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Family Law Council

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Dear Elizabeth

Options Paper – Improving the interface between the child protection systems and the family law system

Thank you for your letter dated 12 February 2012.

I confirm that the Family Law Council ('the Council') considered the Options Paper drafted by your Department at their meeting on 23 February 2012. The Council appreciated the opportunity to provide comments on the fifteen national recommendations contained within the Options Paper.

Council provides the following general comments in relation to the Options Paper:

1. Council notes that the focus of the paper is on the interface between the child protection systems and the family law courts. Council acknowledges that the interface between the family law courts and the child protection systems is a small part of the wider family law system which includes family relationship services and legal assistance services. Council recommends that the title of the paper should be amended to reflect its focus on the family law courts rather than the family law system.
2. Council has some concern that the recommendations do not go far enough to address some of the problems in the interface between the family law courts and the child protection systems. Council notes that there are reports dating back to the year 2000 detailing proposed recommendations to improve the interface, including the Council's September 2002 report, 'Family Law and Child Protection: Final Report' (Council's 2002 report), and its December 2009 report, 'Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues' (Council's 2009 report). Each of these reports contains extensive recommendations for addressing the issues raised in the Options Paper. These include

recommendations for the development of protocols for information sharing between a wider range of relevant organisations than is posed in the present paper, including Legal Aid, Police services and mental health services in respect of families that are mutual clients (see for example, Chapter 9.3 of the Council's 2009 report). Council does however recognise that the fifteen national recommendations in the Options Paper are a step in improving the interface between the family law courts and the child protection systems and that the majority of recommendations are achievable within existing jurisdictional limitations. Subject to the comments below Council supports the implementation of the recommendations in the paper. Council proposes that further recommendations should be considered for implementation in the longer term, with particular consideration to be given to recommendations made in previous reports to improve the interface.

Council provides the comments below in relation to the specific recommendations contained within the paper.

Theme of case management and information sharing

Recommendation 1

Stakeholders in each jurisdiction should review the current Memorandums of Understanding and Protocols in place between their federal family courts and State and Territory child welfare authorities and amend them, or create new ones if required, with reference to the best practice framework drafted by the Commonwealth Attorney-General's Department.

Council supports this recommendation.

Council notes that the Department has undertaken to include issues relating to Recommendation 12 of the Council's December 2009 report in their Memorandum of Understanding Best Practice Framework. Recommendation 12 of the Council's report relates to communication between States, Territories and Federal Authorities, with a particular focus on initiatives to improve information sharing. As noted above, Council's view as expressed in its 2009 report is that the development of such Memorandums of Understanding and Protocols should be extended to include Legal Aid, police services and mental health services.

Consistent with its previous reports, Council considers that the best practice framework, Protocols and Memorandums of Understanding should be regularly reviewed to ensure they reflect the current law and practices in each jurisdiction and to promote ongoing collaboration between the various stakeholders (see Rec. 14 of the Council's 2002 report). Regular review, possibly on a bi-annual basis, is critical in this area of the law where state child protection systems are frequently subject to major review and reform. Council considers that there would be value in these documents being published on the courts' websites.

Recommendation 2

Memorandums of Understanding and Protocols should include provisions relating to procedures for dealing with Independent Children's Lawyers.

Council supports this recommendation. In Council's view, such provisions should include information clarifying the role of the Independent Children's Lawyer in family law courts cases, utilising section 68LA of the Family Law Act and the Guidelines for Independent Children's Lawyers endorsed by the Chief Justice of the Family Court and by the Federal Magistrates Court (dated 6 December 2007). The Memorandums could usefully identify the ways in which the roles performed by lawyers who represent children in child protection matters and family law courts cases may differ, in particular making clear that Independent Children's Lawyers operate according to a 'best interests' model, and in child protection matters the circumstances where lawyers act on a direct representative 'instructions' model and when they act in a 'best interests' model. Council notes that the drafting and updating of these provisions should be linked with the current review of Independent Children's Lawyers.

Recommendation 3

The Family Court of Australia and the Federal Magistrates Court of Australia should consider: making section 69ZW orders as early as possible in proceedings, if deemed appropriate, and including guidance as to the timings for the making of section 69ZW orders and for the making of "targeted" section 69ZW orders in the Judicial Benchbook.

Council recommends that the family law courts undertake a review of all their processes for the obtaining of information from State and Territory child welfare authorities with a view to streamlining such processes. In particular, Council recommends that the family law courts review not only their practices related to the making of section 69ZW orders but also their practices related to the making of section 91B orders and the issue of subpoenas.

Council also notes the discussion in the Options Paper regarding the effects of section 69ZW in remedying the problems created by *Northern Territories v GPAO* (1998) 196 CLR 553. In light of the decision of Cohen J in *Department of Human Services v Brigham* (2010) FamCA 937 (October 2010), Council's view is that section 69ZW does not achieve this result. Council's view is that the appropriate balance between protecting the notifiers (and therefore encouraging disclosure of risk to children) and being able to make a decision which is in the best interests of the children, is best struck if the agency is required to provide all specified information subject to the agency deleting from it the identity of the notifier. This would require a change to the wording of section 69ZW(3)(b).

Recommendation 4

State and Territory child welfare authorities should work with the federal family courts to develop guidelines and templates for their response to section 69ZW orders, Form 4's, subpoenas and Magellan reports.

