow for the Family Court to review proceedings. The mother and father both filed in the FCA seeking residence. The Department sought to have the Children’s Court protection application struck out and to withdraw from further proceedings. The solicitors for both parents agreed. However, the Children’s Court Magistrate refused to allow the Department to withdraw as she was of the belief that there was still a protective concern. While the matter was resolved to everyone’s satisfaction soon after and the protection application was struck out, the decision of the Magistrate to prevent withdrawal became the subject of litigation in the Victorian Supreme Court.

The case returned to the Family Court in October 1999. At that point, the Judge agreed with the solicitor’s observation that Departmental withdrawal did not necessarily mean that there were no protective concerns.

Finally, in December 1999 a Family Court order gave the mother residence of the three older children, and the father was given residence of the youngest child until the end of the school year. After that point the youngest child was to be placed in her mother’s care. The judge
expressed concern over the children’s future stating ‘there are many more days in court still to be had by this family.’

6.28 As this case illustrates, there is a great need for proper co-ordination of cases and for a decision to be made as early as possible whether a matter should proceed under the Family Law Act or through proceedings under child welfare legislation. Such matters should only be dealt with by one court, unless there are exceptional circumstances.

6.29 Over the years, numerous proposals have been made to create one court system to deal with all issues concerning children and families. Such proposals were indeed canvassed by the Council in its Discussion Paper No 2. Options which have been canvassed include schemes which seek to create a single court - a unified Family Court. Proponents of such a change sought to overcome duplication and fragmentation of the present system. Council has considered these various options in the light of the submissions received and has concluded that the constitutional and other problems associated with creating a unified Federal Family Court exercising jurisdiction in all matters concerning children and families are insurmountable. Even the creation of State-based Family Courts involve significant logistical issues. One very difficult problem involved in having the same Court applying both State and Federal laws in the one proceeding has already been discussed. It is the problem that differing and irreconcilable evidentiary regimes apply in the Family Court and Children’s Courts. Power to make laws concerning child protection could be referred by the States to the Commonwealth so that there are national, federal laws governing the child protection system, but the problem with this is that all the services involved in resolving child protection matters are State-based.

6.30 However, Council has concluded that the creation of one court system applying both State and Federal laws is not necessary to achieve the desired goal. What is needed is one court to hear the matter. This is the ‘One Court principle’.

100 See Chapter 4 - Discussion Paper No 2, The Best Interests of the Child? The Interaction of Public and Private Law in Australia, Family Law Council (October 2000)
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6.31 The One Court principle requires that at the earliest possible point in managing a case, the decision should be taken whether a matter proceeds under state or territory child welfare law or under the Family Law Act. Once that decision has been taken, in all but the most exceptional circumstances, the matter should proceed in the chosen court system and if, for example, a child protection authority is dissatisfied with the outcome of proceedings under the Family Law Act it should address those concerns by way of appeal rather than commencing new proceedings in a different jurisdiction. The benefits of such co-ordination can be seen in the following case study:

Case Study 7

This was a case in New South Wales heard by the Federal Magistrates Service. It concerned a seven year old girl. There were allegations of sexual abuse made by the child against the maternal grandfather which were investigated by the police. Charges were laid but were later dropped when the child retracted the allegations about half an hour after being restored to the care of the mother. The mother had a history of drug and alcohol abuse, although she was no longer using illicit drugs at the time of hearing and had moderated her alcohol intake. The father had also had a problem with alcohol, and had a history of violent behaviour. There were also allegations of child abuse against the father. Both parents had repartnered and apprehended violence orders had been made on behalf of, and in relation to, people in both households.

The child was separately represented and the Department of Community Services (DOCS) also intervened seeking orders. The Federal Magistrate was able to deal with all the issues in the case in the one hearing, as well as the ongoing need for protective supervision of the child. He commented on the very constructive role played by the Department:

“DOCS has at all times acted properly to protect the welfare of this child and its efforts should be respected…I have found the involvement of DOCS in these proceedings to be valuable and a continuing role for DOCS in protecting the child is, in my view, necessary”.

