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19 October 2015

Professor Helen Rhoades
Chair, Family Law Council
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BARTON ACT 2600

By email: flcreference@ag.gov.au

Dear Professor Rhoades,

Family Law Council Reference on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems

Thank you for your invitation to provide submissions to the Family Law Council.

I am writing on behalf of the Family Issues Committee ("Committee") of the Law Society of New South Wales. The Committee represents the Law Society on family law issues, as they relate to the legal needs of people in NSW and include experts drawn from the ranks of the Law Society membership.

The Committee has reviewed the Discussion Paper circulated to stakeholders on 17 August 2015 and the Interim Report to the Attorney-General¹. The Committee's views in regards to the questions set out in the Paper are provided below.

The Committee notes that the United Nations *Convention on the Rights of a Child* recognises that the principle underpinning any consideration in relation to children is that "the best interests of the child shall be the primary consideration" (Article 3). This is the principle that informs this submission.

1. How can the exchange of information between the family courts and family relationship services (such as family dispute resolution services, counselling services and parenting order programs) be improved and facilitated in a way that maintains the integrity of therapeutic service provision?

The Committee notes the existing tension between the need for the Family Court of Australia and Federal Circuit Court of Australia to have access to information that will assist with assessing risk to children involved in court proceedings, and the confidential nature of information provided to family dispute resolution practitioners ("FDRPs"). This information, if provided to the courts, may be relevant in the court's risk assessment determination. However, it is currently confidential and cannot be disclosed to the court.

¹ Family Law Council, *Interim Report to the Attorney-General In response to the first two terms of reference on Families with Complex Needs and Intersection of the Family Law and Child Protection Systems*, June 2015.

The Committee notes that this issue is difficult to resolve. The Committee recognises the importance of the court being provided with all relevant information when assessing risk of harm to a child. The Committee also notes the concerns of FDRPs that if information disclosed by a party during a therapeutic service is shared with the court, or other party to a proceeding, it is possible that that information may no longer be disclosed by parties. FDRPs may also be concerned that if the information is disclosed, the risk of harm to one party from the other party may be increased.

The Committee considers that, where it is in the best interests of a child involved in a court proceeding, information provided to FDRPs should be disclosed to the court. However, the Committee notes that the information disclosed by a party during a therapeutic service should remain confidential in cases where no risk to a child is identified by the FDRP.

The Paper sets out three possibilities for sharing information with the courts. The Committee supports the first suggestion, that is, FDRPs providing further information in a certificate under section 60I of the *Family Law Act 1975* (Cth) ("FLA"), including information to guide case management.

The Committee suggests that FDRPs identify risks to children and families by indicating the following on the section 60I certificate:

- (a) Risk of significant harm to child identified. Mandatory reporting to the relevant State or Territory child protection agency would follow.
- (b) Risk factors to child or family identified. The relevant risk factors would need to be identified, such as family violence, mental health issues or drug dependency. These risk factors may require further consideration or investigation.
- (c) No risk of harm or risk factors identified.

The Committee notes that section 69ZW of the FLA provides the court with the power to obtain information from child protection agencies about child abuse or family violence. If the risk of significant harm or other relevant risk factors are indicated on the section 60I certificate, the court will be aware that information relevant to assessing risk to a child may be held by child protection agencies. The court could seek access to this information by way of an order under section 69ZW.

In this respect, the Committee notes that Officers of the Department of Human Services are located in Registries of the Victorian Magistrates Court. These officers are able to provide judicial officers with information contained on child protection systems within an hour of a request being made for access to such information. The Committee is of the view that such an arrangement would also be of benefit to the Family Court and Federal Circuit Courts. The Committee suggests that an officer from the relevant child protection agency in each State and Territory could be located in each court registry to provide the court with immediate access to information held by child protection agencies.

The Committee understands that additional funding and staff resources would be required to implement these suggestions. The Committee considers that additional training for mandatory reporters should also be provided should these suggestions be implemented. Further, support services to protect women and children should also be enhanced to ensure that their safety is not put at further risk by the identification of risks by an FDRP.

The Committee does not support the second suggestion set out in the Paper. These reports do not necessarily provide information about the nature of the risk to a child or family. These reports are already available to the Court in appropriate cases.

The Committee considers that the third suggestion to amend the confidentiality and admissibility sections of the FLA would be unnecessary if FDRPs are identifying risks to a child on the section 60I certificate and courts are provided with this information under section 69ZW.

The Committee considers that the current confidentiality and admissibility provisions should continue to apply in matters where no risk to a child has been identified.

2. What opportunities exist for ensuring the early assessment of risk to children in family law matters?

The Committee considers that there are many benefits to using a common risk assessment tool across both the family law system and wider community and court sectors, provided it is a simplified system that is easy to use.

The Committee does not support the establishment of a dedicated investigatory service for family law matters in order to build the family law system's capacity to conduct or assess forensic risk assessments. The Committee recommends that an officer from a child protection agency could be located in each court registry to provide the court with immediate access to information held by child protection agencies.

If this recommendation is not adopted, the Committee suggests that Independent Children's Lawyers ("ICLs") should be included as people who are able to request and receive information under Chapter 16A and section 248 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW). This would enable an ICL to make relevant inquiries of agencies including police, health and education.

3. How can services such as child protection departments, mental health, family violence, and drug and alcohol services make relevant information available to the courts to support decision-making in cases where families have complex needs?

The Committee's comments in relation to question 2, above, are also applicable to this question.

