FAMILIES WITH COMPLEX NEEDS AND THE INTERSECTION OF THE FAMILY LAW AND CHILD PROTECTION SYSTEMS

The Attorney-General has asked the Family Law Council to report on ways of improving responses to families with complex needs who use the family law system. The reference reflects the evidence that many families who seek to resolve their parenting disputes are affected by multiple risk issues – including concerns about child abuse, family violence, substance abuse and mental illness – and that addressing the needs of these families can be complicated by the interaction of State, Territory and Federal laws.

The terms of reference issued by the Attorney-General ask the Family Law Council consider the following matters in relation to the needs of these families:

1. The possibilities for transferring proceedings between the family law and state and territory courts exercising care and protection jurisdiction within current jurisdictional frameworks (including any legal or practical obstacles to greater inter-jurisdictional co-operation).

2. The possible benefits of enabling the family courts to exercise the powers of the relevant state and territory courts including children's courts, and vice versa, and any changes that would be required to implement this approach, including jurisdictional and legislative changes.

3. The opportunities for enhancing collaboration and information sharing within the family law system, such as between the family courts and family relationship services.

4. The opportunities for enhancing collaboration and information sharing between the family law system and other relevant support services such as child protection, mental health, family violence, drug and alcohol, Aboriginal and Torres Strait Islander and migrant settlement services.

5. Any limitations in the data currently available to inform these terms of reference.

In June 2015 the Council provided an interim report to the Attorney-General covering terms of reference 1 and 2. The Council is required to provide a final report to the Attorney-General on this reference by June 2016.

The Family Law Section has previously provided comment on references 1 and 2 above. This submission responds to references 3 and 4.

> *3. The opportunities for enhancing collaboration and information sharing within the family law system, such as between the family courts and family relationship services.*

One of the most significant changes to Family Law, requires parties to a pending dispute to attend upon a Family Dispute Resolution Practitioner and participate in dispute resolution. This must occur before an application can be made to the courts for a parenting order. Section 60I(7) provides that a court must not hear an application unless the applicant to the proceedings files in the court a certificate that the parties have attended FDR. Section 60I(8) provides a number of exemptions.

Prior to this amendment that commenced from 1 July 2008, a party to parenting disputes would be required to attend confidential counselling with a Family Court counsellor prior to the matter proceeding to court. After counselling, the counsellor would provide to the Judge directly (and provide copies to each party) a Form 69 Summary and Recommendation Sheet.

Section 10H(1) of the Family Law Act provides that a family dispute resolution practitioner must not disclose a communication made to the practitioner while the practitioner is conducting family dispute resolution.

Section 10H(3) and Section 10H(4) provides some exceptions surrounding confidentiality.

A significant percentage of parties who attend dispute resolution practitioners will either resolve all issues in dispute, or substantially narrow issues in dispute. The fact that the parties to a dispute can speak freely and openly with the practitioner, without those discussions being communicated to third parties, is integral to the success of the process.

However, the information that is provided back to the courts pursuant to a certificate under Section 60I(8) is of no probative value. Prior to the amendments being made to the Act, a Form 69 was provided to the Judicial Officer from a counsellor. This document in no way breaches a party's confidential discussions, but provided various recommendations to the court for the management of a particular matter.

The Judicial Officers could consider the recommendation and information provided by the court counsellors, and make at least appropriate enquiries with the parties or the lawyers about issues. A court could be assisted with recommendations from a Dispute Resolution Practitioner without there being any breach of the parties' confidential communications. In addition, with the consent of the parties, a Dispute Resolution Practitioner may disclose information. See Section 10H(3). At present, no meaningful information is provided to the court.

Improving the current Section 60I Certificates by providing, if appropriate, a Dispute Resolution Practitioner's recommendations and providing for the provision of information (after consent is provided) would significantly improve information sharing between the Dispute Resolution Practitioner Sector and the courts. This, of course, would have the advantage of providing a Judicial Officer who is to hear a case, with at least information and potential case management assistance, which should improve outcomes for the parties and their children. An updated form to assist this process is attached for consideration.

> *4. The opportunities for enhancing collaboration and information sharing between the family law system and other relevant support services such as child protection, mental health, family violence, drug and alcohol, Aboriginal and Torres Strait Islander and migrant settlement services.*

When a parenting dispute is the subject of court proceedings, it is a dispute between private citizens. Those private citizens (or at least the person filing first) have decided to invoke the law, and presumably trust in the law to solve a dispute they cannot solve themselves. It is trite to say that the rule of law in this country depends on people having faith in the integrity of the Courts, their systems and processes. This includes people from diverse cultures, linguistic groups and social economic backgrounds, all of whom utilise the family law system.

If people know that in invoking the Courts' help, they will cause the State to then possess a significant amount of private information about their private lives, it can be an inhibiting factor for people to firstly be frank with the Courts, and secondly invoke the Courts' help at all. Any sort of blanket notion that whatever is filed with Court should be accessible by instruments of the State, who have coercive powers over people's lives and families, ought be rejected. People have a right not to be subject to arbitrary incursions in their privacy, simply because they are embroiled in *inter partes* litigation about a child.

Conversely, people may be inhibited from seeking appropriate assistance from drug and alcohol services or other State service providers; or from being frank and open with child protection

officers; if there is a wholesale exchange information system between the Courts and State entities.

The capacity to issue subpoenas provides a means of obtaining information, with the built-in safeguard of a capacity to object to providing information, or having information released. Parties can issue subpoenas themselves or the Court can on its own initiative. Conversely, a Court can always grant leave for a Family Report or Expert's Report to be made available to child protection agencies when issues of risk are apparent. A less targeted, more blanket wholesale information-sharing system could swamp capacity; obscure cases where such information is relevant and important; and fail to properly balance litigants' right to privacy with the best interests of children.

Having sounded those warnings, it is acknowledged that in many cases, particularly if both parties are unrepresented and/or there is no Independent Children's Lawyer, the Court could be assisted by having any relevant information from a child welfare authority or Police at an early stage. This could be achieved in different ways:

1. Having litigants disclose if they are aware of any notifications to or involvement from a child welfare authority; or whether Police have ever attended with respect to a family violence allegation; and if so the Court either issues a subpoena of its own initiative or orders a litigant to so file; and

2. Having litigants disclose if a relevant child has been the subject of court proceedings by a child welfare authority. If so, the family law Court can contact the child welfare court and request a copy of the file; and/or

3. The child welfare agency or Police Department is notified of all filings and, where records are held, those records are made available to the Court in electronic form without the need for a subpoena to be filed and served;

4. A child welfare agency officer could be co-located within the family law courts' registries in much the same way in which they are sometimes co-located in hospitals, and could coordinate the early provision of information either administratively or upon an order being made by a judicial officer.