The Magistrate made a residence order in favour of the father with contact to the mother. Orders were also made prohibiting overnight contact with the maternal grandfather and providing that any other contact with the grandfather be in the mother’s presence or in the presence of another responsible adult. The orders also provided for the ongoing role of the Department of Community Services in addressing the child protection issues in the family.
6.32 The idea that only one court should have carriage of the matter is a well-accepted principle in theory, but its application in some jurisdictions leaves much to be desired in practice. There is a need for State and Territory governments to reach agreement with the Commonwealth at the highest levels to ensure that the One Court principle is applied in practice to avoid unnecessary duplication of effort and confusion of orders.

**Recommendation 13**

In child protection matters, duplication of effort between state and federal systems should be avoided, and a decision should be taken as early as possible whether a matter should proceed under the *Family Law Act* or under child welfare law with the consequence that there should be only one court dealing with the matter. This is to be known as the ‘One Court principle’.

6.33 The recommendations set out above embrace an ambitious reform agenda. There is firstly the need to create and foster a new institution, the CPS, and ensure it grows in step with and complementary to other existing parts of the family law system. What this suggests is the need for high-level commitment to reform. In particular, the practical application of the One Court principle will require much greater co-operation between State authorities and courts exercising jurisdiction under the *Family Law Act* than has been so far achieved in many parts of Australia. Overcoming the jurisdictional overlaps, and ensuring that the system works for the benefit of vulnerable children will require a renewed commitment to cooperation and an ongoing mechanism at governmental level for the resolution of problems.

These practical issues and other issues regarding co-operation across the State-Federal divide need to be worked through at an operational level. For these reasons, Council believes that it is essential that a high-level Committee should be established by the States and Territories in co-operation with the Commonwealth. Its purposes would be several. The first would be to promote cooperation in ensuring the effectiveness of the

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One Court principle. Secondly, it should work out the circumstances in which it is appropriate for the child protection authority to be involved in presenting the child protection concerns either in proceedings under State or Territory child welfare law or by having an active role in proceedings under the *Family Law Act*. Thirdly, it should examine the various Protocols between the Family Court and State and Territory child protection authorities and to encourage their development where, as in NSW, no Protocol has been finalised. The One Court principle should be central to all such protocols.

6.34 The Council’s examination of the operation of the Protocols entered into between State agencies and the Family Court has led to several questions about their efficacy. While the processes and procedures may be first rate, there has been observed a lack of commitment and resources to making them work in practice. The information gathered suggests that the Protocols have not become assimilated in the ‘rules of thumb’ that make up the bulk of day-to-day decision making at the service-delivery end of the system. Changing work practices and attitudes is never easy or achieved overnight.

6.35 The Council believes the commitment to the implementation of the Protocols needs to be reinvigorated. The operation of Protocols between the Family Court of Australia and State and Territory child protection departments can continue to be improved, drawing on best practice jurisdictions. They may also need to be revised in the light of the lessons learned from the highly successful Magellan Project in relation to child abuse cases which are dealt with under the *Family Law Act*.

**Recommendation 14**

The Council of Community Services Ministers and Standing Committee of Attorneys-General should jointly appoint a Committee consisting of representatives of the child protection authorities in States and Territories, Children’s and Youth Courts, the Family Court of Australia, the Family Court of Western Australia, the Federal Magistrates Service and the CPS. The Committee shall:

**Contd.**
Recommendation 14 (contd.)

a) promote cooperation in ensuring the effectiveness of the One Court principle;

b) endeavour to agree on the circumstances when the child protection authority should take responsibility for presenting the child protection concerns either under child welfare legislation or by becoming a party to family law proceedings and when it is appropriate for the matter to be left to others, such as the parents, to resolve in private proceedings under the Family Law Act;

c) review the operation of the various Protocols between the Family Court and State and Territory child protection departments with a view to promoting as much consistency as is possible given the variations in state legislation and circumstances;

d) encourage a high-level of commitment to the Protocols and their incorporation in all relevant agencies;

e) explore all the practical issues of improving information sharing, examining how to better coordinate elements of the system, and further refining the role of the CPS;

f) keep under review and progressively enhance the various Protocols and promote ongoing collaboration between the child protection authorities in the States and Territories and the Courts exercising jurisdiction under the Family Law Act.

