FAMILY LAW COUNCIL

THE CARE, SUPPORT AND PROTECTION OF CHILDREN: INTERACTION BETWEEN THE FAMILY LAW ACT AND STATE AND TERRITORY CHILD AND FAMILY SERVICES LEGISLATION

DISCUSSION PAPER NO. 2

THE BEST INTERESTS OF THE CHILD?

THE INTERACTION OF PUBLIC AND PRIVATE LAW IN AUSTRALIA

OCTOBER 2000

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PUBLIC CONSULTATION

The Family Law Council is seeking public comment on:

- the particular questions posed throughout this paper;
- the issues raised throughout this paper on which the reader would like to comment; and
- any other issues related to matters in the paper.

Persons and organisations wishing to make submissions or provide comments on all or any part of this paper are invited to do so in writing.

All written submissions made to Council will be publicly available unless there are reasons for confidentiality and those reasons are drawn to Council's notice. Persons making submissions are asked to keep this in mind. It is particularly important that the privacy of personal material, such as information about individual cases, be protected and Council asks that such material be clearly identified as confidential.

If you do not want your name used, or you want your submission or part of it treated as confidential, please advise Council accordingly and state your reasons for seeking confidentiality. You should be aware that confidential material must sometimes be released if requested under the *Freedom of Information Act 1982* (Cth).

The closing date for submissions and comments is **31 May 2001**.

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THE FAMILY LAW COUNCIL

The Family Law Council is a statutory authority which was established by section 115 of the *Family Law Act 1975*. The functions of the Council are set out in sub-section 115(3) of the Act, which states:

It is the function of the Council to advise and make recommendations to the Attorney-General, either of its own motion or upon request made to it by the Attorney-General, concerning -

(a) the working of this Act and other legislation relating to family law;

(b) the working of legal aid in relation to family law; and

(c) any other matters relating to family law.

The Council may provide advice and recommendations either on its own motion or at the request of the Attorney-General.

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CONTENTS

		Page
Public consultation		iii
The Family Law Council		iv
The Child and Family Services Committee		v
1.	Introduction	1
2.	Legal Systems – Present context	6
3.	Jurisdictional Overlaps: Family Violence and Child Protection	23
4.	Proposals for Reform	39
Appendix A:	Terminology	53
Appendix B:	Child Protection Matrix 2000	54
Appendix C:	Protocol between the Department of Human Services (Vic) and the Family Court of Australia	68

CHAPTER 1: INTRODUCTION

BACKGROUND

1.1 The Family Law Council established its Child and Family Services Committee to examine the interaction between Commonwealth and State and Territory child and family legislation.

1.2 More specifically, the Committee's Terms of Reference require it:[1]

(i) To examine:

the interaction of Commonwealth family law with other child and family legislation;

the interaction of agencies which give effect to that legislation and related services; and

protocols, procedures, practices, standards and principles in implementing the legislation,

in order to identify factors that result in duplication, gaps, ambiguity, unintended consequences or confusion in responsibility.

(ii) To examine overseas examples of systems of child and family welfare and family law to determine aspects of possible application in the Australian context.[2]

(iii) To consider options for reform for the efficient and effective integrated delivery of child and family law services in relation to the care and protection of children.

1.3 The Committee issued Discussion Paper No. 1, *Principles and Minimum Standards* in January 1998. This sought to identify the key principles and standards that could be used as a guide by persons involved in the care, support and protection of children.

1.4 That discussion paper also made reference to the major difficulties presented by the lack of a national framework in child and family services generally. It saw these difficulties as being attributable largely to the division of legislative and other responsibility for children between the States and Territories and the Commonwealth. The paper drew attention to the potential for such division to result in duplicated services, gaps, overlaps, lack of coordination and inefficiencies. It noted the effort and resources occurring at all levels of Government to minimise the difficulties,[3] but considered that there should be principles and standards to guide legislation and practice concerning the provision of child and family services. As a result of submissions received, suggested principles and minimum standards are being developed for consideration by legislators and administrators and will be included in the final report. Included for reference is a section on terminology, which appears as Appendix A.

1.5 This second discussion paper takes the issue further. It recognises that national standards can only be applied effectively if they can operate within the fragmented system in which they are embedded. It is also recognised that parenting disputes before the Family Court frequently involve allegations of child abuse, although the primary focus is on the dispute between the parents and the definition of abuse and the treatment of the allegations is quite different to in children's courts. Further, protection cases before the children's courts often involve disputes between parents, but the main focus is on protection of the child. Therefore, classification of matters into private and public law categories may be somewhat meaningless.

1.6 Chapter 2 of the paper explains how the jurisdictional overlaps have come about and examines the legislative and structural regimes at both Commonwealth and State and Territory levels. Chapter 3 highlights the particular difficulties being experienced in the areas of family violence and child protection, where jurisdictional overlaps frequently occur, and describes a number of statutory provisions and methods by which these difficulties are sought to be overcome. Chapter 4 canvasses both short and long term possible solutions to overcome the difficulties previously examined, whilst acknowledging the various limitations and the structural barriers to their possible implementation.

1.7 Examples of the ways in which the bifurcated system impacts in practice on families in different circumstances and in different States and Territories are provided by the inclusion of case studies set out in the discussion paper. These case studies illustrate both the current limitations and the ways in which these are sought to be overcome. The situations to which they refer nevertheless provide cause for concern, describing as they do instances in which (inter alia) matters have been unnecessarily protracted, relevant information not provided to the relevant forum and work duplicated. The conclusion to be drawn from these examples is that there are instances in which the best interests of already vulnerable children are being compromised.[4]

1.8 The paper also contains, in Appendix B, a matrix that sets out the relevant child protection legislation at the State and Territory level. This material illustrates the *inter* State and Territory differences and similarities on a number of dimensions. It highlights the wide disparity in areas such as the status and composition of courts dealing with children's matters, their appeal processes and the nature of the orders they may make.

1.9 Finally and throughout the paper comment is sought from interested members of the public and from relevant organisations in a number of particular areas. Although some specific questions have been framed for ease of response, Council would greatly appreciate submissions on any aspect of this discussion paper and the many issues that it raises. Once all submissions have been considered, Council will prepare a final report.

RECENT DEVELOPMENTS

1.10 The volatile nature of family law, the involvement of such a large number of jurisdictions and infrastructures and the plethora of laws relating to children's welfare all combine to provide a dynamic and constantly changing legislative climate. These factors in turn impact upon practices and arguably also on outcomes. For the purpose of this discussion paper the Commonwealth and State and Territory legislation

referred to were in operation at 1 September 2000.

(a) Legislative Changes – State and Territory

1.11 There have been a number of relevant developments at both Commonwealth and State and Territory levels since Discussion Paper 1 was distributed in early 1998. Several States have introduced new child protection legislation, have passed significant amendments to existing legislation or are contemplating changes. A Model Bill has been drafted to deal with transfers of child protection orders across jurisdictions, and several States have passed legislation reflecting the terms of the Model Bill. Some protocols between the States and Territories and the Family Court have been revised (or revisions are under consideration) as a consequence of the many changes.

(b) Legislative Changes – Commonwealth

1.12 An additional forum to determine disputes involving children has been established at the federal level. Legislation establishing the Federal Magistrates Service came into effect in December 1999 and the Court has been in operation since July 2000. As chapter 2 explains, it has concurrent jurisdiction with the Federal and Family Courts in matters designated as less complex. In the Family Court arena these matters include the granting of divorces, parenting disputes, adjustment of property interests with a total unencumbered value of less than $300,000 (or more by consent), and enforcement of orders. Matters initiated in the Federal Magistrates Service may be transferred to the Family Court should they become too complex. Appeals on family law matters will lie to the Full Court of the Family Court, which may be constituted by a single judge. Federal Magistrates are appointed pursuant to Chapter III of the Constitution.

1.13 The discussion in this paper and the legislative matrix that accompanies it focus primarily on ‘traditional’ child protection issues and measures. However Council recognises that adoption procedures may frequently result in outcomes for

children which are in many respects identical to those provided by permanent care orders made by State and Territory courts and parenting orders made by the Family Court. The more recent open form of adoption and guardianship and attitudes towards the child's right to know her or his origins and biological parents provides an illustration of the extent to which children's best interests may be interpreted differently over a relatively short period of time.

(c) Case law – Commonwealth

1.14 In *Re Wakim; Ex parte McNally* [1999] HCA 27 the High Court held that the States cannot vest State jurisdiction in federal courts, and that the Commonwealth cannot consent to the vesting of State jurisdiction in federal courts. This decision invalidates cross vesting legislation to the extent that such legislation purports to give federal courts jurisdiction to exercise State judicial power. The decision therefore prevents cross vesting being relied on as a possible strategy for extending the range of federal and State and Territory matters that might be consolidated and heard in one court simultaneously.

1.15 Recent cooperative arrangements made between the Commonwealth and the States will result in the States making a limited referral of power in relation to the cross-vested corporations law matters affected by the *Re Wakim* decision. Similar arrangements have not been mooted in the family law arena.

Endnotes: Chapter 1

[1] The original terms of reference agreed by Council were amended later to the current terms outlined here, to lessen the emphasis on standards and to focus on the legislation and practices.
[2] Council subsequently decided that this was not necessary, given that overseas examples are unlikely to have relevance to the Australian experience.
[3] For instance, the work of the Standing Committee of Community Service and Income Security Administrators.
[4] The case studies are placed randomly throughout the paper and are not necessarily illustrative of points made in the surrounding text, except where stated.

CHAPTER 2: LEGAL SYSTEMS – PRESENT CONTEXT

2.1 In recent years there has been increasing recognition of the need to consider the consequences of decisions on child protection matters possibly being made in two (or more) jurisdictions, in different courts, and under different legislative regimes.[1] In this chapter of the discussion paper, the current legal structures in the area of family law and child protection in Australia are described. In particular, in this chapter the constitutional context and the legislation and court structures of the State and Territory and Commonwealth systems are described.

CONSTITUTIONAL CONTEXT

2.2 The issue of jurisdictional overlap arises due to Australia's federal system of government and the distribution of powers under s. 51 of the Commonwealth Constitution. Under the Constitution, neither the Commonwealth nor the States and Territories have exclusive legislative competence in the area of family law. Sections 51 (xxi) and (xxii) of the Constitution restrict the Commonwealth's involvement in family law by expressly vesting the Commonwealth parliament with power to make laws with respect to (1) marriage; and (2) divorce and matrimonial causes and 'in relation thereto parental rights and the custody and guardianship of children'. These sections must be read in conjunction with s. 51(xxxix), the incidental power, which gives the Commonwealth power to legislate on 'matters incidental to the execution of any power vested by this Constitution in the Parliament.' An additional section of relevance is s. 109, which provides that State laws are invalid to the extent that they are inconsistent with validly enacted laws of the Commonwealth.[2] Section 109 thus applies where the Commonwealth family law system and the State and Territory child protection system overlap.

2.3 The Commonwealth's power to legislate in respect of family law was greatly expanded between 1986 and 1990 when all States except Western Australia referred the majority of their legislative powers with respect to children to the

Commonwealth.[3] The statutes that refer State legislative power to the Commonwealth cover three broad areas: (1) custody, guardianship and access; (2) child maintenance; and (3) child-bearing and child expenses.[4] Missing from this list of referred powers is any reference to child 'welfare'. When the States referred their powers to the Commonwealth, all of them excluded from the scope of these powers the power to affect the operation of State child welfare legislation.[5] While there has been some dispute over the implications of the 'welfare' exclusion,[6] the result is that while parenting disputes in relation to ex-nuptial as well as nuptial children now fall within the domain of Commonwealth legislative power, child protection remains the domain of the States.[7] This line, however, becomes blurred when a child protection issue arises in the context of a parenting dispute, or vice versa. Thus, jurisdictional overlaps are an inevitable, but unintended, consequence of Australia's constitutional system.

2.4 The constitutional framework set out above has perpetuated the development of a complex and fragmented system for determining child protection issues in Australia. In essence, at least two court systems are potentially involved in any protection dispute: the State and Territory children's courts, and the federal Family Court. With the introduction of the Federal Magistrates Service, this fragmentation now extends to three courts. Further, if a dispute extends across State and Territory borders, more than one children's court may be involved. Family violence issues are also often relevant when child protection issues are raised, but the State and Territory courts that deal with violence issues are usually the generalist magistrates' courts. This can add a further layer of complexity. Jurisdictional overlaps in the areas of family violence and child protection are discussed further in Chapter 3. Relevant features of these different structures, and their interaction, are considered in the remainder of this chapter.

CASE 1

A is the elder of two girls. When A was three and a half years old, her parent's neighbour Mrs X notified the child protection authority that she believed A's father had been sexually assaulting Mrs X's four year old son B when B visited A and that A's father had been sexually assaulting A as well. The child protection authority started to investigate. When they informed A's mother, she believed the allegations and ejected A's father from the home. A's father denied the allegations and moved in with his parents. A's mother maintained that A's father had always been physically abusive towards her and gained an order from the magistrates court to prevent A's father from visiting the family home.

A's mother then applied to the Family Court for orders that A reside with her and for supervised contact only between A and her father. A child representative was appointed and a report sought from the child protection authority.

In the report, the child protection authority argued that it was clear that both A and B had been sexually assaulted and that it was possible that A's younger sister had been as well. The authority took the view that A and her sister should have only supervised contact with their father, who continued to deny the allegations. The father sought a report from a psychologist in relation to his functioning, but refused any counselling.

At the next hearing, the father sought interim supervised contact with both daughters and the mother agreed. Not long after that hearing, the parents reconciled and all Family Court applications were withdrawn, the magistrates court order was discharged and the father returned to the family home.

The child protection authority informed the court that it they did not regard the children as being properly protected and of their intention to pursue the case in the children's court.

LEGISLATION AND COURT STRUCTURES – STATE AND TERRITORY CHILDREN'S COURTS

State and Territory Child Protection Legislation

2.5 Every State and Territory has legislation which deals with child protection,[8] and each of the State and Territory Acts has as its general purpose the protection of children. The Acts specify that each State and Territory has a child protection authority that has the responsibility of carrying out child protection work.[9] Action under the State and Territory child protection Acts takes place in two stages.[10] First, the threshold test for intervention must be satisfied. The threshold tests vary from State to State, but are similar in their focus. In Victoria, for example, the test for intervention is 'significant harm',[11] in New South Wales it is 'in need of care',[12] and

in South Australia it is 'at risk'.[13] Once the threshold test has been satisfied, that is, the protection application has been found proven, the second stage – the decision-making stage – commences (although there is scope in some jurisdictions for diversion using alternative dispute resolution strategies). Each Act specifies a decision-making standard. Some States and Territories apply the 'best interests of the child' standard in accordance with the *Family Law Act 1975* ('the FLA') and the United Nations Convention on the Rights of the Child. While the best interests principle is the defining principle in some State and Territory legislation, others use it sparingly.[14] In those States and Territories where the 'best interests of the child' is not the determining principle, phrases such as the 'welfare of the child' usually apply. (See the matrix in Appendix B for variations in terminology). It is important to note, however, that the 'best interests of the child' or 'welfare of the child' standards do not apply until the threshold test for intervention has been satisfied.

2.6 While there is some variation across States and Territories regarding the threshold test for intervention and test to be applied at the decision-making stage, the applicant in family proceedings in State and Territory children's courts is always the State and Territory child protection authority. Hence, children's court disputes are public law disputes with the State acting as applicant. This is in contrast to disputes under the Commonwealth FLA where both the applicant and respondent are usually a parent or family member, and the dispute is thus a private one.[15] There can, however, be a private element to child protection disputes and a public element to Family Court disputes. For example, in a matter before the Family Court an allegation of abuse may be made requiring child protection authorities to become involved.[16] At the State and Territory level, once the public law threshold test for intervention has been met, a children's court may make custody and access orders in favour of individuals in the context of exercising their protective jurisdiction (although the ambit of this power depends on the order made),[17] thus creating a private law dimension in such disputes.

2.7 The differing focus of the two courts is reflected in the contrasting roles played by the child representatives. In the Family Court, the role of the child's representative is reasonably clear: to investigate matters which he or she thinks are relevant to the court's consideration of the best interests of the child.[18] While the child representative

must inform the court of the child's wishes where they are expressed, he or she is not bound by the child's wishes.[19] Instead, the child representative must form an independent judgement regarding what is in the best interests of the child. It is also the role of a Family Court child representative to arrange for collation of expert evidence and ensure that all evidence relevant to the best interests of the child is before the court.[20] In contrast, in the children's courts, the role of the child's representative is more often that of advocate for the child, and on occasions acting on the child's instructions.[21]

2.8 Differences between the jurisdictions also exist regarding when child representatives will be appointed. In children's court proceedings, all parties, including the child, are usually represented. In contrast, in the Family Court, the Full Court has set out a list of circumstances where it is appropriate for a child's representative to be appointed.[22] The list includes such circumstances as where: there are allegations of child abuse; there is an apparently intractable conflict between the parents; and, it is proposed that siblings be separated. The existence of this list initially resulted in a significant rise in the appointment of child representatives and a proportionate refusal by legal aid authorities (particularly in Victoria) to fund such matters. Child representatives are almost invariably paid for by legal aid.[23] Given the variation in roles and circumstances of appointment between the two jurisdictions, in addition to the tendency for barristers to practice in either the Family Court or the children's courts but not both, it is not surprising that in cases involving both the Family Court and a children's court, it is highly unlikely in all jurisdictions (except perhaps WA) that the same child representative will represent the child in both courts.

