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

SUBMISSION TO THE FAMILY LAW COUNCIL by the FEDERAL CIRCUIT COURT OF AUSTRALIA

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?

There are potential advantages of information sharing between family relationships services and the family courts, especially in circumstances in which allegations of risk to a party or a child are made. The issue has been the focus of a number of reviews. However, despite goodwill on both sides, no consensus has been reached about whether and how such information should be transmitted from the family relationships sector. The main objections to the provision of the information are put on the basis of, firstly, the importance of confidentiality for the success of the dispute resolution process and, secondly, the dangers inherent in placing the dispute resolution practitioner in the role of fact finder with potentially incorrect information being transmitted. However, those objections appear to misunderstand the very limited nature of the information proposed to be made available to courts.

There is no doubt that confidentiality of client communications is a fundamental and highly valued principle of practise for both legal practitioners and dispute resolution practitioners. The question is whether, and to what extent, the principle of confidentiality should give way to the principle of ensuring parties and children are protected from harm.

All applicants for family law parenting orders are required to participate in family dispute resolution before a court is empowered to hear the application. [1] The requirement does not apply in particular circumstances including urgency and where the court is satisfied there are reasonable grounds to believe there has been child abuse or family violence or a risk of either. For those parties not exempt from the requirement, a certificate from a family dispute resolution practitioner must be filed with the application for parenting orders. Section 60I(8) of the Family Law Act provides for a range of different kinds of certificates, including one which is to the effect that the dispute resolution practitioner *"considers, having regard to the matters prescribed by the regulations for the purposes of this paragraph, that it would not be*

[1] Section 60I(7) Family Law Act

appropriate to conduct the proposed family dispute resolution." [2] This form of certificate is reasonably common in family law proceedings. It is this certificate with a slight modification which has the potential to provide useful information to courts exercising family law jurisdiction.

A certificate issued under section 60I(8)(aa) simply states that the dispute resolution practitioner considers the matter inappropriate for the process without stating why. Courts could benefit from knowing the reason the matter was deemed unsuitable for mediation. If, for instance, it was because of allegations of family violence, child abuse, substance abuse, mental illness or some other risk factor, the certificate could act as a flag for the court indicating the matter may require particular attention to safety issues. Such a certificate would not put the dispute resolution practitioner in the role of a fact finder, as the certificate would not be evidence of anything other than that allegations within broad categories have been made. It need not even say who made the allegations. It is up to the Court to ensure parties file material which addresses any allegations made and it is up to the Court to determine whether or not those allegations are substantiated. Such a process would also not undermine the confidentiality of the dispute resolution process as, if the parties are deemed unsuitable for the process, it will not have occurred.

In January 2015 the Federal Circuit Court of Australia amended its Rules to require each party to parenting applications to file a Notice of Risk which is designed to bring allegations of risk to the attention of the Court as early as possible in the proceedings. This is discussed in more detail in answer to question 2 below but one consequence of its introduction is that the need to pursue the issue of the provision of information by family dispute resolution practitioners is no longer pressing.

In terms of information flowing in the opposite direction, there seems no reason for courts exercising family law jurisdiction not to provide to dispute resolution practitioners copies of up to date orders if that will assist the dispute resolution process. The Federal Circuit Court Rules already provide for the release of family reports to dispute resolution practitioners unless there has been an objection by a party in which case the objection will be determined by a court.

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

Risk screening is an important part of the family law litigation process. Child Dispute Services play a central role in screening for risks in parenting disputes when undertaking family assessments. When parenting proceedings are filed in either the Family Court or the Federal Circuit Court, the parties may attend a Conference with a Registry-based Family Consultant pursuant to an Order of the Court under s11F of the Family Law Act (1975), part of which involves risk screening. These assessments are delivered to the Court in either a

[2] Section 60I(8)(aa)

written Memorandum or through oral evidence. In 2015 Child Dispute Services piloted an online, structured screening instrument which is a derivative of the MASIC (Mediators Assessment of Safety Issues and Concerns) when undertaking these Conferences. An evaluation of this pilot is currently underway, the results of which will inform future practices and policy in Child Dispute Services.

Insufficient resources means that these early intervention Conferences comprise only a fraction of the number of parenting matters filed in the Federal Circuit Court, although the majority of parenting cases have some early intervention. In order to address the need for more comprehensive risk screening in all parenting matters, the Federal Circuit Court introduced in January 2015 a compulsory Notice of Risk which is required to be filed by every applicant and respondent in parenting proceedings.

The Notice of Risk asks a series of questions to which a 'yes' or 'no' answer is required. It is the Court's experience that in response to a direct question parties will sometimes disclose allegations of risk which they might otherwise be reluctant to volunteer. The questions in the Notice of Risk are not restricted to family violence and child abuse but include other allegations which, if true, could pose a risk to a child or a party. They include questions about mental illness, drug and alcohol abuse, serious parental incapacity and any other potential risks to a child.

The form is designed to identify very simply which of the notices need to be sent to the local child protection authorities in accordance with section 67Z of the Family Law Act. It also assists the Court to discharge its obligations pursuant to section 67ZA, 67ZBA and 67ZBB of the Act.

The Notice of Risk brings to the attention of the docket judge any allegation made which is relevant to the safety of a party or a child. Because it is required to be filed with every application or response, the risk issues are able to be identified on the first return date (or shortly thereafter if the respondent has not yet filed material). This facilitates early identification of risks and increases the capacity of the Court to make timely orders to address them.

The Court is aware of proposals for the development of a single broad based risk screening device which could be implemented by all participants in the family law system. In principle the Court is interested in such a proposal which may save duplication and unnecessary stress for parties undergoing multiple risk assessments. As a matter of practicality, however, and in the absence of the significant resources which would be required, the Court is satisfied that the Notice of Risk operates as an effective and functional alternative in the form of the Notice of Risk.