4. What services are needed to support families and children who use the family law system where child safety concerns are identified?

Over the last 25 years Committee members have observed an improvement in the responsiveness of legal practitioners and court services to refer clients to support services. Committee members have also observed an increase in coordination and referrals between support service providers. The collaboration between service providers is working well.

The Committee recommends the annual publication in each State and Territory of the names and contact details of government and NGO providers of support services to assist with greater coordination and understanding of the availability of these

services. Support services include child care, contact centres, FDR, drug and alcohol programs and parenting courses.

The Committee notes the delays experienced by clients in accessing support services. The Committee considers that the support services are overworked and under resourced which leads to delay. Support services would operate more efficiently if they were appropriately funded.

5. How can interaction between the family courts and relevant services, including child protection departments, family violence, mental health services, drug and alcohol services and support services for Aboriginal and Torres Strait Islander families, be enhanced?

The Committee considers that the mechanisms outlined in the Paper that may promote enhanced interaction and coordination all have merit but require adequate and ongoing funding to ensure they are successful.

The Committee strongly supports the co-location of service provider personnel at court registries. Service provider personnel could be located in the registry at a “referral kiosk”. Service provider personnel could provide parties with information about local and regional services and referrals to services when appropriate.

The Committee strongly supports the special court listing days for complex cases with multiple needs to maximise the likelihood and efficiency of having service provider staff attend courts and co-ordinate multi-agency responses.

The Committee notes that regular stakeholder meetings and joint training initiatives already exist and are working well.

Committee members are aware that some funding has already been allocated to establish Aboriginal and Torres Strait Islander family court liaison officers within Aboriginal and Torres Strait Islander specific agencies.

6. What opportunities exist for developing integrated responses to families with complex needs who use the family law system?

The Committee considers that there is potential to enhance integrated service delivery structures to support families with complex needs who use the family law system and agrees with the suggestion that there should be more integrated service delivery.

The Committee notes the inclusion of the Family Court’s Magellan list in the Paper as an example of effective multi-disciplinary collaborative practice in the family law system. However, the Magellan list only operates in cases of serious allegations of child abuse and only in limited geographical areas and is not available in the Federal Circuit Court. The Committee considers that the Magellan list approach should be expanded in the courts and separate lists should be established for cases involving family violence, mental health or substance abuse issues.

7. How might a more co-ordinated legal system for families with complex needs be created?

The Committee notes that in New South Wales the Local Court has the jurisdiction to deal with a range of relevant legal issues together, including issues of family law, child protection and civil and criminal family violence matters. The Committee suggests that Local Court Magistrates be encouraged (through better education and training) to exercise this jurisdiction. This would improve responses to families with multiple and complex needs, particularly where family violence is an issue.

The Committee supports the suggestion to establish a specialist case co-ordinator role attached to state and federal courts. A specialist case co-ordinator could facilitate the efficient transfer of cases to the appropriate court or specialist court list and could also facilitate the efficient exchange of information between courts and other government agencies.

The Committee considers that it is essential that duty judges be available in all state and federal courts to improve the responsiveness of courts to families with immediate needs.

8. Recommendations in the Interim Report

The Committee has reviewed the Interim Report and provides the following comments on a number of the recommendations.

8.1 Recommendation 1

The Committee supports the recommendation that sections 69J and 69N of the FLA be amended to remove any doubt that children's courts, no matter how constituted, are able to make family law orders under Part VII of the FLA in the same circumstances that are currently applicable to courts of summary jurisdiction.

The Committee also suggests that children's court orders be registered in the Family Court or the Federal Circuit Court as a matter of practice. It is also suggested that the process for the registration of orders and the transfer of proceedings between the children's courts and the Family Court and Federal Circuit Courts is expedited.

8.2 Recommendation 2

The Committee supports the recommendation that the FLA be amended to provide a simplified decision-making framework for interim parenting matters.

8.3 Recommendation 3

The Committee supports the recommendation that the FLA be amended to enable judicial officers to deliver 'short form' judgments in interim proceedings.

8.4 Recommendation 4

The Committee supports this recommendation.

8.5 Recommendation 5

The Committee supports the development of a national database of court orders to include orders from the Family Court of Australia, the Family Court of Western Australia, the Federal Circuit Court of Australia, state and territory children's courts,

state and territory magistrates courts and state and territory mental health tribunals, so that each of these jurisdictions has access to the other's orders.

The Committee supports the convening of regular meetings of relevant stakeholder organisations, including representatives from the children's courts, child protection departments, magistrates courts, family courts, legal aid commissions, Attorney-General's Departments and support organisations, to explore ways of developing an integrated approach to the management of cases involving families with multiple and complex needs.

The Committee supports amending the prohibition on publication provisions in state and territory child protection legislation to make it clear that these provisions do not prevent the production of reports prepared for children's court proceedings in family law proceedings. The Committee considers that the prohibition on publication provisions in family law legislation should be similarly amended.

The Committee supports the entry into Memoranda of Understanding by state and territory child protection agencies and the federal family courts to address the recommendations of Professor Chisholm's reports. The Committee notes that in New South Wales, a Protocol and a Memorandum of Understanding between the Federal Circuit Court and Family Court and the Department of Family and Community Services is already in operation.

The Committee would be grateful for an opportunity to discuss these concerns. Questions can be directed to Chelly Milliken, policy lawyer for the Committee. Chelly is available on 9926 0218 or chelly.milliken@lawsociety.com.au.

Yours sincerely,

John F Eades
President