Q: What are the differences between the various jurisdictions and should consideration be given to changing the role of the child representative and others who advocate for children:

(i) in the children's courts;

(ii) in the Family Court?

Q: Should the role of child representatives and advocates be made more consistent across jurisdictions? If so, how?

2.9 Despite the blurring of the public/private divide discussed above, the largely public nature of State and Territory children's court disputes and the largely private nature of Family Court disputes means that the focus of each of the courts is distinct. In the children's courts, the focus is on determining whether or not the state should intervene to protect the child. In the Family Court, the focus is on determining a private dispute between two parties in relation to the care of the child. Further, the manner in which allegations of abuse are investigated and the information put to the court may well differ depending upon in which court the issues are raised. All of this may mean that the issue of whether abuse has occurred may be considered differently in the Family Court than a children's court, although this point is debatable.

Q: Is there, and if so, should there be, any significant difference in the way in which the court processes operate in the Commonwealth and State and Territory jurisdictions?

Q: Is the difference between public and private proceedings described above a legitimate difference, or should one or other of the Commonwealth and State and Territory jurisdictions be changed?

2.10 In particular, in *M v M* (1988) 166 CLR 69, the High Court held that whether or not a child had been sexually abused was not the paramount issue for the Family Court's determination, rather, the paramount issue was the welfare of the child.[24] In fact, it was held that the court should decline from making a finding regarding whether abuse has occurred or not unless impelled by the particular circumstances to do so or satisfied on the balance of probabilities. The fundamental matter to be taken into account is whether there is an 'unacceptable risk' of abuse occurring.[25] The extent to which the children's courts take the same approach in deciding whether the requisite level of harm exists is unclear. This is because our knowledge of child protection systems throughout Australia is under-developed largely because there is no

court of record making reportable decisions in child protection matters. Whilst the Family Court is a court of record, State and Territory children's courts are not.[26]

Q: Is the focus in determining issues concerning children different in the Family Court and children's courts? If so, does this lead to a difference between the courts in deciding issues such as whether sexual abuse has occurred? Are the tests applied in each court similar, or are they different?

Q: Does the fact that children's courts are not courts of record make it difficult to determine what tests are applied in children's courts? Should the current system be modified in some way, and if so, how?

2.11 Given the variations between States and Territories regarding the tests to be applied when making orders and the types of orders that can be made (see matrix at Appendix B), problems may arise when children subject to children's court orders in one State and Territory move to another State and Territory. To help address this, most States and Territories are currently in the process of drafting and passing legislation to deal with the transfer of child protection orders and proceedings across state boundaries. The *Child Protection (Reciprocal Arrangements) Act 1999* (the 'Model Bill') has been drafted and several States and Territories have already incorporated it into their legislative framework.[27] For example, the *Child Protection Amendment Act 2000* (Qld) introduced a new Chapter 7A to the *Child Protection Act 1999* (Qld) to deal with the 'interstate transfers of child protection orders and proceedings'.[28] The purpose of these amendments was to provide for the transfer of orders and proceedings between Queensland and other States and Territories and Queensland and New Zealand, so that 'a child in need of protection may be protected if they move from one jurisdiction to another', and so that 'proceedings relating to the protection of a child may be decided, in a timely and expeditious way, in a court in the most appropriate jurisdiction'.

2.12 There are two types of transfers that can occur under the Model Bill: an administrative transfer and a judicial transfer. An administrative transfer permits the

Chief Executive (for example, in Victoria, the Secretary of the Department of Human Services or his/her delegate) to transfer a child protection order to a participating State if, amongst other things, the Chief Executive is satisfied an order to 'the same or similar effect as the home order' could be made under a child welfare law of that State (s. 3). To transfer orders (whether administratively or judicially), there must be agreement between the child welfare authority from the transferring State (the 'sending State') and the child welfare authority in the proposed receiving State (the 'receiving State'). The sending State contacts the receiving State to establish the receiving State's agreement to the transfer. The sending State also works out the form that the orders should take in the receiving State – in other words, the sending State is responsible for translating the orders into orders that can be made under the receiving State's legislation.

2.13 If there are not equivalent orders across States, an administrative transfer is not possible and a judicial transfer must be made. Other reasons for judicial transfer are: lack of parent and/or child consent to transfer (with the result that transfer cannot be made administratively), as an alternative to other appeal processes (for example, in Victoria, parents and/or children who do not consent to administrative transfer may appeal to the Victorian Civil and Administrative Appeals Tribunal); and the desire of child welfare authorities to obtain court sanction for transfer although this may not be strictly required.

2.14 When equivalent orders cannot be made in the receiving State, new orders may involve more or less state intervention in the child's life. It is the responsibility of the respective child welfare authorities to agree on the format of new orders. When an agreement is reached, the sending State applies to the children's court in the receiving State for the proposed new orders. Determining the orders that should be made may require the court to effectively re-hear the original matter, especially where parents and/or the child do not consent to the transfer. Under s. 10(1) of the Model Bill, the court is directed to make orders that it believes to be '(a) to the same or similar effect as the terms of the home order; or (b) otherwise in the best interests of the child'. Where State legislation differs markedly in terms of the orders that can be made (for example, Victoria vs Western Australia – see matrix at Appendix B), transfer of

orders as originally made is obviously more difficult to achieve. Thus, attempts to address the portability issue may be ultimately undermined by variances between State laws.

2.15 A further issue that may arise is whether it is possible to return a child to a State in which child protection orders have been made, but from which the child has absconded or has been unlawfully removed. In this situation, it is possible for the child welfare authority in the State from which the child has departed to obtain a warrant under local child protection legislation for the return of the child. For example, in Victoria the Department of Human Services would obtain a warrant under the *Children and Young Persons Act 1989* (Vic). This warrant would then be executed by police in the receiving State, pursuant to the *Service and Execution of Process Act 1992* (Cth). A protocol is currently being developed to ensure that children subject to child protection orders are treated appropriately and with minimal police involvement when warrants are executed.

State and Territory Child Protection Court Structures

2.16 Each of the States and Territories also offers different services within their courts. For example, the Victorian Children's Court houses the Children's Court Clinic, which has as its primary function the provision of clinical assessments for the Children's Courts across Victoria in both protection matters and criminal matters. No other State in Australia has an in-house clinic, though some are considering it as an option. Another example of differing services and structures is that some States, such as New South Wales and Queensland, have Child Commissioners, while others do not. Variations also exist between the jurisdictions regarding the position of the children's court and those deciding children's court cases within the broader court system. For example, in Victoria, the Children's Court has recently been given the status of a court independent of the Magistrates Court, in an effort to reflect the importance of children's matters in the legal system.[29] The President of the Melbourne Children's Court is a County Court judge. In Western Australia, the Children's Court is a Magistrates' Court. Cases are heard mainly by magistrates, but also by judges who have the status of District Court judges. The President of the Western Australian

Children's Court is a District Court judge on secondment from the District Court. Further, Western Australian District Court judges, when on country visits, can hear Children's Court matters exercising the additional powers that Children's Court judges (compared with Children's Court Magistrates) have. In South Australia, two judges of the Children's Court are appointed indefinitely. In contrast to Western Australia, South Australian Children's Court judges do not have the capacity to be transferred back to the District Court.

2.17 In addition to the differing status and composition of State and Territory courts dealing with child protection matters, there are also significant differences in their processes, as well as the provisions for appeals. Further, there are variations in the manner in which adoptions are handled. A number of these differences are set out in the matrix at Appendix B.

2.18 It should be noted at this point that the jurisdictional arrangements in the area of child protection differ in Western Australia as compared with other States and Territories, due to Western Australia electing in 1976 to have its own State Family Court, pursuant to s. 41 of the FLA. The Family Court of Western Australia has limited power to exercise jurisdiction under the *Child Welfare Act 1947* (WA), pursuant to s. 36 of the *Family Court Act 1997* (WA). The court may do so if a case arises before it in which the court decides that the child is in need of protection, and there are no Children's Court proceedings on foot. However, the Family Court of Western Australia apparently exercises jurisdiction under the Child Welfare Act very rarely. If a protective issue does arise, the Family Court will invite the State child welfare authority, the Department of Family and Children's Services, to intervene. If a protective concern exists it is likely that the Department will begin proceedings in the Children's Court, due to the greater delays, costs, and problems perceived to exist in Family Court processes.

2.19 Variations between the child protection legislation of each of the States and Territories mean that there is little in the way of uniformity and national standards in child protection across Australia. This *inter-State and Territory plurality* is one important consequence of our federal system. A second consequence, and our focus, is

that of *State/federal overlapping jurisdiction* in relation to child protection. The starting point for considering this issue is the FLA, and how it addresses cases of overlapping jurisdiction.

CASE 2

This case involved a young boy Q whose parents separated in 1995. Family Court of Western Australia proceedings were commenced in respect of what was then called guardianship, custody and access. Approximately 12 months after the proceedings commenced, in 1996, the father filed a Form 66 Notice of Child Abuse or Risk of Child Abuse alleging sexual abuse of Q by the mother. A Child Representative was appointed and the Family Court gave interim custody to the father. On appeal Q was returned to the mother who was residing with her parents. The child protection authority investigated, provided assistance and support but did not intervene in the proceedings. The allegations were not substantiated. Several months later and one month prior to the date scheduled for the Family Court trial, P (a child of the father from a previous relationship who had resided with the father and the mother during their period of cohabitation) alleged that she had been sexually abused by the mother. The Police subsequently charged the mother. The child protection authority apprehended Q and placed Q into foster care where Q remained for one month.

Only because the Family Court trial was about to commence and an earlier date was not available in the Children's Court, the child protection authority agreed to have its Care and Protection application heard alongside the Guardianship, Custody and Access proceedings in the Family Court. The matter had come before the Children's Court on two occasions before this decision was made. Substantial duplication of work would have been required had the matter proceeded in the Children's Court given the history of the matter. In addition, due to Q's young age, he would not have been able to have a representative in the Children's Court proceedings.

Prior to the trial a Family Court Judge placed Q in the care of his maternal grandparents after an interim placement hearing and the mother and father were given supervised access on an interim basis. The child protection authority had opposed this placement. At trial the Care and Protection application was dismissed and Q was returned to the interim custody of the mother.

The mother was subsequently convicted of the sexual abuse of P and served a period of imprisonment. A further Family Court trial date was set in late 1999 to determine the issues of what was now termed residence and contact. The maternal grandparents who had cared for Q whilst the mother was in prison intervened in the proceedings. The child protection authority also intervened as a consequence of concerns about the risk posed to Q by the mother in circumstances where she continued to deny the abuse and the maternal grandparents supported her denial. Upon the recommendation of the child protection authority, supported by the Child Representative, the proceedings settled on the basis of Q residing with the maternal grandparents and Q's family the mother, the father, P, the maternal grandparents and other family members and friends participating in a counselling program which, if successful, would enable the mother to live with Q and the maternal grandparents with an appropriate safety plan and network in place to ensure that Q is safe. This program requires the intensive involvement of the child protection authority workers, which would not normally be available in circumstances where there was no Care and Protection proceedings or Order on foot.

These proceedings were lengthy and complex. The existence of the Family Court trial date caused the child protection authority to submit to the jurisdiction of the Family Court which is still supervising the progress of the matter.

LEGISLATION AND COURT STRUCTURES: COMMONWEALTH

The Family Law Act 1975 (Cth) and Child Protection

2.20 In contrast to the children's courts, the Family Court decides children disputes arising between individuals, usually the parents (private law disputes). The powers of the Family Court in relation to children arise under Part VII of the FLA. In particular, the Family Court has the power to make residence, contact and specific issues orders on the application of the parent(s), the child, or 'any other person concerned with the care, welfare or development of the child'.[30] It should be noted however that each court of summary jurisdiction in each State and Territory is also invested with limited federal jurisdiction under Part VII of the FLA by virtue of Section 69J of the FLA.

2.21 As stated earlier, under s. 109 of the Commonwealth Constitution State and Territory laws are invalid to the extent that they are inconsistent with validly enacted laws of the Commonwealth.[31] However, section 69ZK of the FLA prevents State and Territory child protection laws from becoming inoperative because of inconsistency with the FLA. Section 69ZK has the effect that an order under the FLA cannot be made in relation to a child under the care of a person under State or Territory child protection legislation, except in limited circumstances. It also expressly acknowledges that the FLA does not affect State and Territory child protection legislation.

2.22 While s. 69ZK is the current provision that appears in the FLA in relation to this issue, the history of amendments to the FLA means that the old s. 60H actually applies in Queensland, South Australia and Western Australia.[32] Regardless of which section is applied, the application of State and Territory child protection laws is preserved despite the presence of s. 109 of the Constitution (see para 2.2 above).

2.23 Following changes to the FLA resulting from the *Family Law Reform Act 1995*

(Cth), the terminology used in the FLA now differs from that found in most State and Territory child protection legislation. Prior to the changes, the language in the FLA was in terms of parental rights to 'guardianship', 'custody' and 'access' and orders were made using that terminology. Since the changes, the language in the FLA is in terms of parental responsibility and parenting orders which may deal with any aspect of parental responsibility, including with whom a child is to live (residence order) and contact with a child (contact order). The use of the terms 'residence' and 'contact' in the FLA, as opposed to the on-going use of 'custody' and 'access' in much of the State and Territory legislation and children's courts, reflects the difference of intention between the two systems. While 'access' and 'contact' amount to the same thing, 'custody' and 'residence' are not the same. 'Residence' concerns where the child shall live,[33] but 'custody' is broader. The definition of custody at common law can, like the definition of 'guardianship', vary depending on the context in which it is used.[34] Prior to the Family Law Reform Act, which introduced the new terminology, 'custody' under the FLA comprised (a) the right to have daily care and control of the child; and (b) the right and responsibility to make decisions concerning the daily care and control of the child.[35] In Victoria, the definition of 'custody' in the relevant child welfare legislation, the *Children and Young Person's Act 1989* (s. 5) reflects the pre-Family Law Reform Act FLA definition. There are similar definitions in other jurisdictions, such as Queensland and Tasmania, while by contrast in the ACT, the terminology reflects the current provisions in the FLA concerning residence and contact orders. The possible implications (for example, possible confusion for families) of this current lack of fit between the ambit of Family Court 'residence' orders and children's court 'custody' orders has apparently not yet been explored. Also unexplored is the confusion that may be caused by differing application of the term 'custody' in the children's courts – in Victoria, for example, a custody order can be made in favour of the Secretary of the Department of Human Services or a third party.[36]

Q: Does the difference in terminology used in different systems cause problems, and if so, what problems and how might they be overcome?

2.24 The Family Court also has a welfare *parens patriae* jurisdiction but it appears to be limited to children of a marriage.[37] In recent years, it has almost exclusively been

used in relation to the sterilisation of young women with intellectual disabilities.[38] The States and Territories also have a *parens patriae* power (wardship), particularly evident in the area of medical decision-making, deriving from common law. New South Wales and South Australia have established Guardianship Boards to assist decision-making in cases involving medical treatment including sterilisation, and they have within their power the ability to make decisions regarding young people with disabilities. In NSW, the Guardianship Board is empowered to consider applications involving people 16 and over, while in SA, no age limit is mentioned in the legislation.[39] Other State/Territories with Guardianship Boards only have jurisdiction to make decision regarding adults. In recent years the New South Wales Supreme Court has also taken an active role in medical decision-making involving juveniles, suggesting that the inherent *parens patriae* jurisdiction of the State and Territory supreme courts has not been affected by the State and Territory child protection legislation, nor the referral of powers over children to the Commonwealth contained in the FLA.[40] In a recent decision, Austin J of the Supreme Court of NSW held, 'the whole of the *parens patriae* jurisdiction of the [Supreme] Court with respect of the wardship, custody and care of the children is unaffected by Part VII of the Family Law Act.'[41]

The Federal Magistracy

2.25 The Federal Magistrates Service is a new federal court created by the Federal Parliament under Chapter III of the Commonwealth Constitution. The Service is governed by the *Federal Magistrates Act 1999* (Cth), along with the *Federal Magistrates (Consequential Amendments) Act 1999* (Cth). The Service has been established in order to deal with a range of less complex issues currently heard by the Family Court and the Federal Court. The Service commenced operations in some locations from mid-2000.

2.26 The Federal Magistrates Service does not have any exclusive jurisdiction – it shares this with the Family Court and the Federal Court. In the area of disputes concerning children, the main issue the Federal Magistrates Service will deal with is parenting orders (both interim and final), namely: contact orders, specific issues

orders, and child maintenance orders for children over 18. Currently, the Service does not have the power to decide final, as opposed to interim, residence orders, unless the parties consent.[42]

2.27 The crucial issues for determining in which federal court a family law dispute should be heard are the complexity of the matter and, at a more practical level, the (in)ability or (un)willingness of parties to pay the more expensive legal cost applicable in the Family Court. As discussed below, these two issues may assume particular importance when child protection concerns are raised.

