Leadership in Family Law

30 September 2015

Family Law Council Secretariat
C/- Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Via email: flcreference@ag.gov.au

Dear Sir/Madam,

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

Please find enclosed the completed cover page for the Family Law Practitioner's Association of Queensland's (FLPA) submission together with a copy of FLPA's written submission in relation to the first six questions posed.

We thank you for considering our submission. Please do not hesitate to contact us should you require any further information.

Yours sincerely,

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President

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QUESTON 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 facilitated in a way that maintains the integrity of therapeutic service provision?

From a global perspective, to be effective, family relationship services need to have:-

1. Timely notification of, and explanation of, all legislative and policy change relevant to the family courts, which affect the services delivered;

2. A clear understanding of their place in the family law dispute resolution pathway (how and why litigants and their families access, or are referred by the family courts into, those services, and what the family courts intend will be achieved by that referral);

3. Feedback as to the relevance of, and treatment of, the outcome of their services by Judicial Officers in the family courts (in particular, clear guidance as to matters which are privileged, and those which are not protected); and

4. Understanding as to how outcomes of services can and will be communicated to the family courts; and

5. Guidance as to how general information about service offerings are to be conveyed to the family courts.

From the same overarching perspective, to be able to make orders which are of practical assistance to litigants and their families, and which can actually be implemented, the family courts need to have:-

1. Information as to the type, nature and scope of services offered (particularly by counselling services, and parenting order programs); and

2. Feedback as to the limits of, and availability of, such services (in terms of timing/wait lists, in terms of location, and in terms of particular threshold requirements).

It is submitted that the conveyance of information of this broad nature can be achieved by:-

A. Establishment of a central register of service providers, outlining the nature and scope of services offered by those providers, which is capable of being accessed by Judicial Officers and family law practitioners (and which is required to be updated by service providers at defined intervals so that the information is current). It is envisaged that this register would contain information of practical use to Judicial Officers and family law practitioners, such as whether services cover parents, children, or both; whether the service provider will issue reports and the cost and time frames in doing so; the cost of services; and any lead time in the provision of services;

B. In respect of key / larger organisations (e.g. those offering services State-wide, over a number of geographic areas, etc), the formation of a working

committee (involving stakeholders from the family courts, and key people within the service provider organisations), which represent a liaison between the family courts and service providers – such a forum can allow service providers to adapt service offerings to fall in line with expectations of the family courts (where that is possible), and for service providers to ventilate logistical and other challenges being encountered in the delivery of services (e.g. the implementation of Orders), overall achieving cohesion and uniformity in the relationship between family courts and service providers, and tailoring of services offered by service providers so that they can be of use in the litigation process – this information can be used to update the information on the central register as change is introduced by particular organisations;

C. A subscription service by which general information of the nature above can be disseminated by the family courts to family relationship service providers, and *vice versa* (which it is anticipated would be accessed by smaller / individual service providers, and can contain information exchanged by the liaison committee in B above).

At individual case level:-

1. The data derived from the framework above can be applied. The expectation of the Judicial Officer can be informed by the information on the central register, and the directions made by the Judicial Officer tailored around the information contained on that register (e.g. if the service provider in question offers a reportable service, then this can be the subject of specific directions). With the benefit of specific data available about the scope of services provided, orders and directions can be more targeted to meeting the purpose isolated by the Judicial Officer;

2. When making directions for referral into services, directions can include a request that the service provider complete a form of Notice of Risk (which can be, for example, an adaptation of the form presently required to be filed by parties) as to any matter (abuse, neglect, harm, or risk thereof) which the service provider has concluded should, based on observations made and/or information disclosed during provision of services, be conveyed to the Judicial Officer (with the service provider meanwhile retaining the existing ability to refer cases to child protection agencies when there are grounds for doing so);

3. Parties could consent to certain additional personal information being provided to the court by the service provider, to avoid the need for a subpoena.

4. Once proceedings have been commenced, any risk identified by FDR providers during FDR can be conveyed to the family courts, on the following basis:-

    a. Disclosures made during the course of FDR should remain protected from revelation in proceedings (so as to preserve the general incentive for families to continue to genuinely embrace FDR as a dispute

resolution mechanism), subject to the existing situations in which disclosures can be made to child protection agencies;

b. The exception to that protection should be cases where the FDR provider holds genuine concerns as to the welfare of the subject child or children (again, abuse, neglect, harm, or risk thereof, which the service provider has concluded should, based on observations made and/or information disclosed during provision of services, be conveyed to the family courts);

c. Such disclosure would occur to the family courts by completion of form of Notice of Risk by the FDR provider;

d. The existence of such a Notice would be reflected on the Certificate provided to litigants (given that proceedings will, in the ordinary course, not have been commenced at the time of issue of the Certificate), but not disclosed to the litigants themselves (given the scope for misuse of such information if published to parties external to Court proceedings) – rather, the Certificate would contain a form of 'flag', requiring the Notice to be filed by the FDR provider if and when proceedings were ever commenced by a litigant. A copy of the notice could be provided to the parties during the course of the proceedings.