Providing that Children’s Courts become Courts of Record

6.36 It is also desirable to enact reforms providing for the recording of reasons for decisions in Children’s and Youth Courts. A court of record is one in which proceedings are recorded and available as evidence of fact. As a consequence, the court’s decision is also recorded and may be reported. The Discussion Paper Number Two asked whether the fact that in some jurisdictions, Children’s Courts are not courts of record makes it difficult to determine what tests are applied. It asked

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whether the current system should be modified in some way. Researchers have identified the lack of such records as a significant impediment to their work:

The dearth of information largely stems from the fact that there is no ‘court of record’ making reportable decisions in child protection matters and, as a result, the law reports are not a useful source of information about such cases. The absence of law reports also probably explains the lack of secondary materials in this area.

6.37 Given the significance of the decisions being made it may at first glance appear anomalous that decisions are not subject to some form of reporting. Even if these were to be done in an abbreviated ‘Statement of Reasons’ format the benefits may be manifold. Firstly, a written record would provide parties, and their legal advisers, with a greater appreciation of the judicial balancing of the competing interests involved. Secondly, it would significantly benefit the legal community in establishing a body of precedent and promoting consistency between judicial officers. Thirdly, it would ensure a measure of feedback to the community, with appropriate confidentiality protections, about the legal processes involved in such sensitive cases. Justice would be able to be seen to be done. Finally, it would valorise children as the primary subject of the resources allocated to maintaining the institutions and supporting the judicial personnel involved in this very specialised form of caring for children.

6.38 In light of these points, Council considers that a short form of reporting should be encouraged with a common template, preferably drafted in consultation with potential end-users.

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103 ibid. 12.
104 Fiona Kelly and Belinda Fehlberg, above n. 20, at 39.
Recommendation 15

That Children’s and Youth courts should be encouraged to collaboratively develop and implement a short form of reporting of their decisions.
CHAPTER 7:
CONFIDENTIALITY OF DISCLOSURES OF
CHILD ABUSE

7.1 A further major issue in child protection in the context of family law proceedings is whether judges should be allowed to hear evidence which is vital to the protection of children but which arises from disclosures in the course of confidential counselling and mediation. This issue arises from the effects of sections 19N, 62F, and section 70NI of the Family Law Act.

Background

7.2 The admissibility of evidence in Commonwealth Courts is determined by applying a sequence of tests set out in the Evidence Act 1995 (Cth). In family law proceedings the key tests are relevance, the hearsay rule, and whether client legal privilege, or another ground for exclusion, can be claimed.

7.3 The Evidence Act defines relevance in terms of evidence that, if it were accepted, could rationally affect (directly or indirectly), the assessment of the probability of the existence of a fact in issue in the proceedings. The general hearsay rule is that evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation. This would typically be evidence of a statement made to a witness by a person not called as a witness, with the object of asserting the truth of the contents of the statement. Client legal privilege may be invoked where legal advice is provided or professional legal services are provided relating to litigation. Evidence may be excluded on other grounds such as matters of state. In addition, at common law the ‘without prejudice’ privilege applies to information disclosed during the

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105 Evidence Act 1995 (Cth), s.55(1)
106 ibid. s.60, note exceptions in ss. 60, 60,71, and 72.
107 ibid. see s.118 and s. 119 respectively.
108 ibid. s. 130.
Confidentiality of Disclosures of Child Abuse

course of mediation. This privilege provides that any communication made with a
view to settling either part or the whole of a dispute cannot be put into evidence
without the consent of both parties.\textsuperscript{109} The ‘without prejudice’ privilege has been
replaced by section 131 of the \textit{Evidence Act 1995} for the purpose of most proceedings
brought in Federal courts. Section 131 is similar in many respects to the ‘without
prejudice’ privilege. Section 131 of the \textit{Evidence Act} provides:

\textbf{Exclusion of evidence of settlement negotiations}

(1) Evidence is not to be adduced of:

(a) a communication that is made between persons in dispute, or between one or more
persons in dispute and a third party, in connection with an attempt to negotiate a settlement
of the dispute; or

(b) a document (whether delivered or not) that has been prepared in connection with an
attempt to negotiate a settlement of a dispute.