2.28 The legislation does provide for matters to be transferred between the courts, with the courts being required to consider, among other things, whether the Federal Magistrates Service has sufficient resources to hear and determine the matter and the interests of the administration of justice. In practical terms transfer may be less likely when the parties are unable or unwilling to pay the higher legal costs associated with Family Court proceedings, and are prepared to consent to the matter being heard by the Federal Magistrates Service.

2.29 As the Federal Magistrates Service is still in its infancy, the test to be applied to determine whether a matter is 'complex' or not is unclear at this stage. There is a resulting risk that litigants may exploit this to 'forum shop' between the two federal courts. The complexity of a case may not be initially apparent, so there is a possibility of matters being transferred after they have progressed some way down a particular court system. This raises risks of additional delay, duplication of proceedings, and cost for the parties concerned. These issues are of particular concern in cases involving child protection issues where allegations of abuse are sometimes made after the application is filed. Transfer Protocols, while facilitating the movement of cases between the federal courts once proceedings are filed, will not address the problem of litigants filing in the inappropriate court in the first place. This problem of inappropriate filing raises the prospect of yet another layer of potential systems abuse. However, the advent of any new system raises potential problems, and protocols to prevent some of the risks are still being developed.

Endnotes: Chapter 2

[1] Examples include the Law Institute of Victoria's 1997 seminar, *Contact Orders in the Family Court vs Children's Court (Family Division): Why are They Different and Why Do We Need to Know?*, and the themes of the 3rd Family Court Conference, held in October 1998, which included the empowerment and protection of children and unified court systems. See also the Australian Law Reform Commission & Human Rights and Equal Opportunity Commission report, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84, AGPS, 1997 ('Seen and Heard'), which recommended extension of the cross-vesting arrangements to the State and Territory children's courts and the Family Court in relation to the exercise of State and Territory care and protection and related federal family law matters. The Family Law Council has also released a discussion paper on the project topic: *The Care, Support and Protection of Children: the Interaction Between the Family Law Act and State and Territory Child and Family Services Legislation*, Discussion Paper 1: Principles and Minimum Standards (1998); Linda Dessau, 'A Unified Family Court', Third National Family Court Conference, Hotel Sofitel, Melbourne, October 1998.

[2] The Constitution s. 109. Application of s. 109 in the family law context was dealt with recently in the High Court decision of *AIFS v AMS* (1999) 24 Fam LR 756, where an aspect of the case was whether s. 35 of the *Family Court Act 1975* (WA) was inconsistent with s. 63F of the *Family Law Act 1975* (Cth) ("FLA") and, if so, rendered invalid by s. 109 of the Constitution to the extent of the inconsistency.

[3] *Commonwealth Powers (Family Law – Children) Act 1986* (NSW), *1986* (Vic), *1990* (Qld), and the *Commonwealth Powers (Family Law) Act 1986* (SA), *1987* (Tas).

[4] Section 3(1) of all the above Acts.

[5] Section 3(2) of all the above Acts.

[6] See, eg, John Seymour, 'The Role of the Family Court Act in Child Welfare Matters', *Federal Law Review* 1, 1993, pp. 20-24.

[7] The Family Court has a 'welfare' jurisdiction under s. 67ZC of the FLA.

[8] *Children and Young Persons Act 1989* (Vic); *Children (Care and Protection) Act 1987* (NSW), (note updating legislation: *Child and Young Persons (Care and Protection) Act 1998* (NSW) is expected to be proclaimed in late 2000); *Child Protection Act 1999* (Qld); *Family and Community Services Act 1972* (SA) and *Children's Protection Act 1993* (SA); *Child Welfare Act 1947* (WA), *Community Services Act 1972 (WA)*, *Family Court Act 1997* (WA) (note updating legislation: *Family and Children's Services Bill 1999*); *Children and Young Persons and their Families Act 1997* (Tas); *Children and Young People Act 1999* (ACT) *Community Welfare Act 1983* (NT).

[9] Department of Human Services (Vic); Department of Community Services (NSW); Department of Families, Youth and Community Care (Qld); Department of Human Services (SA); Department for Family and Children's Services (WA); Department of Health and Human Services (Tas); Department of Education and Community Services (ACT); Department of Community Services (NT).

[10] Action here means court action. Council recognises however that a great deal of child protection work never reaches the court system.

[11] *Children and Young Persons Act 1989* (Vic) s. 63.

[12] *Children (Care and Protection) Act 1987* (NSW) ss. 10 and 72.

[13] *Children's Protection Act 1993* (SA) s. 37.

[14] The exceptions are Victoria and WA, where there is no mention made of 'best interests' or 'welfare' principles being paramount, although a 'best interests' standard appears to be implicit in the interpretation of the relevant legislation. There are, however, plans to replace WA's current legislation, the *Child Welfare Act 1947*, with a new Act in which the 'best interests' principle will be express.

[15] Under s. 65C of the FLA a parent, the child, or any other person concerned with care, welfare and development of the child may apply for a parenting order in the Family Court.

[16] See para. 3.10.

[17] Eg in Victoria, the *Children and Young Persons Act 1989* provides that the court may make conditions to orders in all cases except Guardianship to Director-General orders, where no such provision is made (ss. 106-9).

[18] *Bennett and Bennett* (1991) 14 Fam LR 397, 402-406; *Re K* (1994) 17 Fam LR 537, 549-51.

[19] *Re K* (1994) 17 Fam LR 537, 549-51.

[20] *Marriage of B and R* (1995) 19 Fam LR 594, 628-9.

[21] The role varies substantially from jurisdiction to jurisdiction, and may depend on factors such as the age of the child.
[22] *Re K* (1994) 17 Fam LR 537, 555-9.
[23] In certain circumstances, the cost of a child representative may be borne by the parties. For example, in *In the Marriage of Telfer* (1996) 20 FLR 619, it was held that the length and cost of the proceedings had been exacerbated by the parties conduct and this fact, together with the finite resources of legal aid, made it appropriate for the parties to bear the child representative's costs.
[24] *M v M* (1988) 166 CLR 69, 77.
[25] The term 'unacceptable risk' originally arose in relation to child sexual abuse in *M v M* (1988) 166 CLR 69, 77 but also applies to 'other risks of harm': *A and A* (1988) FLC 92-800, 84,994-5.
[26] A 'court of record' is one in which proceedings are recorded and available as evidence of fact. As a consequence, the court's decision is also recorded and may be reported.
[27] At this stage Queensland, Tasmania, the ACT and New Zealand have passed transfer legislation, and Victoria, SA, NSW and the NT intend to pass legislation by the end of 2000. WA is likely to introduce similar legislation as part of a new Act, though it is unclear when this is to occur.
[28] *Child Protection Amendment Act 2000* (Qld) s. 43.
[29] *Children's Court (Appointment of President) Act 2000* (Vic).
[30] FLA Part VII, Division 6, s. 65C.
[31] The Constitution s. 109. See above ch. 2, n. 2.
[32] Section 69ZK has its origins in the *Law and Justice Legislation Amendment Act 1992* (Cth) which introduced an amended version of s. 60H (corresponding to what is now s. 69ZK). However, the Act provided in substance that the amended version of s. 60H would only apply in States where a proclamation has been made to that effect. In the absence of such a proclamation, the former version of s. 60H remained operative. A proclamation has been made in respect of Tasmania, Victoria and NSW and, by virtue of the constitutional Territories power, in the ACT and NT. Hence, in those States where a proclamation has not been made, the original s. 60H remains in force. For a detailed discussion of this issue see Australian Family Law, Butterworths loose-leaf service paras [s. 69ZK.1] – [s. 69ZK.12].
[33] FLA s. 64B(2)(a).
[34] Anthony Dickey, *Family Law* 3rd edn, LBC Information Services, Sydney, 1997, pp. 321-7.
[35] Former s. 63E(2) of the FLA.
[36] *Children's and Young Persons Act 1989* (Vic) ss. 96-105.
[37] For a discussion of the Family Court's *parens patriae* jurisdiction see Seymour, above ch. 2, n. 6, pp. 10-32.
[38] *Re Marion* (1992) 175 CLR 218.
[39] For a discussion of the State and Territory *parens patriae* jurisdiction in relation to medical procedures on children see *Sterilisation and Other Medical Procedures on Children: A Report to the Attorney-General prepared by the Family Law Council*, Family Law Council, November 1994, para 1.02.
[40] See John Eades, 'Parens Patriae Jurisdiction of the Supreme Court is Alive and Kicking' *Law Society Journal* 38, 2000, p.52.
[41] *DoCS v Y* [1999] NSWSC 644, 30 June 1999 (Austin J).
[42] Amendments to allow the Federal Magistrates Service to make final residence orders are contained in the Family Law Amendment Bill 2000, currently before Parliament.

CHAPTER 3: JURISDICTIONAL OVERLAPS: FAMILY VIOLENCE AND CHILD PROTECTION

> *We have a ridiculous fragmentation of jurisdictions between children's courts and family courts.*[1]

3.1 In Chapter 2, the Commonwealth and State and Territory legislative and structural regimes were described. In this Chapter, the issue of overlapping jurisdiction between the State and federal legislative regimes is discussed, with the focus being on family violence orders and cases involving child protection issues. Two central questions are addressed: (1) why do jurisdictional overlaps arise in the area of family law?; and (2) what problems do they create, both for the courts and the families involved?

FAMILY VIOLENCE

3.2 Jurisdictional overlaps are a common occurrence in the area of family violence and the application of family violence orders. As a result of inter-governmental agreement, the Family Law Reform Act introduced a new Division 11 to the FLA, to resolve inconsistencies between FLA contact orders and State and Territory family violence orders, and State and Territory legislation was also amended to complement the changes to the FLA. The new provisions sought to ensure that the Family Court and the State and Territory magistrates' court would know of the orders made within the other court system. However, the possibility of inconsistent orders still exists where one court orders contact while another court prohibits it. Section 68K of the FLA states,

> In considering what order to make, the court must, to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration, ensure that the order:
> (a) is consistent with any family violence order; and
> (b) does not expose a person to an unacceptable risk of family violence.[2]

Hence, s. 68K permits an inconsistent order providing it is in the best interests of the child and does not expose a person to an 'unacceptable risk' of family violence.

3.3 If an inconsistent order is made, Division 11 and, in particular, s. 68R applies. Section 68R sets out the rather onerous requirements the Family Court must fulfil if it proposes to make a contact order that is inconsistent with a family violence order.[3] The court must explain, in language likely to be readily understood, to the applicant and the respondent, or the person against whom the family violence order is directed and the person protected by the family violence order if those persons are not the applicant or respondent, the purpose of the contact order, the obligations the order creates, the consequences of failure to comply, and the court's reasons for making an order inconsistent with a family violence order.[4] If a s. 68R contact order is inconsistent with a family violence order, the s. 68R order prevails and the family violence order is invalid to the extent of the inconsistency.[5]

3.4 Section 68R must be read with reference to s. 68Q which sets out the purposes of Division 11, which include ensuring that Division 11 orders do not expose people to family violence, as well as respecting the child's right to regular contact where 'contact is diminished by the making or variation of a family violence order.'[6] Section 68J(1) of the FLA imposes a duty on a party to the proceedings to inform the court of any family violence order that applies to the child or a member of the child's family.[7] Failure to inform the court of a family violence order does not, however, affect the validity of any Family Court order.[8]

3.5 While the FLA permits contact orders to be inconsistent with State and Territory family violence orders, providing ss. 68K and 68R are complied with, s. 68T of the FLA states that in the course of making or varying a family violence order, a State and Territory court may make, revive, vary, discharge or suspend a FLA contact order.

3.6 While the FLA contains quite detailed procedures for the Court to follow when the possibility of inconsistent orders arises, the written law is not necessarily the same as the law in practice. In a 1999 study of the practical impact of the Family Law

Reform Act family violence amendments by Rhoades, Graycar and Harrison,[9] they found that a number of judges appeared to have 'a limited knowledge of the existence of Division 11 and s. 68K'.[10] Many of the solicitors interviewed noted that judges seemed unaware of s. 68K.[11] In addition, when reviewing unreported judgments the Interim Report found that Division 11 was rarely referred to and none of the judgments expressly mentioned s. 68K. Hence, while the 1995 family violence reforms were drafted to deal with overlap between State and Territory legislation and the FLA, we cannot be certain that the procedures are being applied in a manner that prioritises the child's best interests as the paramount consideration, or applied at all. However, this problem may not arise frequently in practice. In another report dealing with Part VII of the FLA, it was found that inconsistent orders may actually be quite rare due to the increasing tendency in most jurisdictions to exempt court ordered contact from the operation of family violence orders.[12]

3.7 The current position regarding family violence orders, as described above, was possibly exacerbated by the policy shift in the Family Law Reform Act towards the rights of the child and, particularly, the right of the child to know and be cared for by both parents, and the right of the child to contact with both parents.[13] Independent of the policy behind giving contact orders precedence over family violence orders, the fact that inconsistent orders can be made may result in confusion for courts, parties and practitioners.

Q: Has the legislation worked in addressing the problems? If not, why not?

CHILD PROTECTION

3.8 Protective issues are predominantly the domain of the State and Territory children's courts, but they may still arise when the Family Court exercises its jurisdiction to make parenting orders. For example, a parent in a Family Court proceeding may allege that the other parent has been violent towards the child. Conversely, in exercising their power to make protection orders, State and Territory children's courts sometimes make orders on issues that could also be the subject of

parenting orders made by the Family Court. For example, in making a protective order, a children's court may make orders regarding access and custody.

3.9 Where jurisdictional overlaps arise, the FLA makes clear that orders pursuant to State and Territory child welfare laws take precedence over Family Court orders. If there are pre-existing children's court orders regarding a child, the jurisdiction of the Family Court is suspended until the expiration of the State and Territory orders[14] (see para 2.21 above). The jurisdiction of the Family Court is unfettered if no orders have been made pursuant to State and Territory child welfare laws, but if it appears that such orders may be made, the Family Court may adjourn proceedings before it in relation to that child.[15] In cases where children's court orders are imminent, adjournment would seem likely given that pre-existing Family Court orders are overridden by subsequent children's court orders.[16] In contrast, in the area of family violence, contact and residence orders made under the FLA can be used to defeat State family violence orders.[17]

CURRENT APPROACHES TO DEALING WITH INCIDENTS OF OVERLAP IN CHILD PROTECTION

Notifications of abuse under the FLA

3.10 In order that State and Territory child welfare authorities are alerted to Family Court proceedings where protective issues have arisen, the FLA contains several provisions regarding the notification process to be followed when abuse allegations are made within the Family Court as follows:

> **Section 67Z: Where party to proceedings makes allegation of child abuse**
>
> (1) This section applies if a party to proceedings under this Act alleges that a child to whom the proceedings relate has been abused or is at risk of being abused.
>
> (2) The party must file a notice in the prescribed form in the court hearing the proceedings, and serve a true copy of the notice upon the person who is alleged to have abused the child or from whom the child is alleged to be at risk of abuse.
>
> (3) If a notice under subsection (2) is filed in a court, the Registrar must, as soon as practicable, notify a prescribed child welfare authority.

(4) In this section:

prescribed form means the form prescribed by the Rules of Court.

Registrar means:

(a) in relation to the Family Court, or the Family Court of Western Australia—the Registrar, or a Deputy Registrar, of that Court; and
(b) in relation to any other court—the principal officer of that court.

Section 67ZA: **Where member of the Court personnel, counsellor or mediator suspects child abuse etc.**

(1) This section applies to a person in the course of carrying out duties, performing functions or exercising powers as:

(a) a member of the Court personnel; or
(b) a family and child counsellor; or
(c) a family and child mediator.

(2) If the person has reasonable grounds for suspecting that a child has been abused, or is at risk of being abused, the person must, as soon as practicable, notify a prescribed child welfare authority of his or her suspicion and the basis for the suspicion.

(3) If the person has reasonable grounds for suspecting that a child:

(a) has been ill treated, or is at risk of being ill treated; or
(b) has been exposed or subjected, or is at risk of being exposed or subjected, to behaviour which psychologically harms the child;

the person may notify a prescribed child welfare authority of his or her suspicion and the basis for the suspicion.

(4) The person need not notify a prescribed child welfare authority of his or her suspicion that a child has been abused, or is at risk of being abused, if the person knows that the authority has previously been notified about the abuse or risk under subsection (2) or subsection 67Z(3), but the person may notify the authority of his or her suspicion.

(5) If notice under this section is given orally, written notice confirming the oral notice is to be given to the prescribed child welfare authority as soon as practicable after the oral notice.

(6) If the person notifies a prescribed child welfare authority under this section or subsection 67Z(3), the person may make such disclosures of other information as the person reasonably believes are necessary to enable the authority to properly manage the matter the subject of the notification.

Section 91B: Intervention by child welfare officer

(1) In any proceedings under this Act that affect, or may affect, the welfare of a child, the court may request the intervention in the proceedings of an officer of a State, of a Territory or of the Commonwealth, being the officer who is responsible for the administration of the laws of the State or Territory in which the proceedings are being heard that relate to child welfare.