QUESTION 2

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

It is submitted that the issue is not a case of how risk is being assessed by service providers, but how the results of those assessments are being conveyed to the family courts.

As families come into contact with a wide range of service providers prior to, and at the time of, entry of the family law system, and each of those service providers has a different:-

1. Nature (public sector; private sector charity/religious institution; voluntary / community group, etc);

2. Basis (legislative/regulatory; private fees; not-for-profit etc);

3. Source of funding (Federal Government; State Government; private sector; charity, etc); and

4. Purpose/objective;

there will be an inevitable divergence in resources, and therefore internal systems, in implementation of risk assessment tools by service providers.

This makes use of a universal assessment tool a challenging objective to achieve.

Where parties are represented, or an ICL appointed, the historic participation in any form of service provision will usually prompt information gathering about those services and their

outcomes, where relevant (e.g. via the issue of Subpoenas to produce documents to service providers, the procuring of reports as to provision of services, etc).

Concern is raised that there is a potential information 'loss' if this does not occur (e.g. parties are unrepresented, or the matter is not pursued by legal representatives or the ICL), and that this has the potential to adversely affect outcomes for children.

Further concern is raised that such steps cannot be taken quickly – often Court events will pass before Subpoenaed documents are produced, and reports are completed.

The form of Notice of Risk referred to in the submission to Question 1 is a means by which any assessed risk, whatever process by which the conclusion is reached, can be conveyed to the family courts *by the service provider,* at an earlier stage in the proceedings.

The service provider can complete the Notice if there is some aspect relevant to the assessment of risk to a child which the service provider is of the view should be brought to the attention of the family courts.

That notification can then be the subject of further examination in the proceedings (orders/directions as to formal assessment and reporting; requirement to produce documents or give evidence; etc).

As has been suggested in Question 1, the completion of such a Notice can be procedurally connected with the issue of a Section 60I Certificate (given that, for service providers other than FDR providers, they may not even be aware of the existence of any proceedings in the family court).

It is acknowledged that this methodology (completion of a form of Notice of Risk) is less than ideal, as the assessment of risk on which completion of Notices would occur is not a product of a standard means of measurement, and that the treatment of such information, and the weight to applied to it, will be a matter for the discretion of Judicial Officers. However, if the objective is to ensure passage of information as to risk to which a child is subjected, so as to facilitate earlier assessment of risk to children, then the lower the barrier to the conveyance of that information, the more likely the information will be conveyed at all.

Alternatively, having parties complete a questionnaire, similar to those often sent by Independent Children's Lawyers in the course of proceedings, seeking information about services the parent, party or children had been engaged with would assist in information gathering and identifying services that may have information relevant to the issues of risk.

Concern is noted as to the 'use' which can be made of the information in such Notices and/or questionnaires – it is likely to be in short form, based on disputed facts, and untested. Those limitations are acknowledged. The information will however enable the Judicial Officer to ensure that directions have been made which address the risks raised, at an early stage in the proceedings. The information is therefore a prompt for the securing of evidence which *can* be safely relied on in the litigation process.

The completion of a Notice has potential to clash with a service provider's therapeutic role and the maintenance of privacy of the events of that therapy (where the role of the family courts is to make orders which achieve the best interests of the subject child/ren). That conflict is not entirely neutralised by the reality that information disclosed during therapy may be revealed by one of the processes referred to above in any event. It can only be addressed by prescribing (in the *Family Law Act*) situations in which the service provider can provide a Notice with impunity. It is accepted that this is not an easy threshold to define, and that the spectre of disclosure by a service provider may, for some, be a disincentive to

participation in therapy / services (which involves its own set of consequences). This is a controversy which can only be resolved by meticulous definition of situations in which a notice can or should be completed. That is a discussion for separate submission.

QUESTION 3

How can services such as 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 suggestion in Question 1 as to a form of Notice of Risk is equally applicable to allied services to the family law system.

Again, information held by these service providers is capable of being procured (Subpoena; reports as 'treating' experts etc), but that is time-consuming, and costly.

Whether such steps are actually taken often depends on the level of representation in the proceedings.

The Notice could require revelation of any opinion as to any direct or indirect risk to a child which was evident to the service provider, and explanation of its basis (subject to the same clearly defined threshold as has been referred to in Question 2).

Though of itself of potentially limited assistance to a Judicial Officer (for the reasons specified above), the information contained in the Notice can then be the subject of further orders and directions as to the investigation/assessment of the matters raised, and assembly of evidence on those matters.

This process ensures that information as to harm, or risk of harm, to a child the subject of proceedings is capable of being independently revealed by service providers when that is considered necessary or appropriate.