2) Subsection (1) does not apply if:

(a) the persons in dispute consent to the evidence being adduced in the proceeding concerned
or, if any of those persons has tendered the communication or document in evidence in
another Australian or overseas proceeding, all the other persons so consent; or

(b) the substance of the evidence has been disclosed with the express or implied consent of
all the persons in dispute; or

(c) the substance of the evidence has been partly disclosed with the express or implied
consent of the persons in dispute, and full disclosure of the evidence is reasonably necessary
to enable a proper understanding of the other evidence that has already been adduced; or

(d) the communication or document included a statement to the effect that it was not to be
treated as confidential; or

(e) the evidence tends to contradict or to qualify evidence that has already been admitted
about the course of an attempt to settle the dispute; or

\textsuperscript{109} Field \textit{v} Commissioner for Railways (NSW) (1957) 99 CLR 285; Lukies \textit{v} Ripley (No 2) (1994) 35
NSWLR 283.
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(f) the proceeding in which it is sought to adduce the evidence is a proceeding to enforce an agreement between the persons in dispute to settle the dispute, or a proceeding in which the making of such an agreement is in issue; or

(g) evidence that has been adduced in the proceeding, or an inference from evidence that has been adduced in the proceeding, is likely to mislead the court unless evidence of the communication or document is adduced to contradict or to qualify that evidence; or

(h) the communication or document is relevant to determining liability for costs; or

(i) making the communication, or preparing the document, affects a right of a person; or

(j) the communication was made, or the document was prepared, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty; or

(k) one of the persons in dispute, or an employee or agent of such a person, knew or ought reasonably to have known that the communication was made, or the document was prepared, in furtherance of a deliberate abuse of a power.

7.4 In the ordinary course of events, it is only if one or more of these tests were not satisfied, or a ground for claiming privilege upheld, that evidence would be held by a Court not to be admissible.

7.5 It is against this background that section 19N of the Family Law Act, introduced in 1995 (but based on provisions in the Act since its original enactment in 1975), can be seen. It provides for the absolute inadmissibility of evidence in any court of anything said in the course of a family and child counselling or mediation. In the nature of things it has the potential to conceal evidence relevant to a child’s safety and welfare. It states:

Admissions made to counsellors, mediators etc.

(1) This section applies to:

(a) a family and child counsellor; or

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110 The repealed Matrimonial Causes Act 1959 (Cth) also contained, in section 16, an ‘exclusion of evidence’ provision in respect of ‘anything said or...any admission made in the course of an endeavour to effect a reconciliation’ under Part III of that Act.
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(b) a court mediator; or

c) subject to the regulations, a community mediator or a private mediator; or

d) a person nominated, or acting on behalf of an organisation nominated, for the purposes of paragraph 14C(3)(b) or subparagraph 44(1B)(a)(ii); or

e) a person to whom a party to a marriage has been referred, for medical or other professional consultation, by a person referred to in paragraph (a), (b), (c) or (d).

(2) Evidence of anything said, or any admission made, at a meeting or conference conducted by a person to whom this section applies while the person is acting as such a person is not admissible:

(a) in any court (whether exercising federal jurisdiction or not); or

(b) in any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory, or by the consent of the parties, to hear evidence.

7.6 There is also a provision dealing with conferences with family and child counsellors or welfare officers that excludes evidence. Section 62F provides:

Conferences with family and child counsellors or welfare officers

(1) This section applies if, in proceedings under this Act, the care, welfare and development of a child who is under 18 is relevant.

(2) The court may, at any stage of the proceedings, make an order directing the parties to the proceedings to attend a conference with a family and child counsellor or welfare officer:

(a) to discuss the care, welfare and development of the child; and

(b) if there are differences between the parties in relation to matters affecting the care, welfare and development of the child—to try to resolve those differences.

…

(8) Evidence of anything said, or of any admission made, at a conference that takes place pursuant to an order under subsection (2) is not admissible:

(a) in any court (whether exercising federal jurisdiction or not); or

(b) in any proceedings before a person authorised by a law of the Commonwealth or of a State or Territory, or by consent of the parties, to hear evidence.
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7.7 The Family Law Regulations 1984 provide for the Attorney-General to authorise family and child counsellors. Section 19K of the Family Law Act provides that court and community mediators must make an oath or affirmation of secrecy before starting to perform the functions of a mediator. Family and child counsellors, and court mediators and community mediators, are required to make an oath or affirmation in the following terms:

For the purposes of subsection 19 (1) of the Act, a family and child counsellor must make an oath or affirmation in the following form:

I [name of family and child counsellor] do swear by Almighty God [or solemnly and sincerely affirm and declare] that I will not disclose to any person any communication or admission made to me in my capacity as a family and child counsellor, unless I reasonably believe that it is necessary for me to do so:

(a) to protect a child; or

(b) to prevent or lessen a serious and imminent threat to:

(i) the life or health of a person; or

(ii) the property of a person; or

(c) to report the commission, or prevent the likely commission, of an offence involving:

(i) violence or a threat of violence to a person; or

(ii) intentional damage to property of a person or a threat of damage to property; or

(d) to enable me to discharge properly my functions as a family and child counsellor; or

(e) if a child is separately represented by a person under an order under section 68L of the Family Law Act 1975 — to assist the person to represent the child properly.

7.8 There is, then at least some inconsistency between the policy expressed in the terms of the oath or affirmation taken by counsellors and mediators, and the policy given effect to in sections 19N and 62F. The oath or affirmation recognises that there

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111 Regulation 57.
112 Regulation 66.
113 Regulation 58.
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are limits on the requirement of confidentiality in counselling and mediation. The exceptions to the requirement of confidentiality go far beyond the protection of children but extend to the protection of property and the disclosure of crimes against the person or property. There is of course no requirement on a counsellor or mediator to reveal information of this kind which emerges from his or her professional work with clients, except as required by mandatory reporting provisions in relation to child protection. Whether or not in a given case, a report of a matter not related to child protection is made will be a matter of professional judgment for the counsellor and mediator. Nonetheless, it is significant for the purposes of this discussion to note that the Family Law Regulations 1984 do not make confidentiality an absolute value.

7.9 Section 70NI is a more recent amendment to the Act which also prevents relevant evidence being heard by a judge. Section 70NI is an evidentiary provision which is an element of a three stage parenting compliance regime:

- Stage 1 – preventative measures, to improve communications between separated parents and educating parents about their respective responsibilities in relation to their children;

- Stage 2 – remedial measures, to enable the parents to resolve issues of conflict about parenting; and

- Stage 3 – sanctions, to ensure that, as a last resort, a court takes other action in relation to a parent who deliberately disregards a court order.

7.10 In certain circumstances, as a remedial measure under Stage 2, a Court may order a parent in breach of a Court order to attend a specified appropriate post-separation parenting program. Section 70NI provides that:

Evidence of anything said, or of any admission made, by a person attending before the provider of a program for assessment, or attending a program, is not admissible:

(a) in any court (whether exercising federal jurisdiction or not); or

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114 Section 70NI commenced on 27 December 2000.
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(b) in any proceedings before a person authorised by a law of the Commonwealth, of a State or of a Territory, or by the consent of the parties, to hear evidence.

7.11 The effect of ss.19N, 62F and 70NI is to ensure that anything disclosed as a result of counselling, mediation, or attending a Court ordered post-separation parenting program cannot be admitted as evidence in court. These sections therefore, are not directed to the preservation of the confidentiality of counselling or mediation so much as placing severe restrictions on the use in court proceedings of such disclosures. A counsellor or mediator may, consistently with his or her oath or affirmation, or pursuant to mandatory reporting requirements, reveal information concerning the commission of offences or the likely commission of offences, but it is then up to the appropriate authorities to find their own evidence to sustain legal action. Moreover, the parties involved are free to tell their lawyers and friends about it. The only person who cannot know is the Judge, who is making a decision which can adversely affect the lives of the parties and their children. The perverse result is that a mechanism intended to assist in resolving interpersonal problems can be used as a shield for criminal behaviour.\(^\text{116}\)

7.12 The potential of these sections to conceal evidence is illustrated in the following scenarios:

- A husband and wife consult a family counsellor. During counselling one makes statements which admit serious child abuse and foreshadow a continuation of this abuse. No evidence can be given of the admissions.

- A husband and wife each apply under the Act for residence orders in relation to their child. The Family Court orders them to attend a conference with a court counsellor under section 62F. During counselling, one makes statements

\(^{115}\) See section 70NG Powers of the Court

\(^{116}\) Mr Martin Bartfeld QC, personal communication.
which admit serious child abuse and foreshadow a continuation of this abuse. No evidence can be given of the admissions.  

7.13 Not surprisingly, section 19N has attracted controversy, and has been the subject of review. There are powerful and long accepted arguments supporting its absolutist approach to admissibility and the primacy it gives to supporting free and frank exchanges in counselling sessions. And there are arguments to the contrary which have been rehearsed in some detail.