Council supports this recommendation.

Recommendation 5

State and Territory child welfare authorities should establish centralised contact points to address referrals and enquiries from the federal family courts.

Council supports this recommendation. Council recommends that the Queensland Court Services Unit should be considered as a model for the development of centralised contact points.

Recommendation 6

State and Territory child welfare authorities should establish a network of interstate child welfare collaboration officers.

Council supports this recommendation.

Recommendation 7

When referring a viable carer to the federal family courts, State and Territory child welfare authorities should provide:

- (a) written information to those courts detailing the reasons for the referral, and***
- (b) reports and other evidence.***

Further, State and Territory child welfare authorities should intervene in such family law proceedings, if appropriate.

Council notes that there are potentially significant costs implications arising from this recommendation, not only across systems but also for the individuals involved. In particular the funding for viable carers to institute proceedings in the family law courts and their access to ongoing financial support to care for a child if they obtain parenting orders from the family law courts as opposed to the Youth or Children's Court. Council recommends that the Department give consideration to these issues and any potential funding arrangements to address them.

Council also recommends that the Department give consideration to examining the possibility for State and Territory Youth and Children's Courts to make parenting orders under the *Family Law Act 1975* ('the FLA'). This would allow the needs of viable carers to be addressed in a single forum. Council acknowledges that there is work underway in South Australia to consider a pilot in which the Youth Court makes parenting orders under the FLA in certain circumstances.

Recommendation 8

Stakeholders in each jurisdiction should consider possibilities for the sharing of experts' reports between the child protection system and the family law system.

Council supports this recommendation. Council notes that the recommendation should be extended to provide that State and Territory child welfare authorities and State and Territory children's courts should have access to the Commonwealth Courts Portal. This is consistent with the recommendation of Australian Law Reform Commission and New South Wales Law Reform Commission in their 2010 Family Violence Report (Rec 30-8).

Recommendation 30-8 provides that:

Federal family courts should provide state and territory courts dealing with family violence and child protection matters—and others with a proper interest in such matters, including police and child protection agencies—with access to the Commonwealth Courts Portal to ensure that they have reliable and timely access to relevant information about existing federal family court orders and pending proceedings for such orders.

Council supports investigating further possibilities for the sharing of additional information with the State and Territory child welfare authorities, particularly by electronic means. In Council's view, consideration should be given to extending this recommendation beyond the sharing of experts' reports, to capture information such as family reports and Children's Court Clinic reports. In addition, consideration should be given to the current legislative restrictions upon the sharing of information.

Theme of risk identification and assessment

Recommendation 9

Officers from State and Territory child welfare authorities should provide training to officers from the Family Court of Australia and the Federal Magistrates Court of Australia in relation to how child welfare authorities determine if a child is in need of care or protection or is at risk.

Council supports this recommendation.

Recommendation 10

The Family Court of Australia and the Federal Magistrates Court of Australia should provide training to officers from the State and Territory child welfare authorities on the federal family courts and how they operate, to reduce concerns of child welfare officers regarding appearances in the family courts.

Council supports this recommendation. Council notes that this training should involve Legal Aid.

Recommendation 11

The Family Court of Australia and the Federal Magistrates Court should consider:

- (a) limiting the use of section 91B orders to cases where the court determines that neither parent is a viable carer, and***
- (b) providing a checklist to State and Territory child welfare authorities simultaneously with any section 91B order providing information as to why the court views it as important for the child welfare authority to intervene.***

Council supports this recommendation subject to changing the wording to provide that the Family Court of Australia and the Federal Magistrates Court should consider limiting the use of section 91B orders if the court is of the view, based on prima facie evidence, that neither parent is a viable carer.

Recommendation 12

State and Territory child welfare authorities should develop best practice frameworks for responding to a federal court's request for intervention in proceedings under section 91B, with serious consideration to be given to intervening in circumstances where a family court determines that neither parent is a viable carer.

Council supports this recommendation subject to changing the wording to provide that the State and Territory child welfare authorities will give serious consideration to intervening in circumstances where a family court is of the view, based on prima facie evidence, that neither parent is a viable carer.

Recommendation 13

State and Territory child welfare authorities should consider developing guidelines for family law practitioners and self-represented litigants on how to complete the Notice of Child Abuse or Family Violence (Form 4).

Council supports this recommendation subject to changing the wording to provide that State and Territory child welfare authorities and the family law courts collaborate to develop guidelines for family law practitioners and self-represented litigants.

Theme of expanding the exercise of current jurisdiction

Recommendation 14

The Commonwealth Attorney-General's Department should monitor the outcome of projects in South Australia and Western Australia relating to improving the interface between the child protection systems and the federal family law system.

Council supports this recommendation.

Theme of relationship building

Recommendation 15

Stakeholders in each jurisdiction should convene on a regular basis (for example, biannually) to discuss matters relevant to the interface between the child protection system and the federal family law system in their jurisdiction.

Council supports this recommendation.

Council is supportive of the work that the Department is undertaking with States and Territories to improve the interface between the child protection systems and the family law courts. It is important work that has real potential to provide improved outcomes for children and their families who have been involved with both the child protection system and the family law courts.

The Council looks forward to hearing of the progress of the recommendations in the paper.

Yours sincerely



Associate Professor Helen Rhoades