Arguably, that is information which would come to light in proceedings in any event (through the mechanisms referred to above) – importantly, the Notice mechanism allows such information to come to light *earlier*, facilitating earlier attention by the family courts.

QUESTION 4

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

There are many and varied existing service providers in both the public and private sector which are supportive of and important for families and children who use the family law system, whether child safety concerns are identified or not. Such service providers include, but are not limited to:-

1. child protection services and agencies;

2. courts and associated facilities;

3. course providers and educative facilities (including post separation parenting, Triple P parenting, parenting order programs and anger management programs);

4. drug and alcohol rehabilitation practitioners;

5. family dispute resolution practitioners and mediators;

6. family violence support providers;

7. legal service providers (including privately and publicly funded practitioners);

8. medical professionals (including general practitioners and psychiatric care providers); and

9. mental health practitioners (including psychological support and counselling providers).

Each of these elements when employed effectively and in a manner appropriate to the individual circumstances of a family can contribute to better outcomes for families and children. When service providers are utilised inappropriately or excessively, however, the outcomes for families and children can be adversely affected (see, for example, cases involving emotional or psychological harm to children resulting from systems abuse).

Commonly, once involved in the family law system, parties will either voluntarily seek assistance from those providers to whom they are directed (whether by friends, family or other service providers) or alternatively be required to engage with service providers by way of court order.

It is submitted that it is critical therefore to identify specifically, and at an early stage, what is (and what is not) appropriate for an individual family.

The manner in which this could be practically implemented is another issue entirely. It would be a relatively simple step, however, to undertake an information gathering exercise at the time of families engaging in the court system.

At present, a Notice of Risk is a compulsory form required to be filed by each party involved in parenting proceedings before family courts (at the time of filing their initiating and response material) and there is the possibility of expanding both the form itself and the purpose of the form.
It could be mandatory, for example, for parties to divulge their medical history (including their current treating practitioners, prescriptions, medication, current or previous diagnoses of mental health issues/admissions), their criminal history (covering offences related to children, violence, drugs and alcohol) and their previous involvement in any domestic violence proceedings. Such a form would flag potential areas of concern for the family courts (particularly in circumstances where parties are self-represented).

Of course, another crucial aspect surrounding the provision of services to support families and children who use the family law system where child safety concerns exist, is the availability and affordability of those services. Funding is required.

Further education of the relevant child protection workers as to the protocols around information sharing, both with the Courts and Independent Children's Lawyers would also assist, as would education as to the importance of the Department intervening in some family court proceedings.

QUESTION 5

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

Information sharing is crucial to enhanced interaction. The central register, the formation of a working committee and the subscription service proposed in response to Question 1, would assist greatly in the enhancement of interaction between the family courts and relevant services.

Options available to encourage the ongoing exchange of information might include:

1. regular stakeholder meetings; and

2. training and educational initiatives, incorporating:

    a. the involvement of non-court related practitioners at court events and functions (including the introduction of court liaison workers or support officers in particular duty lists, whether observing court events or interacting with litigants); and

    b. the involvement of court personnel at service provider events.

Further education of the relevant child protection workers as to the protocols around information sharing, both with the Courts and Independent Children's Lawyers would also assist, as would education as to the importance of the Department intervening in some family court proceedings.

QUESTION 5

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

The formation of a working committee (involving stakeholders from the family courts and key people within service provider organisations) as suggested in answer to question 1, would provide an opportunity to develop integrated responses to families with complex needs who use the family law system.

On an individual case level, the use of a registrar or a family consultant to coordinate meetings between the parties, their legal representatives and key service providers, (similar to the concept of a Family Group Meeting in the child protection sphere), may assist in developing a more integrated response to those families. Information could be conveyed/exchanged in an informal way at those meetings, however, if court proceedings progressed there would be a need for the individual service providers to provide reports.

Authorities could be signed by the parties to enable information to be shared between agencies working with the family so that responses can be more integrated. Service providers/the family consultant could report back on what services the family might benefit from. As identified in answer to question 4, funding is required for the provision of such services.

The relevant child protection agency could be included in such meetings if a s91B order has been made.

QUESTION 6

Is there a need for a specialist case co-ordination approach to families with complex needs, and what opportunities exist for developing such an approach?

It is submitted that there is a need for a specialist case co-ordination approach to families with complex needs. Having such an approach will hopefully prevent cases falling between the gaps and will ensure that risks are correctly identified and addressed.

Informally the specialist case co-ordination role is often performed by a proactive independent children's lawyer (ICL), in cases where such an ICL has been appointed. However, having to take on that role, may place the ICL in a position where their duties as ICL and the requirements for case co-ordination may conflict. It may also leave the ICL open to more allegations of bias and applications for their discharge.

Ideally, the specialist case co-ordination role would be performed by someone who is independent of the proceedings. For example, a registrar or a family consultant (who is not to be the expert witness in the matter).

Alternatively, judge managed proceedings, such as occurs in Magellan matters, may assist.