7.14 In *Re W and W*, a case concerning abuse allegations, an affidavit sworn by a counsellor was said to contain alleged admissions by the husband of inappropriate sexual behaviour. This affidavit was sought to be admitted into evidence on appeal. The respondent objected to this on the basis that it would not have been admitted at trial due to section 19N.

7.15 In dismissing the application for leave to adduce this further evidence, the Full Court of the Family Court, in a joint judgment of Chief Justice Nicholson and Justice O’Ryan stated:

> In our view, it is most unfortunate that the legislation contains no exception to the legislative prohibition to the giving of such evidence in circumstances where its non-receipt may impinge on the best interests of children. This means that a court that is required to make decisions treating the best interests of children as

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117 In both scenarios mandatory reporting requirements apply: section 67ZA. However, in the absence of other evidence options for protection of the child or encouraging treatment of the parents may be limited.


120 [2001] FamCA 216.
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the paramount consideration in determining issues such as residence and contact must do so without having any knowledge of important and relevant facts that could affect such a decision.\textsuperscript{121}

7.16 This succinctly states the public interest ground for allowing an exception to the blanket rule in section 19N.

7.17 The rationale for maintaining such a sweeping exclusionary provision is to be found in a concern not to compromise the ability of parties undergoing counselling to discuss in a free and frank manner their relationship difficulties. The provision, it is argued, allows parties to explore possibilities for improving relationships in as confidential a framework as possible, without feeling that they must carefully watch what they say in case it is subsequently used against them in criminal, family, or civil proceedings.

7.18 Concerns were also expressed that in the absence of such a provision parties may seek to manipulate the matters discussed in joint counselling sessions, covert taping of sessions may occur, and there may be routine subpoenaing of counselling files as part of a ‘fishing expedition’.

7.19 The National Alternative Dispute Resolution Advisory Council’s 1997 Report, ‘Primary Dispute Resolution in the Family Court’, provided a very useful summary of the reasons mediators favour the retention of the blanket prohibition in section 19N. The report noted that:

Mediators consider the prohibition on calling evidence to be essential to the integrity of the mediation process for the following reasons:

• the participants need to feel free to be honest and open and to negotiate freely if disputes are to be resolved successfully. If the participants fear that what they say will later be used as evidence in a court it will constrain their ability to do so;

\textsuperscript{121} ibid. para 99.
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- if the mediator could subsequently be called to give evidence the informality of the process might be compromised by the mediator’s concern to avoid being required to give evidence of what was said in the mediation;

- the possibility that the mediator might be brought before a court to give evidence of what happened would affect the participants’ trust in the mediator; and

- the participants may be encouraged to continue the marital fight in court and to draw the mediator (and others) into it.

Furthermore, the possibility that mediators might be required to give evidence of what was said in mediation would have a number of significant practical effects for mediators and mediation organisations. New record keeping practices and training would be required in addition to the need to make time available to enable mediators to prepare for and to attend court hearings. These new requirements could be expected to be increase the costs of providing mediation services.  

7.20 These are compelling public interest grounds for retaining the general principle that nothing said in counselling or mediation conducted pursuant to the Family Law Act should be admissible in court. The protection of such candour as can be elicited by counsellors is important, notwithstanding that the oath or affirmation in the Family Law Regulations, and mandatory reporting requirements where applicable, do not require the absolute confidentiality of such counselling or mediation sessions. If the exemption on the protection of confidentiality were removed, there would be legitimate cause for presuming that attempts may be made by some parties to subvert the proper process, by seeking to ‘manufacture evidence’ or routinely subpoenaing files.

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7.21 It is conceded that there may well be some diminution in the incidence of otherwise unguarded comments or candid exchanges as a result of allowing an exception to section 19N. It is right to say that the drafting of appropriate prefatory remarks to make to clients and time taken to explain the exception to clients would be required. Similarly the encouragement of alternative dispute resolution mechanisms, what the Pathways report describes as the 'supported pathway', is to be commended and encouraged. Taking away the blanket prohibition may be considered undesirable in terms of promoting such services.