The discussion paper raises the possibility of establishing a dedicated investigatory service for family law matters given the current inability of the family courts to compel child protection departments to conduct forensic investigations of child risk issues. The Federal Circuit Court would certainly welcome such a service. It would no doubt be costly in the short term but is likely to be cost effective in the long term as a result of assisting the courts

to substantiate or eliminate alleged risks to parties and children which, in turn, will facilitate the resolution of disputes at an earlier time than is currently possible given delays in availability of forensic services.

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?

From the perspective of the Federal Circuit Court, there have been significant improvements in recent years in the information available to the Court when dealing with families who have been involved with State and Territory child protection authorities. Section 69ZW of the Family Law Act enables the Court to require the production of documents or information held by particular agencies prescribed by schedule 9 of the Regulations. To date only child protection agencies and police forces are prescribed. The section is used extensively in relation to documents held by child protection agencies. Relatively few orders directed to police are made. Information from mental health, family violence and drug and alcohol services is usually obtained through the issuing of subpoenas. Arguably that is the more appropriate method of obtaining such information as it gives the parties the opportunity to object to the production of the material. Determining the objection often involves balancing the likely probative weight of the material and the potential damage to a therapeutic relationship. An order pursuant to section 69ZW does not involve the same sorts of considerations as it is directed to agencies in relation to which there is unlikely to be a therapeutic relationship.

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

It is common for families accessing the family law system to present with substantial need for support services and yet be unable to access those supports. The major hurdle is a lack of adequate resourcing for support services across the board. Support services offered by child protection authorities are chronically under resourced. Contact centres have long waiting lists and delays exacerbate tensions. Other therapeutic services such as publicly funded counselling or family therapy also usually have long waiting lists. The result is that the difficulties which might be adequately addressed with targeted early intervention can become entrenched and exacerbated as a result of inadequate or delayed availability of those services.

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?

Regular interaction and discussion between organisations providing services to family law litigants is desirable and best achieved in local areas through direct dialogue. The major benefits of such discussion are that each organisation and service operating in the area develops an increased awareness of how the family law system works and how they can best target their services, and members of the court develop an increased awareness of what services are operating, their particular constraints and how the services can best be utilised for the benefit of litigants.

The Federal Circuit Court regularly meets with the State and Territory child protection authorities in different locations to discuss issues in the area of overlap between the state and federal systems. As a result, some innovative approaches have been developed in local areas. In New South Wales, the Department of Family and Community Services has been able to utilise its facilitative information sharing provisions to pilot the provision of a "Personal History" document to the Court which provides basic information about whether the family is known to the child protection authority and whether there are current investigations under way or imminent. This information is often available on the first Court day and is particularly useful in helping to assess the level of risk where there is limited other information.

In Victoria the Department of Health and Human Services in conjunction with the family courts has piloted the co-location of two child protection workers in the family law registries in Melbourne and Dandenong. From the perspective of the family courts this has been a resounding success. It has led to a greater level of understanding by the family courts of the operation of the Department and vice versa. It has facilitated the timely provision of information to the Courts including information about recent notifications of suspected child abuse and the results of any assessments, investigations and reports commissioned by the Department without a formal subpoena being issued. Given the lack of investigative powers by the family courts, such information is invaluable where serious risks are alleged and especially in urgent circumstances.

While there is nothing in the Family Law Act that requires State and Territory child protection authorities to respond to Notices of Risk sent to them by the Federal Circuit Court, the Court has encouraged them to consider the provision of basic information at that early stage. It is hoped that this will reduce or even avoid the need for section 69ZW orders or the issuing of subpoenas later in the proceedings. The Court is working with individual authorities to develop template responses to try to minimise the resource impact on them.

With respect to support services for Aboriginal and Torres Strait Islander families the Court recently became the first Australian Court to develop the Reconciliation Action Plan (RAP). In various locations around Australia the Court is working with local Aboriginal and Torres Strait Islander groups to improve the Court's understanding of their particular needs and to

make the Court and its processes more accessible to them. It is hoped that the Plan will demonstrate to Aboriginal and Torres Strait Islanders that they can approach the Court with confidence that it is attuned to their needs, particularly in family law proceedings.

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

Processes are in place in all family law registries to enable parties to identify safety concerns related to attending Court. Part of the process is the development of an individual safety plan which can be adapted over time to suit changing circumstances and needs.

Many families accessing the family law system have complex needs and could benefit from integrated family support services. For instance, a parent who has been the victim of long standing family violence may also have significant deficits in their parenting capacity related to the abuse. They may have developed mental health problems as a result of the abuse or pre-existing problems may have been exacerbated by it. They may have developed drug or alcohol abuse issues which have been used by the perpetrator to prevent them seeking help. In these sorts of situations, well integrated and targeted assistance can help to establish a safe and healthy environment for both the victim of violence and the children.

A coordinator appointed to facilitate the provision of services to families with complex needs would most likely need to be State based as most support services are provided by state based organisations and child protection authorities.

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

A more co-ordinated system could be developed through discussions between courts and their user groups about the areas of overlap between them.

The Federal Circuit Court is piloting a scheme in Brisbane in which State magistrates dealing with domestic violence cases can, in appropriate circumstances, provide parties with a referral form giving them priority listing in the Federal Circuit Court to deal with urgent parenting issues. It is hoped that this will help parties avoid difficult situations such as where children's arrangements are used as a bargaining tool in the domestic violence proceedings or where a domestic violence order prevents contact between a child and a parent and there are delays in the parenting proceedings being listed.