(2) Where the court has, under subsection (1), requested an officer to intervene in proceedings:

> (a) the officer may intervene in those proceedings; and
> (b) where the officer so intervenes, the officer shall be deemed to be a party to the proceedings with all the rights, duties and liabilities of a party.

The notification provisions are essentially to the effect that if child protection issues arise in the context of Family Court proceedings, the Family Court must notify the relevant child welfare authority.[18] The FLA provides for court personnel (s. 67ZA) and parties (s. 67Z) to notify relevant State and Territory child welfare authorities of any reasonable suspicion that a child has been abused or is at risk of abuse. A judge may also request the intervention of the child welfare authority (s. 91B). Significantly, however, a judge cannot compel such intervention.

3.11 Notification procedures thus provide State and Territory child welfare authorities with the opportunity to assess protective issues arising in Family Court cases, so that an informed decision can be made as to whether to intervene in the proceedings or have the matter proceed at a State level. Following notification and investigation, a State and Territory child welfare authority has a number of options. First, it may initiate children's court proceedings, with the result that Family Court proceedings will be curtailed (see para 3.9 above). Second, it may intervene in the Family Court proceedings as a party, or as a friend of the court (*amicus curiae*). Third, it may decide to do nothing. While State and Territory child welfare authorities should respond to the Family Court regarding action on notifications, they are not obliged to take any action (apart from considering the notification), or to give reasons for a decision not to act.[19] Whether or not a State and Territory child welfare authority intervenes in Family Court proceedings, the authority retains the power to seek orders in the children's court at any time, including after Family Court orders have been made. This raises another possible problem:

> 'the opportunity for forum shopping, with parties being able to re-litigate residence or contact issues in the FCA once juvenile court orders have expired. In addition, there is nothing to prevent a State welfare authority, dissatisfied with an FCA outcome, from making an application in the juvenile court rather than pursuing an appeal from the decision in the FCA.'[20]

The exception is Western Australia: if a child is made a ward of the State by the Family Court of Western Australia exercising its protective jurisdiction and the

Department is unhappy with that decision, an appeal would have to be made to the Supreme Court of Western Australia.

3.12 There is evidence that many problems exist regarding the follow-up by child welfare authorities of Family Court notifications.[21] Empirical evidence suggests that Family Court notifications very rarely result in any action on the part of State and Territory child welfare authorities, in the Family Court or the children's courts.[22] The suggestion is frequently made that child welfare departments treat allegations of abuse that arise during Family Court proceedings as being brought falsely for tactical reasons, or consider them to be less serious than those brought in public law cases.[23] Thea Brown and her colleagues found that in Victoria in 1994-6, only 50 per cent of cases referred to the State child welfare authority were assessed,[24] responses took an of average 42 days to arrive at the Family Court (double the time suggested in the Victorian Protocol between the Family Court and the child protection authority),[25] and many were cryptic and inconclusive.[26] Nevertheless, Brown and her colleagues claim that the false allegation rate was approximately 9 per cent, the same as that for all abuse allegations.[27]

Q: How many notifications (s. 67Z and s. 67ZA) issue, from which Registries and what are the responses from the child welfare authorities?

Q: Is there a need for some type of filtering system, before notifications are made to the child welfare authorities? If so, how would such a system operate?

Child Protection Protocols

3.13 Given the potential for duplication of proceedings as discussed above, in most States and Territories the Family Court and the relevant State and Territory welfare authorities have entered into protocols which assist in coordinating the work of all those involved in the area of child protection.[28] (A copy of the Victorian protocol can be found in Appendix C). The protocols are designed to assist cooperation, clarify procedures and improve decision-making in cases that may occur in either or both

Commonwealth and State and Territory jurisdictions. They cover: the role of the police; the powers and jurisdiction of the Family Court; notifications from the Family Court to the State and Territory child protection authorities; the procedures for referring cases of suspected child abuse and neglect to the child protection authorities; action by the child protection authorities upon receipt of a notification; information exchange; case conferences and management; response to the Family Court by the child protection authorities following investigation; inspection and photocopying of child protection authorities' case file material subpoenaed by the Family Court; and dispute resolution processes.

3.14 The Protocols were created to facilitate smooth working relationships in cases that may be dealt with at either State and Territory or federal level. For example the Victorian Protocol provides, among other things, that when the Department of Human Services is deciding in which court a case should proceed, the Department is required to consider matters including: whether there is an appropriate carer or parent willing to apply for Family Court parenting orders; which court is likely to provide the quickest and most effective solution to secure the welfare of the child; and whether protective concerns can be alleviated by Family Court orders.[29] The protocols are vital to ensuring cooperation between the different personnel. However, they cannot always prevent instances of overlap and duplication, and recent research, discussed at para 3.21 below, suggests that at least the Victorian Protocol is infrequently and inconsistently applied.[30]

CASE 3

The child T lived with the mother, the mother's de facto R, T's brother S and the child of R and the mother, C. T's father resided with the paternal grandparents and had regular contact with T and S. The child T disclosed to the paternal grandmother and the father that R had sexually interfered with her. The Police charged R. The father applied for residence orders in the Family Court in respect of T and S. A Child Representative was appointed. The mother opposed the orders sought by the father and denied that R had abused T. She alleged that the father might have been the perpetrator of the abuse against T. The child protection authority informed the mother that if R were to remain residing with her and the children, the children would be apprehended.

The father admitted having sexually interfered with his younger sister before the marriage to the mother. The mother alleged that the break down of the marriage had largely been caused by the father doing this again during a period of time that the sister was staying in their household.

The child protection authority offered to provide counselling for the children and also for the father and the mother and indicated that they would be monitoring the family closely. The contact of the father with the children was to be supervised on an interim basis by the paternal grandparents. R was injuncted from having any contact with T and S. The child protection authority required input into the interim orders that were made and agreed to reference being made to the counselling and the monitoring by them being included in those orders but declined to intervene in the proceedings. The proceedings were adjourned for a period of 6 months for the trial of R, to enable the counselling to take place and to monitor the father's contact to determine the need for ongoing supervision.

Shortly prior to the resumed hearing it became apparent that the father had not attended counselling as ordered. The child T was now saying that it was the father who had been abusing her during contact visits and not R. In addition the child S had allegedly disclosed to a counsellor that the father had abused him. The child protection authority worker who investigated this disclosure was not aware of the status of the Family Court proceedings, the existence of the Child Representative, or the fact that a Court expert psychiatrist had carried out an assessment of this family and the previous abuse allegations. The Family Court was only made aware of these and other developments in the matter as a consequence of enquiries made by the Child Representative in preparation for the resumed hearing of the matter notwithstanding the reference to monitoring by the child protection authority in the interim Orders. This caused delay in the implementation of independent supervisors for the contact between the father and the children and delay in the commencement of further assessment by the Court Expert. It also meant there was delay in responding to the father's failure to attend counselling.

CONSEQUENCES OF OVERLAPS FOR CHILDREN AND FAMILIES

3.15 There is general agreement that duplication of proceedings across two different court systems is likely to be highly destructive in its consequences for children and their families. Of particular concern is that 'systems abuse' (meaning 'the preventable harm [that] is done to children in the context of policies and programs which are designed to provide adequate care or protection')[31] may result from the lack of

coordination between jurisdictions.[32]

3.16 According to the 1997 Australian Law Reform Commission ('ALRC') and Human Rights and Equal Opportunity Commission ('HREOC') Report *Seen and Heard: Priority for Children in the Legal Process* ('*Seen and Heard*'), the current lack of coordination between jurisdictions 'may often result' in duplicate proceedings, delays in deciding a child's future, the possibility of repeat interviews for the child, and a potential increase in the risk of further abuse or the creation of situations of damaging uncertainty for the child.[33] By way of example, the report cited one case where a contested custody matter in relation to two siblings was listed for hearing in a rural registry of the Family Court on the day before a care and protection application was due to be heard in the Magistrates Court in relation to one of the children. Committal proceedings for criminal charges against the alleged abusing parent were listed for the same day as the care and protection proceedings.[34] When it heard the appeal the Full Court of the Family Court did not comment adversely on the arrangements. The report went on to say that anecdotal evidence indicates that these circumstances are not unusual.[35]

3.17 Steps have been taken under the FLA to protect children from multiple or damaging medical, psychological and psychiatric examinations, though some concerns remain. Section 102A of the FLA provides that where a child is subject to such examination without the leave of the court, the evidence resulting from the examination which relates to the abuse of, or risk of abuse of, the child is not admissible. Presumably the inadmissibility of examinations without leave of the court deters parties from proceeding with them. Section 102A does not however, prevent multiple *interviews* of children by police, child protection workers, and social workers, does not restrict the number of examinations for the purpose of providing evidence about matters other than abuse, and does nothing to restrict the number of interviews or examinations that a child subject also to children's court proceedings must attend. Nicholson CJ and Fogarty J drew attention to these limitations in their decision in *Separate Representative v JHE and GAW*: 'It may be that some further legislative attention should be given to this section and in particular prohibiting examinations without leave of the court'.[36] Recent proposed amendments to the FLA

include limitations on children swearing affidavits and appearing as witnesses, stipulating that children must not swear affidavits or appear as witnesses in the Family Court or in another court exercising jurisdiction under the FLA, unless the court makes an order allowing them to do so.[37] These provisions essentially mirror current Rules of Court (Order 23, Rule 5(5) and 5(6)).

Q: Should any further measures be taken to reduce multiple examinations of children for the purpose of court proceedings? If so, what?

3.18 Although anecdotal evidence of jurisdictional overlap and systems abuse can be found in reports such as *Seen and Heard*, there is little systematic empirical evidence regarding the frequency with which jurisdictional overlaps occur. The evidence currently available is now considered. As the evidence is drawn mainly from Victoria-based research, there is some question surrounding the general application of the findings throughout Australia.

Child Protection and the Family Court

3.19 While the divide between State and Territory and federal child welfare jurisdiction appears to be dictated by the Constitution, and clarified under the FLA and via the Protocols, recent Victorian research suggests that child protection cases are part of the 'core business' of the Family Court. The Family Court recently introduced a special case management system for cases in which there are allegations of child abuse (the 'Magellan List'), evidencing that such cases cause serious problems for the Family Court, children and their families. Research by Thea Brown and colleagues found that cases involving allegations of child abuse in Victoria and the ACT are not solely the concern of the Children's Court, and in fact make up a proportionally small, yet significant, percentage of Family Court cases. [38] In particular, Brown and her colleagues argue that cases in which there are allegations of child abuse are part of the 'core business' of the Family Court and, as such, the Court has developed considerable expertise in the area.[39] The study found that in the Family Court only 3% of total applications and 5% of applications involving children's

matters in 1994-6 included allegations of child abuse.[40] However, at what could be described as the mid-point of court proceedings – the Pre-Hearing Conference – such cases represented one half of the total children's matters cases. At the end point they had subsided to one third of children's matters cases.

3.20 The Brown et al study also suggests that there is a tendency for cases to be 'referred to the Family Court'[41] by the Victorian and ACT child protection services, 'who chose to do so rather than handle the matter themselves, thereby underlining the movement of the [Family] Court into the child protection services system.'[42] This view is supported by recent research conducted in Victoria by Belinda Fehlberg and Fiona Kelly, involving the tracking of 42 cases involving allegations of child abuse heard in both the Melbourne Children's Court (in 1997) and in the Family Court of Australia. Preliminary findings from this study indicate that the most common outcome of the cases studied was for the Department of Human Services – the Victorian child protection authority - to withdraw from Children's Court proceedings because a 'viable carer' had been identified by protective workers and that carer had obtained, applied for, or was willing to apply for Family Court orders.[43] Fehlberg and Kelly argue that this movement of cases from the Children's Court to the Family Court appears to be for three possible reasons: (1) a belief that Family Court orders offer more stability and finality than orders of the Children's Court; (2) the speed with which cases could be 'resolved' in the Family Court, both for the parties and the Department; and (3) encouraging a viable carer to apply for Family Court orders allowed the Department to take a far more secondary role than it would be obliged to take in Children's Court proceedings, where it is always the applicant.

3.21 Given that both the Children's Court and the Family Court are heavily involved in cases involving allegations of child abuse, coordination and communication between the two is essential. However, the Fehlberg and Kelly study found a lack of communication and coordination between the Family Court and the Melbourne Children's Court, and between the Family Court and the Victorian child protection authority, as well as a failure to apply the Victorian Protocol consistently or at all.[44] This resulted in at least one case of tandem proceedings, and several cases where coordination between the various bodies was clearly lacking. Fehlberg and

Kelly contrast two cases of overlapping jurisdiction in which the protective concerns arose in the context of a parental dispute over residence and/or contact, as follows:

CASE 4

Case 4 involved a young girl ('C') involved in an ongoing dispute between her parents, where parental conflict over contact became the main basis for protective concerns. The parents separated in 1996, though the Victorian child welfare authority ('the Department') involvement had begun in 1994 after the mother alleged that the father had sexually abused C and was violent towards the mother. Neither of these claims was substantiated, but C was placed on a six month Supervision Order to remain with her parents. After the parents separated, the father applied to the Family Court for residence. The mother subsequently filed a Form 66 - Notice of child abuse or risk of child abuse – in the Family Court, alleging sexual abuse by the father. Family Court orders in 1997 gave the father supervised access. Following the 1997 Family Court orders, the mother made several more abuse notifications, and the mother refused the father contact. In November 1997, after several months of continued notifications and frustration of contact, the Department issued a protection application by apprehension and C was placed in a community placement. Family Court proceedings were effectively suspended at this point. For the next two years, Children's Court proceedings continued. Department workers were of the view that 'whilst the Family Court is the proper jurisdiction to settle questions of custody … in this case there is a clear basis for concern in respect of both parents … and a Children's Court order will be a more appropriate source of support for C.' After several months of Children's Court involvement C was returned to the care of her mother, with the condition that the mother not talk about the Family Court action in the presence of C. By late 1998, and after little real progress, Department workers began talking of returning the matter to the Family Court in order to secure C's 'long term needs'. This was despite continuing notifications, frustrated contact, and increased violence between the parents during handovers. In August 1998, the Department revoked its Children's Court order in relation to C, and the next day the father filed for residence in the Family Court. The case reached a final hearing in the Family Court in May 2000, but the file was reactivated in the Family Court in August 2000.

CASE 5

Case 5 involved a young boy ('P') caught up in his parents' acrimonious separation. Separation occurred in 1990, the first Family Court orders were made in 1992, and the final court decision (in the Melbourne Children's Court) was in March 1998. The Department began involvement in 1995, following three years of Family Court hearings, when the mother filed a Form 66 – Notice of child abuse or risk of child abuse – in the Family Court accusing the father of sexually abusing P since 1992. A Department worker was allocated at this point. The abuse allegations were thoroughly investigated on more than one occasion, but never substantiated. Despite a lack of substantiation, the mother continued to frustrate contact and began to isolate P (eg, keeping him home from school, continually taking him to see psychologists and psychiatrists for assessment, and discouraging P from developing a relationship with his father). Due to this behaviour, the Department remained involved, believing that the parents' ongoing conflict and the mother's isolation of P was exposing P to emotional harm. Throughout this time, Family Court proceedings regarding contact continued. After two more years of Family Court action, (including the mother being found in contempt of court for failing to abide by contact orders), the Department made a protection application in the Children's Court on the basis that Family Court proceedings 'were unlikely to reach a resolution'. This decision was reached after Department consultation with Family Court Counselling and several medical professionals involved in the case. In the Children's Court, P was initially placed on a Supervision Order to reside with his mother, but after the mother continued to refuse access, P was moved to his father's care. The final result of the case was a 12-month Supervision Order with P residing with his father, and having supervised access with his mother.

3.22 Fehlberg and Kelly argue that both cases presented the risk of duplication and

thus an opportunity for the Victorian child protection authority ('the Department'), the Family Court, and the Children's Court to coordinate in a manner that would reduce such duplication. However, the cases were approached in contrasting manners and, Fehlberg and Kelly argue at least partly as a result of this, represent opposite ends of the spectrum in terms of results. The second case (Case 5) was one in which a Department worker who seemed particularly committed to the case took decisive action, in accordance with the Victorian Protocol, once it became apparent that Family Court proceedings were unlikely to reach a resolution. The Department coordinated a meeting between itself and the Family Court Counselling Service which determined that the matter was best dealt with by the Children's Court. While the matter ultimately returned to the Family Court, the decision made at the case conference solved the immediate protective concern and paved the way for further coordination. In contrast, in the first case (Case 4) the matter remained in the Family Court, no conference was called, no coordination was attempted and, at the conclusion of the study, no resolution had been reached.

3.23 The Fehlberg and Kelly study did find that cases of serious overlap (in terms of duration of the case, lack of communication between authorities, and consequences for the parties) were infrequent, and were likely to have been complex cases wherever they were heard. Overlapping jurisdictions, however, added to this complexity by providing the parties with an opportunity to further extend their dispute. Fehlberg and Kelly argue that these cases consumed a considerable amount of court time and resources across two court systems and were serious enough in their consequences for children to warrant concern, despite their being few in number.