7.22 But these consequences and costs, are of a different type compared with child protection. They should not be reckoned against, or traded off with the protection of a child from serious harm, where a real and present danger has been shown to exist. The policy of the *Family Law Act* with respect to children is largely premised on firstly recognising and thereafter advancing their best interests - the so called ‘paramountcy principle’.123 This should be in the forefront of the minds of all decision-makers in the family law system. Council agrees with the proposition that prevention of harm to children should be the primary goal of public institutions and publicly funded services in the family law system and this approach should underpin institutional responses where a choice of ‘public goods’ is to be made.

7.23 Following this line of reasoning, and accepting that the arguments apply equally to sections 62F and 70NI, Council is persuaded that the present evidentiary arrangements are in need of reform. It has formed the view that these three provisions do not reflect a satisfactory balancing of the competing public goods that have been canvassed above. The proponents of the current system presume to relegate the protection of children to other personnel and rely on evidence becoming available through other channels. This sits uneasily with recent developments in family law and

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123 Section 65E provides that “In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.” Section 68F sets out how a court determines what is in a child’s best interests, and includes ‘the need to protect the child from physical or psychological harm…’; section 68F(2)(g). See also s.68K - court to consider risk of family violence.
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does not conform with the tide of community opinion generally with respect to a heightened sensitivity to the care and protection of children.

7.24 Council notes also that some measure of reform would be in line with recent developments in the Commonwealth law of Evidence:

- The *Evidence Act* has eliminated medical privilege as a ground for excluding a doctor’s evidence;

- Legal professional privilege can be lost if the justice of the case dictates that this should happen;\(^{124}\)

- The privilege protecting without prejudice negotiations (a situation not dissimilar to the counselling or mediation situation) can be overcome if one of the exceptions contained in section 131(2) of the *Evidence Act* applies.\(^{125}\)

7.25 It is incontrovertible that the operation of these three sections of the *Family Law Act* pose a clear risk to children in some circumstances. Some would argue that cases where their operation may pose such a danger may be few and far between, and indeed the number of children at risk may be a fraction of the numbers of people attending counselling over the same period. However, the gravity of the possible harm done in the small minority of cases by withholding salient evidence from a court outweighs the good done by quarantining counselling sessions from the normal operation of the laws of evidence. Hence, the Council sees force in the argument that the time is ripe for a re-assessment of the balance struck in this area. It recommends a very limited exception to be inserted into the relevant sections of the *Family Law Act*.\(^{126}\) This would make the minimum change to the law required to secure children’s safety from serious harm.

\(^{124}\) See section 121(2) or 125.

\(^{125}\) Mr Martin Bartfeld QC, personal communication.

\(^{126}\) Alternatively, if it was deemed preferable the *Evidence Act* could be amended by means of a suitable amendment to section 131(2), rather than retaining the separate evidentiary code in the FLA.
Recommendation 16

Section 19N(3) should be amended along the following lines:

Subsection (2) does not apply to:

(a) any admission of an adult or disclosure of a child which indicates a child under eighteen years of age has been seriously abused; or

(b) any admission of an adult or disclosure of a child which indicates a child under eighteen years of age is at risk of serious abuse unless in the opinion of the Court there is sufficient other evidence of an admission of the adult or disclosure of the child relating to such abuse which is available to the Court.

7.26 Sections 62F and 70N are susceptible to the same analysis as that which was applied to section 19N. Council recommends that these provisions be amended along the lines proposed above for section 19N.

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127 Section 60D of the FLA defines abuse in the following terms:

*abuse*, in relation to a child, means:

(a) an assault, including a sexual assault, of the child which is an offence under a law, written or unwritten, in force in the State or Territory in which the act constituting the assault occurs; or

(b) a person involving the child in a sexual activity with that person or another person in which the child is used, directly or indirectly, as a sexual object by the first-mentioned person or the other person, and where there is unequal power in the relationship between the child and the first-mentioned person.
Recommendation 17

Sections 62F(8) and section 70NI of the Family Law Act should be amended along the following lines so as not to apply to:

(a) any admission of an adult or disclosure of a child which indicates a child under eighteen years of age has been seriously abused; or

(b) any admission of an adult or disclosure of a child which indicates a child under eighteen years of age is at risk of serious abuse

unless in the opinion of the Court there is sufficient other evidence of an admission of the adult or disclosure of the child relating to such abuse which is available to the Court.
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