3.24 As stated earlier, the empirical evidence discussed above derives almost exclusively from Victoria. There is anecdotal evidence that a similar pattern of overlap can be found in other States and Territories. It has been suggested that issues of overlap between the NSW Children's Court and Family Court are a recurrent problem.[45] In particular, there is a concern that if the NSW child protection authority does not intervene or remove a case involving allegations of child abuse from the Family Court, a parent may be left to fund what is effectively a child protection case in the Family Court. It has also been suggested that jurisdictional overlaps arise in the

Northern Territory.[46] It is apparently not uncommon in the NT for the Territory Family Matters Court (a magistrates' court) to move cases to the Family Court due to the Family Court being seen to have a specialist jurisdiction. It is therefore likely that the issue of jurisdictional overlaps between the State and Territory children's courts and the Family Court is not particular to Victoria, and in fact creates problems in other jurisdictions.

Q: Have similar problems arisen elsewhere? If so, to what extent?

3.25 Given the potential and actual duplication and overlap arising from the constitutional division of powers between the Commonwealth and the States and Territories, and the dangers it poses for the children involved in the protection system, there would appear to be a need for a more consistent and coherent legislative, judicial and practice framework for the protection of children. Options for reform are considered in Chapter 4.

Q: Is there a difference between the nature of cases involving allegations of child abuse in the children's courts and the Family Court? If so, what are the differences?

Endnotes: Chapter 3

[1] Chief Justice Nicholson, unpublished address *"Access to Justice in the 21st Century"* delivered in Perth on 21 October 1999.
[2] FLA s. 68K.
[3] FLA s. 68R.
[4] FLA s. 68R(3).
[5] FLA s. 68S(1). This is consistent with s. 109 of the Constitution under which federal laws prevail over inconsistent State laws to the extent of the inconsistency.
[6] FLA s. 68Q.
[7] FLA s. 68J(1). A person who is not party to the proceedings but is aware of a family violence order may, subject to the Rules of the Court, inform the Court of the order: s. 68J(2).
[8] FLA s. 68J(3).
[9] Helen Rhoades, Regina Graycar and Margaret Harrison, *'The Family Law Reform Act 1995: Can Changing Legislation Change Legal Culture, Legal Practice and Community Expectations'*, Interim Report, 1999.
[10] ibid., p. 53.
[11] ibid., p. 53.
[12] Kearney McKenzie & Associates, *Review of Division 11: Review of the Operation of Division 11 of the Family Law Reform Act to Resolve Inconsistencies Between State Family Violence Orders and Contact Orders Made Under Family Law*, February 1998, p. 16.
[13] FLA s. 60B(2).
[14] FLA s. 69ZK(1), see para 2.21.

[15] FLA s. 69ZK(3).
[16] FLA s. 69ZK(2).
[17] For an example of when this has occurred see Dessau, above ch. 2, n. 1, 12.
[18] FLA ss. 91B, 67Z and 67ZA.
[19] This is in accordance with Protocols between the Family Court and State and Territory child protection authorities. See, eg, Protocol Between Human Services and the Family Court of Australia (1996) (Vic) paras 12.1-12.4.
[20] Dessau, above ch. 2, n. 1, p. 10.
[21] Thea Brown, Margarita Frederico, Lesley Hewitt and Rosemary Sheehan, *Violence in Families – Report Number One: The Management of Child Abuse Allegations in Custody and Access Disputes before the Family Court of Australia*, Monash University, Clayton, 1998, chs 5 & 6.
[22] ibid., p. 83.
[23] ibid., p. 81.
[24] ibid., p. 83. Similar findings were made by Penny Armytage, 'Child Protection in the Victorian Human Services Department', *Children At Risk Seminar*, Association of Family Lawyers and Conciliators, University of Melbourne Business School, 1997, cited in ibid 83.
[25] Protocol Between Human Services and the Family Court of Australia (1996) (Vic) para 8.4.2.
[26] Brown et al, above ch. 3, n. 21, p. 87.
[27] ibid., p. 81.
[28] All State and Territories, except NSW and the ACT, have Protocols between their child welfare authorities and the Family Court: Protocol between the Department of Human Services and the Family Court (1996) (Vic); Protocol Between Child Protection Board, The Department of Community Services and the Family Court of Australia (1992) (Tas); Protocol for Interaction Between the Family Court of Australia (Adelaide Registry) and the Department of Family and Community Services (1996) (SA); Protocol Between Department of Family Services and Aboriginal and Islander Affairs and the Family Court of Australia (Qld); Protocol for Interaction Between the Family Court of Australia (Darwin Registry) and the Northern Territory Department of Health and Community Services (1994) (NT). WA is currently finalising a Protocol. NSW and the ACT have been in negotiations with the Family Court in relation to formulating a Protocol for a number of years. Department restructuring and the introduction of new legislation in NSW have meant that agreement has not yet been reached.
[29] Protocol between the Department of Human Services and the Family Court (1996) (Vic), para 11.7.
[30] Belinda Fehlberg and Fiona Kelly, 'Jurisdictional Overlaps Between the Family Division of the Children's Court of Victoria and the Family Court of Australia', *Australian Journal of Family Law* 2000 (forthcoming). Details of these findings will be discussed in greater detail below.
[31] J Cashmore, J Dolby and D Brennan, 'Systems Abuse: Problems and Solutions', NSW Child Protection Council, Sydney, 1994, p. 11, cited in *Seen and Heard*, above ch. 2, n. 1, para 17.6.
[32] For examples of the kinds of systems abuse that can occur see Dessau, above ch. 2, n. 1, pp. 6-7.
[33] *Seen and Heard*, above ch. 2, n. 1, para 15.17.
[34] *In the matter of KMF and CJMcP* (unreported) Family Court of Australia, Sydney, 2 May 1995 (Lindenmayer, Finn & Joske JJ) cited in *Seen and Heard*, above ch. 2, n. 1, para 15.12.
[35] *Seen and Heard*, above ch. 2, n. 1, para 15.12.
[36] *Separate Representative v JHE and GAW* (1993) 16 Fam LR 485, 506.
[37] A new s. 100B contained in the Family Law Amendment Bill 2000 (Cth).
[38] Brown et al, above ch. 3, n. 21, p. 87.
[39] ibid., p. 87.
[40] ibid., pp. 70-1.
[41] ibid., p. 88.
[42] ibid., p. 88.
[43] Fehlberg and Kelly, above ch. 3, n. 30.
[44] ibid.
[45] Private correspondence with Professor Patrick Parkinson (notes on file with author).
[46] Private correspondence with Stewart Brown, Registrar, Family Court of Australia (NT) (notes on file with author).

CHAPTER 4: PROPOSALS FOR REFORM

4.1 In recent years, a number of proposals for reform have been put forward by various bodies and individuals. These proposals vary from complex constitutional amendments to less controversial changes in practice and administration. While there are differences of opinion as to how the issues raised in Chapter 3 are best addressed, it is evident from the proposed reforms and the accompanying debate that the current system is inadequate and in need of change. Some of the proposals put forward in recent years are considered below.

A unified federal jurisdiction

4.2 One possibility put forward for resolving current problems is the creation of a unified Family Court.[1] In particular, Justice Linda Dessau and Margaret Harrison have suggested that in order to overcome the duplication and fragmentation of the present system an appropriately resourced, unified Family Court is necessary.[2] They recommend a national court, with the integrated services presently existing in the Family Court, which would have the power to deal with all care and protection matters, adoption, juvenile crime, and civil and criminal cases where children are victims.[3] They argue that a unified Family Court should be at the highest level of trial jurisdiction, and that judges should be selected on the basis of their qualifications and professional interest in juvenile and family matters.[4] They also suggest that a unified system would be more financially sound than the current system, where duplication leads to wasted resources.[5]

4.3 A similar view was taken in the ALRC/HREOC Issues Paper, *Speaking For Ourselves: Children and the Legal Process*, in which it was suggested that the Family Court and the State and Territory care and protection systems be consolidated.[6] Consolidation would recognise that the Family Court is a specialist court in dealing with children's law, and already resolves welfare issues under its *parens patriae* jurisdiction.[7]

4.4 Unification was also canvassed in the *Seen and Heard* Report. The Report did not, however, give unification unqualified support. Concerns were expressed in relation to the delays currently experienced in the Family Court, the parent-focussed nature of the Court, and the perception that children are sometimes treated as property.[8] Further, it was recognised that a transfer of legislative power would also require transfer of service delivery responsibilities from State to federal bureaucracies.[9] This would demand a dramatic reorganisation and reallocation of funds.

4.5 To create a unified federal Family Court would require either constitutional amendment or a referral of powers by the States to the Commonwealth in relation to child care and protection. Recent history indicates that changing the constitution by referendum is a difficult proposition.[10] In order for a referendum to succeed, the majority of voters in a majority of States must vote in favour of the proposal.[11] This has only been achieved eight times in Australia's history.

4.6 The two ALRC/HREOC publications appear to implicitly accept the difficulties associated with referendums, suggesting that unification could be achieved through a referral of powers to the Commonwealth.[12] This would seem to be a more effective and immediate avenue for reform, although there are some constitutional law questions that arise in the context of referrals of power.[13] Referrals of power also present a practical difficulty in the Commonwealth-State federal balance. For instance, the *Seen and Heard* Report declared, somewhat pessimistically, that: 'A transfer of legislative authority … is unlikely at present to attract the necessary political support in all jurisdictions.'[14] However, there are examples where a reference of power has been given in the family law context. In 1988, four States referred power to the Commonwealth in relation to children's custody, access, guardianship and maintenance.[15] This enabled a more unified jurisdiction in relation to these matters for all children, whether they were children of a marriage or ex-nuptial children. Queensland referred power over these matters in 1992 but Western Australia has not. As this referral effectively underpins a unified child support scheme, the non-referral by Western Australia has meant a more disjointed model for child support in that

state. Despite these difficulties, this example does illustrate that a referral of power may offer some hope for a solution to the problems outlined in this discussion paper.

4.7 There is an additional difficulty in relation to referrals of power that cannot be ignored. A reference of power from the States to the Commonwealth in relation to care and protection of children would create a unified jurisdiction for children. However, each State and Territory maintains extensive infrastructure, typically in the form of a large government department, to administer care and protection of children. In addition, there are similar issues in relation to courts that currently deal with care and protection matters. Careful consideration needs to be given to both administrative and judicial infrastructure and its resourcing should a referral of power be made. There are instances where state infrastructure is used to implement Commonwealth law and policy, legal aid being one such example. However, the practical difficulties should not be underestimated.

Unified state family courts

4.8 An alternative to the creation of a unified federal Family Court, is an amalgamation of the Family Court with the various State courts. Chapter III of the Constitution authorises such a conferment of jurisdiction by the Commonwealth to State courts,[16] and the exercise of federal jurisdiction by the Family Court of Western Australia is an example of this. This option is in effect the reverse of a unified federal jurisdiction discussed above. In the same way as the option of a unified federal jurisdiction encounters significant practical barriers, this option would also require detailed and careful consideration of resource and infrastructure issues. For example, this option would effectively devolve federal judicial power in this area to the States, thus leaving the Family Court with no jurisdiction. Winding up a court the size of the Family Court, where judges are constitutionally protected, would not be an easy matter to carry out. The cost of embarking on such a course would need to be carefully weighed against any perceived benefits. However, in considering all options, this is one approach that would not require constitutional amendment or a referral of powers, and is further considered below.

Dual commissions

4.9 The creation of dual commissions may also be of some assistance in addressing overlap and fragmentation issues in child care and protection matters. For instance, Family Court judges could be appointed to various State courts, so that they could exercise State jurisdiction. It appears that, while there are constitutional and practical difficulties associated with a judge exercising both federal and State jurisdiction simultaneously, there do not appear to be any constitutional obstacles to the appointment of federal judges as judges of State courts, so that such judges could sit on the State court and exercise State jurisdiction in that capacity.[17] In fact, there is a precedent for dual appointments in the appointment of some Federal Court judges as judges of the ACT Supreme Court.[18] Of course, detailed consideration of issues such as which State courts would be involved, and how such dual commissions would affect the existing family law structure, would be necessary. Ad hoc appointments in particular areas of child care and protection may create further complexities in this area.

The WA Family Court model

4.10 As noted above, an example of a 'unified' jurisdiction does in fact exist in Western Australia. The Family Court of Western Australia is a State Family Court established by State legislation (the *Family Court Act 1975* (WA)) and s41 of the *Family Law Act 1975* (Cth), to exercise both State and federal jurisdiction in family law. A judge of a federal court, including the Family Court of Australia, may be appointed as a judge of the WA Family Court, and in this case would generally receive salary, allowances and entitlements under the Commonwealth appointment.[19] An appeal from a decision of the WA Family Court must be made to the Full Court of the Family Court of Australia if the WA Family Court exercised federal jurisdiction,[20] and to the Full Court of the Supreme Court of WA if the WA Family Court exercised non-federal jurisdiction.[21]

4.11 Indeed, it has been suggested that new State courts or divisions of existing State

courts, similar to the WA Family Court, be established as a possible solution to the demise of State to federal cross-vesting. For example, the "Wade scheme" would involve the appointment of all current and future judges of the federal courts (ie. the Family Court) as judges of the Federal Division of all Supreme Courts, in addition to their federal court commissions. Legislation in each area affected by *Re Wakim* would then provide that the Federal Divisions would hear matters currently unable to be heard by federal courts. Appeals would be heard by a State Court of appeal constituted by the Federal Division judges. In practical terms, federal court judges would sit in either federal or State jurisdictions as necessary, with judges acknowledging which jurisdiction is being exercised in each case or part of a case.[22] Under this scheme, it is proposed that the Commonwealth government would increase grants to the states to cover the costs of the new Federal Division, and this cost would be offset by reductions in the Federal and Family Court budgets, in light of the result of *Re Wakim.*[23]

4.12 A variation of the Wade scheme, and one that is more comparable to the establishment and constitution of the Family Court of Western Australia, would be the establishment of new State courts to which existing federal judges would be appointed, with the object being to create a duplicate of the federal court (ie. Family Court) as a State court in each State, so that both State and federal jurisdiction could be invested in each such court. This would not rely on the concept of dual commissions, as each judge would sit as a State court, and would exercise federal jurisdiction as a State court invested with federal jurisdiction.[24] This could be modified to take into account particular overlap issues in child care and protection matters. For instance, the jurisdiction of the various State and Territory children's courts, magistrates courts and the Federal Magistrates Service in child care and protection matters could be transferred to such a new court, to create a more unified, single State court in each State or Territory. Unified administrative bodies could also be created - on existing High Court authority there does not appear to be any constitutional difficulty with an administrative body performing functions conferred by both Commonwealth and State law.[25]

Cross Vesting

4.13 While cross-vesting once seemed a viable solution to problems of overlap, the

recent decision of the High Court in *Re Wakim* means that this solution is currently no longer available. In essence, the High Court struck down, on grounds of constitutional invalidity, those parts of the cross-vesting legislation that purported to vest state jurisdiction on federal courts, including the Family Court. Pre-*Wakim*, the cross-vesting scheme allowed the whole of a case to be heard in one jurisdiction when that case raised both federal and State law matters.[26] The cross-vested jurisdiction was that of superior courts, in this instance, the Family Court and the State Supreme Courts. As a result of the decision in *Re Wakim*, the State Supreme Courts continue to have "cross-vested" jurisdiction in family law matters, but the Family Court no longer has cross-vested State jurisdiction.[27] Extension of the scheme to cross-vest Family Court, Federal Magistrates Service and State magistrates court jurisdiction would have been one solution to resolving overlap issues in child protection matters. The only viable option to restore and extend the cross-vesting scheme following the decision in *Re Wakim* would be a constitutional referendum to permit the cross-vesting of State matters in federal courts, but this faces the impediment that all constitutional referendums face. Furthermore, a constitutional referendum on cross-vested jurisdiction in the area of care and protection is highly unlikely given that, in the corporations law context, the option was considered but dealt with instead by a reference of power on corporations matters, due to the difficulties involved in constitutional amendment.

Accrued jurisdiction

4.14 The demise of State to federal cross-vesting has added further complications to jurisdictional issues in family law. For instance, there is an issue regarding the accrued jurisdiction of the Family Court: its scope, whether the Court has such jurisdiction at all, and whether it may serve to fill the gap left by the decision in *Re Wakim*. These complications are clearly not limited to child care and protection issues, and are not discussed in detail in this paper, however they have inspired some recent consideration of possible reforms to Australia's court structure. There is a sense that a solution must be found as a matter of urgency, particularly in light of uncertainty surrounding the various State remedial legislation enacted to overcome some of the more serious consequences of *Re Wakim*.[28] It is important that the particular child care and protection issues outlined in this paper are taken into account in this general discussion of possible

solutions to *Re Wakim*, so that further overlap and fragmentation is not created.

4.15 Given the difficult issues arising from the decision in *Re Wakim*, one option for reform considering Australia's federal system of government is a strengthening of the current regime through procedural and practice changes.

Changes to State Legislation

4.16 One possibility worth exploring is that of amending State legislation in order to resolve overlap issues in child protection. For example, an issue that has recently arisen in Victoria is the extent of the Children's Court Magistrates' power to prevent the State child welfare authority from withdrawing from Children's Court proceedings in order that the matter can proceed in the Family Court, where the Children's Court is not satisfied that the protective concerns have been resolved. The *Children and Young Persons Act 1989* (Vic) is silent on this issue.

4.17 As noted earlier, recent Victorian research suggests that the child welfare authority frequently withdraws from protective matters once a viable carer is willing to take Family Court action.[29] This raises the possibility that protective concerns are not being adequately dealt with within either jurisdiction, especially given that State protective services usually do not become involved in Family Court proceedings. If this is the case, the question arises whether it would be possible to effectively contain jurisdictional movement by legislating at a State level to the effect that State and Territory child welfare authorities cannot withdraw if the children's court is not satisfied that the protective concern has been addressed.

4.18 A power to compel would, however, raise several fundamental issues. First, such a power would force a party to an adversarial process - here the State and Territory child welfare authority - to continue involvement against its will. Second, such a power to compel participation raises questions regarding the extent to which the judicial arm of government can exert power over the executive arm.

Coordination and Communication

4.19 As discussed in Chapter 3, many of the problems arising from overlapping jurisdictions appear to be the product of lack of communication, coordination and notification between State and Territory children's courts and the Family Court, and the Family Court and the State and Territory child welfare authorities.

4.20 Any attempt to improve communication and coordination between the two courts, and between the courts and the State protective services, must involve all organisations that deal with the children's courts and the Family Court. A useful starting point is the improvement of the current protocols between the Family Court and the State protective services, and the introduction of additional protocols between the Family Court and the State and Territory children's courts. There is also an apparent need for greater attention paid by protective workers and court staff to the protocols given evidence that, at least in Victoria, they are inconsistently and sporadically applied.[30] Steps are currently being taken in WA to improve communication between the Family Court of Western Australia, the Department of Family and Children's Services and Legal Aid Western Australia through the implementation of the 'Columbus Project'. The Columbus Project, modelled on Victoria's Magellan List, consists of a differentiated case management structure to deal with child abuse cases in the Family Court of Western Australia.[31] The Director of Court Counselling in the Family Court of Western Australia has said that,

> [An] outcome of the [Columbus] project would [be] the increased information sharing and transparency that occurs in a project of this kind. Historically the Family Court has operated in relative isolation to our principal stakeholders such as Family and Children's Services and Legal Aid. The Columbus Project would become a tangible vehicle for institutional changes in this area because it encourages inter-agency cooperation and collaboration.[32]

At an individual level, it would be desirable for child representatives to represent the same child throughout all proceedings and across jurisdictions which, at present, is not usually the case.[33]

4.21 Better exchange of information between the children's courts and the Family Court regarding matters before them could possibly be achieved by introducing a

centralised child 'participation register'. The register would include the names of all children subject to current proceedings and orders in either court. While this information should already be included on the file, the reality appears to be that it is sometimes left off. The register would be used by judges and magistrates to check at the start of each case whether the child involved in the case before him or her is, or has been, a participant in the other court. For example, if the Family Court became involved with a child it would check the registry and determine whether the child had previously, or is currently, the subject of children's court proceedings. If the child is, or has been, involved in the children's court, the Family Court could seek access to the file and would have that information even if the State and Territory child protection authority chose not to become involved in the Family Court proceedings. A participation register would mean the courts would no longer be reliant on child protection workers or the parties themselves to provide information of other proceedings. The register would therefore reduce the risk of tandem proceedings, and would provide the basis for an improved system of communication between the courts. One problem with a participation register is that if it is not compulsory to register, the system is useless. Another issue would be to ensure that privacy legislation is not breached.

4.22 Coordination and communication may also be enhanced by more uniform State and Territory child protection legislation. While this discussion paper is not primarily concerned with inter-State and Territory plurality, harmonisation at this level may assist in coordination between the State and Territory and federal systems. Moira Rayner has argued, however, that while the 'variety and state of flux of child protection … laws' is deplorable, development of national standards of professional practice in child protection could be achieved without State and Territory legislative action.[34] Rayner recommends that national legislative guidelines for child protection should not be attempted,[35] instead focussing on the wide variety of philosophical approaches to the delivery of child protection. Rayner argues that it is this, not legislative differences, which 'serve[s] to splinter' the child protection system.[36] Rayner's work alerts us to the issue that while harmonisation of State and Territory legislation may assist the States and Territories in their interaction with the Family Court, cultural differences may limit the benefits that can be obtained.

4.23 While better communication would seem to be a sensible priority for change, certain barriers to information exchange between the Family Court and State and Territory child protection authorities have arisen recently. The High Court decision of *Northern Territory of Australia v GPAO* (1999) 24 Fam LR 253 (‘*GPAO*’) considered whether the NT child protection authority could be subpoenaed to provide documents to the Family Court. The case concerned s. 97(3) of the *Community Welfare Act 1983* (NT), the NT child protection Act, which states that an authorised person shall not, except for purposes of the Act, be required to produce in court a document that has come into his [sic] possession or under his control. The issue was whether this section was rendered inoperative by the provisions of the *Evidence Act 1995* (Cth) or the FLA. The majority held that the Community Welfare Act was not rendered inoperative by either the FLA or the Evidence Act,[37] nor was s. 97(3) rendered ineffective by reason of ‘inconsistency’ under s. 109 of the Commonwealth Constitution.[38] The result was that the child protection authorities were not required to provide the Family Court with the documents requested. While *GPAO* dealt with a ‘specific and narrowly directed’ section (s. 97(3) of the Community Welfare Act),[39] it raises concerns regarding confidentiality and the wider public interest in shielding sensitive documents from being made public.

4.24 There may also be barriers to information exchange in the opposite direction, ie, where Family Court information is requested by the State and Territory child protection authority. There currently exists the potential for breach of the *Privacy Act 1988* (Cth) if FCA staff provide confidential information to State and Territory child protection departments without legislative authority. The Privacy Act places stringent restrictions on the disclosure of personal information, raising the possibility that the Court cannot disclose personal information to State and Territory child protection authorities. However, the Privacy Act does not preclude the disclosure of information if it is required or authorised by or under law.[40] Section 67ZA(6) of the FLA provides that where a Family Court counsellor, mediator or member of personnel has *made a notification* to a State and Territory child protection authority, the person may make ‘such disclosures of other information as the person reasonably believes are necessary to enable the authority to properly manage the matter the subject of the notification.’[41]

Hence, the Privacy Act restrictions appear not to apply as long as s. 67ZA(6) is brought into play via a notification. Without a notification, it is likely that the Privacy Act will apply and the State and Territory child protection authority will not be able to access Family Court information about the parties without there being a breach of the Act. From the point of view of State and Territory child protection authorities, this may be viewed as a cumbersome procedure with the added disadvantage that they are not in a position to make a notification themselves, thus placing the matter outside their control.

Professional Approaches and Attitudes: A Need for Change

4.25 Other avenues for procedural reform exist in terms of: joint professional development activities and counselling services; avoidance of multiple hearings in both jurisdictions through prompt notification and response, and timely communication generally; and, fostering a spirit of understanding of the roles to be played by each jurisdiction in looking after the best interests of the child. While several of these recommendations are captured by the Victorian Protocol between the Department of Human Services and the Family Court, there is little evidence that they are actually put into action.[42] Putting the Protocols into action may be a first step in the process towards uniting the two jurisdictions at a practical level. This process is not encouraged by recent budget cuts to the Family Court of Australia. According to the Chief Justice of the Family Court, recent budget cuts to the Court will result in cuts to Family Court counselling services in particular.[43] This could in turn result in increased reliance on State and Territory child welfare authorities to assist the Family Court.

Barriers to Change

4.26 The issue of overlapping State and Territory and federal jurisdiction will always be a controversial topic. The States and Territories are traditionally reluctant to hand over their powers to the Commonwealth, and State and Territory child protection authorities are unlikely to welcome a reduction of their powers in favour of

a unified federal system of child protection. This tendency is exacerbated by the public's unwillingness, as discussed above, to embrace constitutional amendment through the process of referendum. The political sensitivity of this issue is therefore a considerable barrier to change.

4.27 Another barrier to change is that any reform is likely to involve considerations of resource allocation in an area that already has limited resources. For example, improvements to coordination and communication are likely to be hindered by the fact that such improvements may require either federal or State resources to be used in the opposing system. Greater involvement of State child protection authorities in Family Court matters would mean State resources being used in federal cases, and improved communication between the Courts, perhaps through enhanced notification procedures, may result in the perception that federal money is being used to resolve problems that are within State and Territory responsibility.

CONCLUSION

4.28 Given Australia's constitutional framework, there is considerable scope for fragmentation and overlap in the area of child protection. Evidence suggests that this fragmentation is a problem for the courts, and the families and children participating in the process. While we do not have much evidence of the frequency of overlap and duplication, there is evidence that where overlap does occur, cases are particularly complex, consume considerable court resources, and involve particularly vulnerable children. Considering this, it is important that the issue be addressed by consideration of the numerous options for change. In light of the introduction of the Federal Magistrates Service and recent concerns about the effect of the High Court's decision in *Re Wakim*, this would appear to be an opportune time to reconsider the present family law structure in Australia as a whole, including the particular issues raised in this paper in respect of child care and protection matters.

The Family Law Council would welcome any comments on the proposals outlined in this chapter, including comments on the practical and legal issues involved in implementing those proposals, and any other possible options for addressing the issues discussed in this paper.

Endnotes: Chapter 4

[1] See *Seen and Heard*, above ch. 2, n.1, para 15.42; Linda Dessau & Margaret Harrison, 'A Unified Family Court – Does Australia Need One?' *Family and Conciliation Courts Review* (forthcoming); Australian Law Reform Commission/Human Rights and Equal Opportunity Commission, *Speaking For Ourselves: Children and the Legal Process*, Issues Paper 18, March 1996 ('Speaking for Ourselves'); *Re Karen & Rita* (1995) 19 Fam LR 528, 556 (per Nicholson CJ).
[2] Dessau & Harrison, above ch. 4, n.1, p. 19. Dessau has reiterated this view in Dessau, above ch. 2, n.1.
[3] Dessau & Harrison, above ch. 4, n.1, pp. 19-20.
[4] ibid., pp. 20-21.
[5] ibid., p. 21.
[6] *Speaking for Ourselves*, above ch. 4, n.1, para 7.64.
[7] ibid., para 7.65.
[8] *Seen and Heard*, above ch. 2, n.1, para 15.43.
[9] ibid., para 15.44.
[10] For example, the 1999 referendum to determine whether Australia should remove the Queen as head of State produced a defeat for the republican side, despite considerable republican sentiment within the electorate. However the Commonwealth Government is presently considering Constitutional amendments that would allow the Commonwealth to authorise federal courts to exercise jurisdiction conferred by states, as a means to restoring the cross-vesting schemes: Jeff Shaw, "SCAG's agreement for Constitutional amendment", *Law Society Journal* 37 (8) September 1999, pp64-65.
[11] The Constitution s. 128.
[12] *Speaking for Ourselves*, above ch. 4, n.1, para 7.66; *Seen and Heard*, above ch. 2, n.1, para 15.52. Section 51(xxxvii) of the Constitution allows the Commonwealth to make law over matters referred to it by the States.
[13] Robert Baxt, "The Wakim Decision: What should be done to overcome its impact?" *Company and Securities Law Journal* 17 (8), November 1999, p. 520; Jenny Lovric, "*Re Wakim*: an overview of the fallout", *Australian Bar Review* 19 (3), June 2000, p. 282.
[14] *Seen and Heard*, above ch. 2, n.1, para 15.44.
[15] New South Wales, Victoria, South Australia and Tasmania.
[16] In particular, s. 77(iii). See: Jan Wade, "Re Wakim - A Way Forward", *Australian Journal of Corporate Law* 11 (3), May 2000, p. 274; Dung Lam, "Case Note: Wakim", *Sydney Law Review* 22 (1), March 2000, pp. 172.
[17] However there may be a risk that the High Court will develop new principles precluding overlap in federal and state jurisdictions.
[18] Graeme Hill, "The Demise of Cross-Vesting", *Federal Law Review* 27 (3), 1999, p. 572.
[19] ibid.
[20] ss. 41(3) and 94, *Family Law Act 1975* (Cth). CCH, *Australian Family Law and Practice*, CCH Australia Ltd, paras 1-800 to 1-880.
[21] s211(3), *Family Court Act 1997* (WA).
[22] Jan Wade, "Re Wakim- A Way Forward", *Australian Journal of Corporate Law* 11 (3), May 2000, pp. 274-5.

[23] ibid., p. 275.
[24] There are some potential difficulties with these proposals. For example, there may be a risk that the High Court may develop principles precluding any overlap in the composition of federal and state courts, on constitutional grounds. There may also be issues of incompatibility arising from the conferral of non-judicial powers or functions on such a state court. Issues of appeal from such a new state court or division would also need to be addressed, as it would be necessary to split appeals between two different hierarchies in cases involving discrete federal and state matters.
[25] Graeme Hill "Cross-vesting- An update", *Ethos* (166), March 2000, p. 15.
[26] *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth); (NSW); (Vic); (Qld); (SA); (WA); (Tas); (NT).
[27] Paul Brereton "The Decline and Fall of Cross-vesting: Jurisdiction in Family Law after Re Wakim" *Australian Family Lawyer* 14 (2), Autumn 2000; p. 6.
[28] *Federal Courts (State Jurisdiction) Act 1999* (WA); *Federal Courts (State Jurisdiction) Act 1999* (Qld); *Federal Courts (State Jurisdiction) Act 1999* (SA); *Federal Courts (State Jurisdiction) Act 1999* (Tas); and *Federal Courts (State Jurisdiction) Act 1999* (Vic).
See Jenny Lovric, "*Re Wakim*: an overview of the fallout", *Australian Bar Review* 19 (3), June 2000, pp. 247-250.
[29] Fehlberg & Kelly, above ch. 3, n.30.
[30] ibid.
[31] The definition of 'child abuse' used in the Columbus Project includes physical and sexual abuse, substance abuse, psychiatric illness, domestic violence and the witnessing of domestic violence. The Magellan List does not include this final category.
[32] Dawson Ruhl, Director of Court Counselling in the Family Court of Western Australia, (private correspondence held by author).
[33] See discussion in paras. 2.7-2.8, above.
[34] Moira Rayner, *The Commonwealth's Role in Preventing Child Abuse: A Report to the Minister for Family Services*, Australian Institute of Family Studies, 1994, p. 88.
[35] ibid., recommendation 5.
[36] ibid., p. 88.
[37] *Northern Territory of Australia v GPAO* (1999) 24 Fam LR 253, 276.
[38] ibid., 267-8.
[39] ibid., 305.
[40] *Privacy Act 1988* (Cth) s. 3.
[41] FLA s. 67ZA(6).
[42] See Fehlberg and Kelly, above ch. 3, n.30, in which it is stated that in a study of 42 cases involving jurisdictional overlaps between the Victorian Children's Court and the Family Court of Australia, the Protocol was mentioned only once in the court files, and appeared to have been applied on only one occasion.
[43] Darrin Farrant, '100 Jobs May go in Family Court Cuts', *The Age*, 12 May 2000, p. 9.

APPENDIX A

Terminology

In this discussion paper some terms are used which may require explanation:

"Child" means a person under 18 years of age.

"Families" is used in a wide and plural sense. It is meant, for example, to include two-parent families, one-parent families, the involvement of grand parents and, where appropriate, the wider family circle.

"Family Court" should be taken to refer to the Family Court of Australia, the Family Court of Western Australia (when exercising federal jurisdiction) and the Federal Magistrates Service (when exercising jurisdiction under the Family Law Act), unless the context requires otherwise.

"Family law proceedings" is used in its broadest sense to include proceedings at State, Territory and Commonwealth levels and is meant to include counselling, reporting, mediation, arbitration and other processes as well as judicial proceedings. It also includes the indirect or secondary involvement of children in such proceedings.

APPENDIX C

Protocol between *Department of Human Services and the Family Court of Australia*

July 1996

Acknowledgments

Family Court

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Contents

1. Introduction **71**
2. Human Services **72**
2.5 Human Services Mission Statement for the Protection of Children and Young People 73
3. The Role of the Victoria Police **74**
4. The Family Division of the Children's Court **75**
5. The Family Court of Australia **76**
5.1 Powers of Jurisdiction 76
5.2 Limitations to Jurisdiction 76
6. Applications to the Family Court **77**
6.1 General 77
6.1 Where Allegations of Child Abuse Are Present 77
7. Notifications from the Family Court to Human Services **78**
7.1 Section 91B 78
7.2 Section 67Z 78
7.3 Section 67ZA 78
7.4 Types of Abuse Which Must Be Reported 78
7.5 Types of Maltreatment Which May Be Reported by Court Personnel 79
7.6 Definition of Court Personnel 79
8. Procedures for Referring Cases of Suspected Child Abuse and Neglect to Human Services **80**
8.1 Section 91B 80
8.2 Section 67Z 80
8.3 Section 67ZA 80
8.4 Time Lines Following Referral of 91B Orders and 67Z and 67ZA Notices 81
9. Action by Human Services upon Receipt of a Notification **82**
10. Information Exchange **83**
10.1 The Principles Which Underline the Exchange of Information between Human Services and the Family Court 83
10.2 Human Services Access to Information from the Family Court 83
10.3 Family Court Access to Information from Human Services 84
11. Case Conference and Case Management **85**
12. Response to the Family Court by Human Services Following Investigation **89**
13. Inspection and Photocopying of Human Services Case File Material Subpoenaed by the Family Court **90**
13.2 Procedures to Be Followed to Protect Information 90
14. Dispute Resolution Process **92**
Appendix 1 **93**
MEMORANDUM OF UNDERSTANDING 93
Appendix 2 **96**
RELEVANT SECTIONS OF THE FAMILY LAW REFORM ACT 1995 96
Appendix 3 **104**
RELEVANT SECTIONS OF THE CHILDREN AND YOUNG PERSONS ACT 1989 104
Note: Appendices 4-6 not included

1. INTRODUCTION

1.1 This protocol has been established to facilitate contact between Human Services and the Family Court of Australia in order to ensure that a child's needs for protection are met.

1.2 The protocol is designed to assist cooperation, clarify procedures and improve decision making in cases which may occur in either or both jurisdictions.

1.3 Providing protection for a child is a matter of paramount concern where allegations of child abuse or neglect are made, even if this disadvantages an adult. Human Services is the mandated agency to promptly initiate an investigation of these allegations with the cooperation of the Family Court in cases which also involve that court.

2. HUMAN SERVICES

2.1 Human Services has statutory responsibility pursuant to the provisions of the *Children and Young Persons Act 1989* (C&YPA) and its predecessor the *Community Services Act 1970* of the State of Victoria, in relation to child protection services for children in Victoria under the age of 17 years.

2.2 The interests of the child or young person are the paramount consideration of Human Services, Protection and Care Branch.

2.3 Human Services is authorised to accept notifications of suspected child abuse or neglect and is responsible for investigating the allegation.

2.4 If the allegation is substantiated, Human Services must take whatever action is necessary to reduce the level of risk to the child. This may include initiating a Protection Application in the Children's Court.

2.5 HUMAN SERVICES MISSION STATEMENT FOR THE PROTECTION OF CHILDREN AND YOUNG PEOPLE

2.5.1 Protective Services are provided to children and their families in order to protect children from significant harm resulting from abuse and neglect within the family unit.

2.5.2 Protective Services for children and young people are based on the principle that, normally, the best protection for the child is within the family. A broad range of services provided by, or funded by, Human Services aims to strengthen families so that children can develop within a safe physical and emotional environment.

2.5.3 Where a child / young person is assessed as being at risk within the family, Protective Services in the first instance will, in accordance with the law, take every reasonable step to enable the child / young person to remain in the care of their family by strengthening the family's capacity to protect him or her. In some cases this may involve removal of the perpetrator.

2.5.4 Where, even with support, a child / young person is not safe within the family, Protective Services will intervene and remove the child / young person until the parents are able to resume their custodial responsibilities and provide adequate care and protection.

2.5.5 Where the resumption of care by the parents is not possible, Protective Services will work towards an alternative permanent family care arrangement, or work towards an independent living arrangement depending on the age and circumstances of the child.

3. THE ROLE OF THE VICTORIA POLICE IN CHILD PROTECTION

3.1 The Victoria Police are responsible for dealing with criminal matters which arise in child abuse and neglect investigations.

3.2 Therefore, in cases where a person may have committed a criminal offence against a child, Protective Services will, in accordance with Protective Services standards and protocol between the Victoria Police and Human Services, immediately refer the matter to the police. In these cases the protective investigation will usually be planned and conducted in conjunction with the Victoria Police.

4. THE FAMILY DIVISION OF THE CHILDREN'S COURT

4.1 The Family Division of the Children's Court is empowered to hear and determine Protection Applications. When that Court finds a child or young person in need of protection it may make any one of the following protection orders:

(i) An order requiring either the child, the child's parent or, the person with whom the child is living to give an undertaking.
(ii) A supervision order.
(iii) A custody to third party order.
(iv) A supervised custody order.
(v) A custody to the secretary order.
(vi) A guardianship to the secretary order.
(vii) An interim protection order.

5. THE FAMILY COURT OF AUSTRALIA

5.1 Powers of Jurisdiction

5.1.1 The Family Court of Australia has jurisdiction under the *Family Law Reform Act 1995* to make orders in relation to parental responsibility, residence of, contact with, maintenance of, or having regard to the best interests, welfare and development of all children in Australia under the age of 18 years.

5.1.2 The Family Court in exercising that jurisdiction is obligated under the provisions of the *Family Law Reform Act* to regard:

(i) The best interests of the child as the paramount consideration in determining those issues.

(ii) The need to protect the child from physical or psychological harm.

5.2 Limitations to Jurisdiction

5.2.1 The Family Court's jurisdiction is limited by section 69ZK of the Family Law Reform Act in that is *must not* make an order in relation to a child who is subject to an order which places him / her in the custody of, or under the guardianship, care and control of, a person under prescribed child welfare law, unless:

> The order is expressed to come into effect when the child ceases to be under such custody, guardianship, care and control, or supervision, as the case may be.

5.2.2 Further, where it appears to the Family Court that another court proposes to make an order by which a child is placed in the custody of, or under the guardianship, care and control of, a person under a prescribed welfare law, the Family Court may adjourn any proceedings before it in relation to that child.

6. APPLICATION TO THE FAMILY COURT

6.1 General

Applications to the Family Court in respect of a child may be made in the following ways:

(i) By one or other of the parents.

(ii) By or on behalf of the child or by a person having an appropriate interest in the best interests of the child.

(iii) By a separate representative appointed by the Family Court to represent the child under section 68L of the Family Law Reform Act.

(iii) Under the provisions of section 91B of the Family Law Reform Act, the Court may request the intervention in the proceedings of an officer of the appropriate State welfare department (in Victoria, Human Services).

6.1 Where Allegations of Child Abuse Are Present

Section 92A of the *Family Law Act 1975* as amended by S37 of the *Family Law Reform Act 1995* (appendix 2) provides that in proceedings under the Act in which it has been alleged the child has been abused or is at risk of being abused, each of the following is entitled to intervene in those proceedings:

(i) a guardian of the child;

(ii) a parent of the child with whom the child lives;

(iii) a person who has a residence order in relation to the child;

(iv) a person who has a specific issues order in relation to the child under which the person is responsible for the child's long-term or day-to-day care, welfare or development;

(v) any other person responsible for the care, welfare and development of the child;

(vi) a prescribed child welfare authority (in Victoria, Human Services); and

(vii) a person who is alleged to have abused the child or from whom the child is alleged to be at risk of abuse.

7. NOTIFICATIONS FROM THE FAMILY COURT TO HUMAN SERVICES

Notifications of alleged child abuse, where Family Court proceedings are underway, are made under different sections of the *Family Law Reform Act 1995*, according to the source of the notifier.

7.1 Section 91B

7.1.1 Section 91B of the *Family Law Act 1975* (appendix 2) provides that in proceedings relating to the best interests of a child, the Family Court may request the intervention of the State officer who is responsible for the administration in that State of child welfare laws (in Victoria, Human Services).

7.1.2 The section further provides that upon such a request being made the officer may intervene in these proceedings and if so will be deemed to be a party to the proceedings.

7.1.3 This provision provides a unique legislatively based procedure for the prompt involvement at an early stage in such proceedings of Human Services. It gives to the Family Court a procedure by which it may promptly bring a particular case to the attention of the Secretary of Human Services for consideration and assistance.

7.2 Section 67Z

7.2.1 According to section 67Z of the Family Law Reform Act, (appendix 2) where a party to proceedings under the Family Law Reform Act alleges that a child to whom those proceedings relate has been abused or is at risk of being abused:

(i) that person must file a notice in a prescribed form in the court; and

(ii) the Registry Manager or their nominee must, as soon as practicable, notify a prescribed child welfare authority (in Victoria, Human Services).

7.3 Section 67ZA

According to section 67ZA(2) of the Family Law Reform Act, where a member of the Family Court personnel in the course of carrying out his or her duties has reasonable grounds for suspecting that a child has been abused or is at risk of being abused, that member *must*, as soon as practicable, notify Human Services of his or her suspicion and the basis for the suspicion.

7.4 Types of Abuse Which Must Be Reported

According to section 60D(1)(a)(b) for the purposes of section 67Z 'abuse' means an assault, including a sexual assault, amounting to an offence under the law of the State where the act in question occurred, or sexual activity involving the child,

where the child is used as a sexual object and where there is unequal power in the relationship between the child and the relevant person.

7.5 Types of Maltreatment Which May Be Reported by Court Personnel

According to section 67ZA(3), where a member of the court personnel in the course of carrying out his or her duties has reasonable grounds for suspecting that a child has been ill treated, or is at risk of being ill treated, or has been exposed, or subjected, or is at risk of being exposed, or subjected to behaviour which psychologically harms the child, that member *may* notify a prescribed welfare authority of his or her suspicion and the basis of the suspicion.

7.6 Definition of Court Personnel

The Family Law Reform Act (S60D) defines a member of court personnel to mean: (appendix 2)

(a) a court counsellor; or
(b) an approved mediator; or
(c) an approved arbitrator; or
(d) a welfare officer; or
(e) the Registrar or a Deputy Registrar of a Registry of the Family Court of Australia; or
(f) the Registrar or a Deputy Registrar of the Family Court of Western Australia.

8. PROCEDURES FOR REFERRING CASES OF SUSPECTED CHILD ABUSE AND NEGLECT TO HUMAN SERVICES

8.1 Section 91B Orders

8.1.1 Where the Family Court makes an order under S91B:

(i) the parties to the proceedings will receive a sealed copy of the order; and

(ii) the Family Court Registry shall promptly notify the appropriate Human Services Regional office of the request; and

(iii) promptly provide necessary and relevant information from the court file, including affidavit material, to enable Human Services to respond appropriately to that request.

(iii) The Registry Manager or their nominee will forward the pro-forma section 91B letter to the Court Advocacy Unit of Human Services.

8.2 Section 67Z

8.2.1 Notification of child abuse pursuant to section 67Z is made by a party to the proceedings on a Form 66, which is then filed at the counter. The next hearing date is written on the cover sheet of the notification.

8.2.2 Counter staff provide sealed copies as follows:

(a) Original on court file.

(b) Copy or copies for service upon other party(s).

(c) Copy for service upon the alleged abuser (if not a party to the proceedings).

(d) Copy for the Registry Manager or their nominee.

8.2.3 The Registry Manager or their nominee then forwards this notification to the appropriate Human Services regional office with a pro-forma letter.

At the same time, a copy of the notification will be forwarded to the Court Advocacy Unit of Human Services (appendix 4).

8.2.4 The Regional Human Services office acknowledges receipt of the notification directly to the Registry Manager or their nominee.

Copies of these communications are forwarded to the Registry Manager or their nominee to be maintained in a central register.

8.3 Section 67ZA

8.3.1 Where pursuant to the provisions of the Family Law Reform Act referred to in paragraph 7.3 to 7.6, a member of the court personnel has an obligation or the right to notify Human Services, such notification shall be made by telephone to the

Human Services child protection duty worker in the region where the child normally resides or, if appropriate, the After Hours Child Protection Services (appendices 3 and 4).

8.3.2 Simultaneously a pro-forma letter must be forwarded to the Human Services Court Advocacy Unit.

8.4 Time Lines Following Referral of 91B Orders and 67Z and 67ZA Notices

8.4.1 Wherever possible the Family Court will set a return date which allows Human Services sufficient time to adequately respond to the request.

8.4.2 Human Services will usually require a minimum of 21 days to prepare its response. If there is inadequate time to prepare a response in time for the next hearing date, Human Services will notify the court as soon as practicable, prior to the date of the court hearing.

8.4.3 A further adjournment may be necessary if Human Services has not been able to complete the investigation.

8.4.4 Generally the Family Court will defer making a judgement on the case pending Human Services' response to the referral.

9. ACTION BY HUMAN SERVICES UPON RECEIPT OF A NOTIFICATION

9.1 In accordance with its existing practices, Protective Services will seek the following information when a notification is made:

- Name of family and children.
- Address.
- Language.
- Date of birth.
- Reason for concern about the child / children (as factual and specific as possible).
- The reporter's involvement with the family.
- Any other people or agencies involved.
- Are there any concerns about protective worker's safety in visiting the family?
- Best time to find parents at home.
- Does the family know a report is being made?

9.2 The Human Services regional office, to whom the notification is made, will acknowledge receipt of the notification directly to the Registry Manager or their nominee.

9.3 Upon receipt of a notification, Human Services will investigate in accordance with guidelines laid down within 'Protecting Children, Standards and Procedures for Protective Workers'.

9.4 Following notification and during the investigation, the notifier has an ongoing responsibility to advise the protective worker of anything that may have a bearing on the protection of the child.

9.5 Following initial investigation by Protective Services, the protective worker will always advise the notifier about subsequent action planned and discuss respective roles and responsibilities.

10. INFORMATION EXCHANGE

10.1 The Principles Which Underline the Exchange of Information between Human Services and the Family Court

10.1.1 The paramount consideration of the best interests of the child will underpin any exchange of information between the Family Court and Human Services.

10.1.2 The welfare and protection of children and young people at risk is better secured by a free flow of information between those concerned with the child and family.

10.1.3 Similarly, courts are in a better position to make appropriate orders if they are fully aware of proceedings in other jurisdictions.

10.1.4 Information exchange will be limited to only that which is relevant to the respective roles of each service.

10.2 Human Services Access to Information from the Family Court

10.2.1 In cases where the Human Services child protection worker becomes aware, in the course of their duties, of past or current proceedings in the Family Court, the worker should ascertain from the clients, or failing their cooperation, the Court:

(i) What proceedings have taken place or are taking place.
(ii) In which Registry of the Family Court the proceedings have been or are taking place.
(iii) What orders were made and what orders are being sought.

10.2.2 The worker may then obtain from the Family Court the information referred to hereafter by telephoning:

(i) The Registry Manager or their nominee.
(ii) The Director of Court Counselling.

10.2.3 The information which may be provided on such an inquiry shall be:

(i) The status of the court proceedings, including any orders which have been made and any pending proceedings and date fixed for any future proceedings.
(ii) The names of any lawyers acting on behalf of any party to the proceedings.
(iii) If there is a counsellor involved in those proceedings, the name of that counsellor.

10.2.4 The information shall be given on a ‘phone back’ basis to the Human Services worker.

10.2.5 The worker may obtain more detailed information from the Family Court file at a case conference (section 11).

10.3 Family Court Access to Information from Human Services

10.3.1 If there are proceedings pending in the Family Court relating to a child and the Court becomes aware that there are past or current protective proceedings involving Human Services, the Family Court may obtain information referred to hereafter from the Human Services regional office.

10.3.2 This information may be sought by the Registry Manager or their nominee. Such officers are authorised to received information in accordance with S66(4)(e) of the *Children and Young Person's Act*.

10.3.3 The information which may be provided on such an inquiry shall be:

(i) Whether a notification is known to have occurred in respect of that child.

(ii) Whether or not Human Services believes the allegations of abuse.

(iii) The status of any protective proceedings, including:

- (a) any orders that may have been made, and
- (b) whether there are proceedings pending and if so whether any date has been fixed for hearing of those proceedings.
- (c) The name of the Human Services case worker.
- (d) The information shall be given on a 'phone back' basis to the family court officer.

10.3.4 The Registry Manager or their nominee or Director of Court Counselling or their nominee may obtain more detailed information from the Human Services case file at a case conference.

11. CASE CONFERENCES AND CASE MANAGEMENT

11.1 Case conferences are a critical aspect of case management in child protection work and should be convened at critical decision making points where the information of a number of individuals is needed to guide decision making.

11.2 Consistent with the aims of this protocol, case conferences provide a means of:

(i) Ensuring that relevant information is shared and the roles and responsibilities of involved workers are clearly delineated.

(ii) Determining which jurisdiction can best respond to the needs of a child or young person at risk when both the Family Court and the Children's Court are involved.

11.3 Consistent with Human Services practice and standards, Human Services will usually convene a case conference of all parties within twenty-eight (28) days of commencing an investigation of a notification of suspected child abuse or neglect. The timing of the case conference needs to be consistent with the period allowed for adjournment.

11.4 The Director of Court Counselling or their nominee shall be invited to attend and participate in such conferences as appropriate.

11.5 Human Services will also convene a case conference to which the Director of Court Counselling or their nominee shall be invited to attend and participate whenever:

(i) Either Human Services or the Family Court require access to detailed case file information.

(ii) Both Human Services and the Family Court are involved in a case and an exchange of information is indicated.

OR

(iii) There are concurrent proceedings in the Children's Court and the Family Court.

11.6 It is normally not in the interest of either service, the child or the family that there be conflicting proceedings in both the Family Court and the Children's Court relating to a child. A case conference between Human Services and the Family Court should therefore be convened whenever this occurs to:

(i) Consider in which court the matter should more appropriately proceed.

(ii) Clarify responsibility for assessment and intervention.

(iii) Coordinate efforts with the family.

(iv) Examine questions about the intervention in, or the institution of, Family Law Reform proceedings by Human Services under S91B or S92A and separate representation of the child in Family Law proceedings.

11.7 When deciding in which court the matter should most appropriately proceed, it should be assumed that the nature of the individual case will determine the appropriate jurisdiction and consideration, amongst a variety of issues, should be given to matters such as:

(i) Is there an appropriate parent or carer prepared to lodge a Family Law Reform Act application to establish or vary residence, contact or special orders?

(ii) Which court is likely to provide the quickest and most effective solution to secure welfare of the child, and which order of which court will take precedence.

(iii) Is the need of protection likely to be established and / or can the child's welfare be more effectively assured through residence, contact or special issues orders?

(iv) Which court has jurisdiction to make the orders anticipated to be supported by the participants in the case conference?

(v) Can the protective concerns be alleviated by a change in residence, contact or special issues orders?

11.8 In considering these matters, reference should be made to the Memorandum of Understanding signed in April, 1995 by Justice Frederico of the Family Court of Australia, Nick Papas, then Chief Magistrate of the Magistrate's Court and Robin Clark, then Assistant Director of Child, Adolescent and Family Welfare in the Department of Health and Community Services (now renamed Human Services). See appendix 1 for full document.

The Memorandum of Understanding is based on a number of cases both in Victoria and interstate where families have been subjected to proceedings in the Family Court and intervention from a state welfare authority, have prompted concerns about the overlap of the federal and state jurisdictions and the role of state welfare authorities in such proceedings.

The central principals underpinning this agreement are:

- A recognition of the specialised nature and separate jurisdictions of the Family Court and Children's Court.
- A recognition that Human Services has statutory responsibilities which may involve, or result in the involvement of, both the Family Court and the Children's Court.
- A recognition that multiple hearings, over prolonged periods of time in separate jurisdictions can be harmful to the chid and should where possible be minimised.
- A recognition that parents have a right to have their disputes resolved expeditiously, efficiently and where possible within a single jurisdiction.
- A recognition that the Children's Court should not be utilised as a de facto Court of appeal from the Family Court.

The Memorandum of Understanding goes on to state that:

1. Human Services reserves the right to choose the jurisdiction in which protective concerns are determined, guided by the principles enunciated above.

2. If Human Services forms the view that the Family Court is the appropriate jurisdiction to decide matters of a protective nature, it may choose not to become a party but to give evidence in support of one or another party, or the child's representative, if appointed. This decision will be based on the level of concern, the preparedness of the other parties' legal representative to call the Department's evidence and recognition that the Department, as a witness, will be required to accept the orders of the Court without the avenue of appeal.

3. If Human Services has serious concerns and is not satisfied that its evidence will be fully presented or wishes to raise jurisdictional arguments, it may apply to be made a party to the proceedings.

4. Provided no new protective concerns emerge during the proceedings to suggest that the child is at further risk, Human Services will not apply to change the jurisdiction.

5. During the course of the proceedings in the Family Court, if, as a result of new information, Human Services assesses that the child is at significant risk and that none of the parties will protect the child, proceedings will be initiated through the Children's Court.

6. Where the Department decides to initiate proceedings through the Children's Court, it will appear in person before the Family Court at the earliest opportunity to inform the court of its intentions.

7. If, as a party to the proceedings, Human Services is dissatisfied with the outcome of the Family Court proceedings and considers the child to be at significant risk, an appeal will be initiated through the Family Court.

8. Provided no new protective concerns arise following Family Court proceedings, Human Services will not commence further proceedings in the Children's Court regardless of the judgement.

9. If following the conclusion of Family Court proceedings fresh concerns are raised about the safety and/or well being of a child, Human Services will determine whether the concerns are best addressed through protection application proceedings in the Children's Court or initiation of further proceedings through the Family Court. This decision will be based on the

length of time since the Family Court order was made, whether or not any family members are able to adequately care for the child and the level of Departmental supervision required.

10. Where there have been previous proceedings in the Family Court or proceedings are current in the Family Court, Human Services will ensure, to the extent that it is aware, that this information is communication clearly to the Children's Court in any report submitted to that jurisdiction by the Department.

12. RESPONSE TO THE FAMILY COURT BY HUMAN SERVICES FOLLOWING INVESTIGATION

Following initial investigation, Human Services may respond in any of the following ways:

12.1 Institute protection application proceedings in the Children's Court to protect the child.

12.2 Intervene in and become a party to the Family Court proceedings pursuant to section 92A.

12.2.1 S91B(1) provides that the court may request the intervention of a State or Territory Child Welfare authority.

12.2.2 The officer may intervene in the proceedings and, if so, is then deemed to be a party to the proceedings.

12.2.3 In addition, S92A(1) also provides that in proceedings under the Family Law Reform Act in which it has been alleged that the child has been abused or is at risk of being abused, certain persons including a child welfare authority are entitled to intervene in the proceedings (see 6.2 and appendix 2).

12.2.4 As costs and other responsibilities may be incurred by those who intervene in, or become a party to Family Court proceedings, child protection staff must seek advice from the Court Advocacy Unit of Human Services whenever consideration is being given to this option.

12.3 Inform the Family Court, that Human Services does not intend to intervene, but that Human Services has information in which the Court may be interested.

12.3.1 The court may then wish to issue a subpoena under Order 28 of the Family Court Rules in order that evidence may be provided to the court (see section 13).

12.4 Inform the Family Court that Human Services does not intend to take any further action.

13. INSPECTION AND PHOTOCOPYING OF HUMAN SERVICES CASE FILE MATERIAL SUBPOENAED BY THE FAMILY COURT

13.1 Where a subpoena is issued, pursuant to section 64 of the C&YPA, a person must not disclose to anyone other than a protective intervener, the name of any person who makes a notification of suspected child abuse, or any information which is likely to lead to the identification of that person.

Section 64 also provides that in any legal proceedings, evidence that a matter is contained in a notification, evidence that identifies the person who made the notification, or, evidence that is likely to lead to their identification as the notifier, is only admissible in the proceedings if the Court or Tribunal grants leave for the evidence to be given, or, if the notifier consents in writing to the admission of that evidence (appendix 3).

13.2 Procedures to Be Followed to Protect Information

13.2.1 When a file is subpoenaed by the Family Court, Human Services will remove from the file any evidence or information contained in a notification or other file sections which might identify the notifier or lead to the identification of the notifier and place it in a sealed envelope at the front of the file.

13.2.2 The envelope will be marked 'Not to be opened except at the direction of the Judge'.

13.2.3 The Registry Manager or nominee is responsible for ensuring that the sealed envelope is removed from the file before inspection of the file by the parties and / or their legal representatives is allowed.

13.2.4 Subject to the following provisions, the court will ensure that all file inspections are carried out under supervision and that photocopying of case file material does not occur, unless ordered by the Court.

13.2.5 If a party or their legal representative wishes to photocopy any case file material, written permission must obtained from the regional child protection worker, named as the contact officer on the proforma letter attached to the front of the file, prior to photocopying taking place.

13.2.6 If written permission is not obtained, the party must make a formal application to the Family Court.

13.2.7 If a party, or their legal representative, wishes to inspect or to photocopy any material as described in paragraph 13.1 of this section, and contained in the sealed

envelope, an application would need to be made to the Family Court.

13.2.8 Where any application is made to Family Court regarding inspection and / or photocopying of Human Services case file material, the Family Court will inform Human Services of the application, the hearing date and provide a copy of the application.

13.2.9 Human Services will be legally represented when applications of this kind are heard.

13.2.10 Human Services may oppose a subpoena in court if it is believed that certain other information, not covered by section 64, should not be revealed. Other information may include third party, or information which, if revealed, may be damaging to the child (appendix 3).

In these circumstances the child protection worker must seek advice from the Department's Legislation and Legal Services section in order to prepare for compliance with the subpoena (appendix 4).

14. DISPUTE RESOLUTION PROCESS

14.1 Any dispute or complaint should be dealt with, in the first instance, at the level of the respective regional child protection worker and family court officer or counsellor. Only if the problem cannot be resolved by the workers concerned should the following process occur:

14.1.1 Depending on the nature of the complaint, contact will be made either verbally or in writing between the child protection worker's line supervisor and the family court officer's or counsellor's line supervisor.

14.1.2 If resolution of the problem is not achieved at this level and the Family Court Counselling section is involved, the complaint shall be directed to the Protective Services Unit Manager (SOC-4) or the Director of Court Counselling, depending on which party has been aggrieved.

If a family court officer is involved in these circumstances, the complaint would need to be directed to the Operations Manager.

14.1.3 If resolution of the problem is not achieved at this level, the matter should be referred to the Registry Manager of the Family Court and the Regional Protective Services Manager who will decide on a course of action to resolve the problem.

14.2 If a family court officer or counsellor, after consultation with their line supervisor, requires further information regarding a particular case or process, they can contact the duty officer at the Court Advocacy Unit, Human Services.

The Manager, Court Services, who is responsible for Human Services' adherence to the protocol, can also be contacted if further clarification is required.

14.3 Contact with the Court Advocacy Unit or the Manager, Court Services, may be made at any time prior to, or during, the dispute resolution process.

Signed by

W. J. McCann
Secretary
Department of Human Services

Alastair Nicholson AO RFD
Chief Justice
Family Court of Australia

August 1996

APPENDIX 1

MEMORANDUM OF UNDERSTANDING

Memorandum of Understanding between the Family Court of Australia, the Children's Court of Victoria and the Department of Human Services, Victoria.

BACKGROUND

1. A number of cases in both Victoria and interstate where families have been subjected to the proceedings in the Family Court and intervention from a state welfare authority, have prompted concerns about the overlap of federal and state jurisdictions and the role of State Welfare authorities in such proceedings.

2. A recent case in which Human Services issued a Protection Application in the Children's Court following the making of an order in the Family Court highlighted the difficulties that can occur where the Department is involved in Family Court proceedings.

3. As a result on 22 November 1994 Justice Frederico convened a meeting of Senior Representatives of the Family Court of Australia, the Children's Court of Victoria and the Department of Human Services, formerly the Department of Health and Community Services (Human Services) to discuss these issues in detail and establish a Memorandum of Understanding.

AGREEMENT

The central principles underpinning this agreement are:-

- A recognition of the specialised nature and separate jurisdictions of the Family Court and Children's Court.

- A recognition that Human Services has statutory responsibilities which may involve, or result in the involvement of, both the Family Court and the Children's Court.

- A recognition that multiple hearings, over prolonged periods of time in separate jurisdictions can be harmful to the child and should where possible be minimised.

- A recognition that parents have a right to have their disputes resolved expeditiously, efficiently and where possible within a single jurisdiction.

- A recognition that the Children's Court should not be utilised as a de facto

Court of appeal from the Family Court.

It is agreed that:-

1. Human Services reserves the right to choose the jurisdiction in which protective concerns in relation to children are determined, guided by the principles enunciated above.

2. If Human Services forms the view that the Family Court is the appropriate jurisdiction to decide matters of a protective nature, it may choose not to become a party but to give evidence in support of one or another party, or the child's separate representative, if appointed. This decision will be based on the level of concern, the preparedness of the other parties' legal representative to call the Department's evidence and a recognition that the Department, as a witness, will be required to accept the orders of the Court without the avenue of appeal.

3. If Human Services has serious concerns and is not satisfied that its evidence will be fully presented or wishes to raise jurisdictional arguments, it may apply to be made a party to the proceedings.

4. Provided no new protective concerns emerge during the proceedings to suggest that the child is at further risk, Human Services will not apply to change the jurisdiction.

5. During the course of proceedings in the Family Court, if, as a result of new information, Human Services assesses that the child is at significant risk and that none of the parties will protect the child, proceedings will be initiated through the Children's Court.

6. Where the Department decides to initiate proceedings through the Children's Court, it will appear in person before the Family Court at the earliest opportunity to inform the Court of its intentions.

7. If, as a party to the proceedings, Human Services is dissatisfied with the outcome of the Family Court proceedings and considers the child to be at significant continuing risk, an appeal will be initiated through the Family Court.

8. Provided no new protective concerns arise following Family Court proceedings, Human Services will not commence further proceedings in the Children's Court, regardless of judgement.

9. If following the conclusion of Family Court proceedings fresh concerns are raised about the safety and/or well-being of a child, Human Services will determine whether the concerns are best addressed through protection application proceedings in the Children's Court or initiation of further proceedings through the Family Court. This decision will be based on the

length of time since the Family Court order was made, whether or not any family members are able to adequately care for the child and the level of Departmental supervision required.

10. Where there have been previous proceedings in the Family Court or proceedings are current in the Family Court, Human Services will ensure, to the extent that it is aware, that this information is communication clearly to the Children's Court in any report submitted to that jurisdiction by the Department.

Parties to Memorandum of Understanding

signed by

Justice Frederico
Family Court of Australia

Nick Papas
Chief Magistrate
Magistrate Court of Victoria

Robin Clark
Assistant Director
Department of Health and Community Services, Victoria

Dated 19th April 1995

APPENDIX 2

RELEVANT SECTIONS OF THE FAMILY LAW REFORM ACT 1995

1. **SECTION 60D** of the 1995 Act, for the purpose of the Act, defines the following terms, relevant to this protocol:-

1.1 **'abuse'**, in relation to a child, means:

(a) an assault, including sexual assault, of the child which is an offence under a law, written or unwritten, in force in the State or Territory in which the act constituting the assault occurs; or

(b) a person involving the child in sexual activity with that person or another person in which the child is used, directly or indirectly, as a sexual object by the first-mentioned person or the other person, and where there is unequal power in the relationship between the child and the first mentioned person;

1.2 **'member of the Court personnel'** means:

(a) A court counsellor; or

(b) An approved mediator; or

(c) An approved arbitrator; or

(d) A welfare officer; or

(e) The Registrar or a Deputy Registrar of the Registry of the Family Court or Australia; or

(f) The Registrar or a Deputy Registrar of a Family Court of Western Australia;

1.3 **'prescribed child welfare authority'**, in relation to abuse of a chid, means:

(a) if the child is the subject of proceedings under this Part in a State or Territory - an officer of the State of Territory who is responsible for the administration of the child welfare laws of the State or Territory, or some other prescribed person;

(b) If the child is not the subject of proceedings under this Part - an officer of the State or Territory in which the child is located or is

believed to be located who is responsible for the administration of the child welfare laws of the State or Territory, or some other prescribed person;

1.4 'professional ethics' includes:

(a) rules of professional conduct; and

(b) rules of professional etiquette; and

(c) a code of ethics; and

(d) standards of professional conduct.

2. SECTION 65E and 68F(2) of the Act deals with the powers of the Family Court in custodial proceedings and makes it clear that:-

SECTION

64E In deciding whether to make a particular parenting order in relation to a child, a Court must regard the best interests of the child as the paramount consideration.

68F(2) The Court must consider;

(g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:

(i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or

(ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour, or may affect, another person;

(i) any family violence involving the child or a member of the child's family;

(j) any family violence order that applies to the child or a member of the child's family;

3. DIVISION 8A, that is **Sections 67Z, 67ZA and 67ZB** of the Act deals with Allegations of Child Abuse - as follows:-

3.1 WHERE PARTY TO PROCEEDINGS MAKES ALLEGATIONS OF

CHILD ABUSE

SECTION

67Z (1) This section applies if a party to proceeding under this Act alleges that a child to whom the proceedings relate has been abused or is at risk of being abused.

(2) The party must file a notice in the prescribed form in the court hearing the proceedings, and serve a true copy of the notice upon the person who is alleged to have abused the child or from whom the child is alleged to be at risk of abuse.

(3) If a notice under subsection (2) is filed in a court, the Registrar must, as soon as practicable, notify a prescribed child welfare authority.

(4) In this section:

'prescribed form' means the form prescribed by the Rules of Court.

'Registrar' means:

(a) in relation to the Family Court, or the Family Court of Western Australia - the Registrar, or a Deputy Registrar of that Court; and

(b) in relation to any other court - the principal officer of that court.

3.2 WHERE A MEMBER OF THE COURT PERSONNEL, COUNSELLOR OR MEDIATOR SUSPECTS CHILD ABUSE

SECTION

67ZA (1) This section applies to a person in the course of carrying out duties, performing functions or exercising powers as:

(a) a member of the Court personnel; or

(b) a family and child counsellor; or

(c) a family and child mediator.

(2) If the person has reasonable grounds for suspecting that a child has been abused, or is at risk of being abused, the person must, as soon as practicable, notify a prescribed child welfare authority of his or her suspicion and the basis for the suspicion.

(3) If the person has reasonable grounds for suspecting that a child:

(a) has been ill-treated, or is at risk of being ill-treated; or

(b) has been exposed or subjected, or is at risk of being exposed or subjected, to behaviour which psychologically harms the child;

the person may notify a prescribed welfare authority of his or her suspicion and the basis for the suspicion.

(4) The person need not notify a prescribed child welfare authority of his or her suspicion that a child has been abused, or is at risk of being abuse, if the person knows that the authority has previously been notified about the abuse or risk under subsection 67A(3), but the person may notify the authority of his or her suspicion.

(5) If notice under this section is given orally, written notice confirming the oral notice is to be given to the prescribed child welfare authority as soon as practicable after the oral notice.

(6) If the person notifies a prescribed child welfare authority under this section or subsection 67Z(3), the person may make such disclosures of other information as the person reasonable believes are necessary to enable the authority to properly manage the matter that is the subject of the notification.

4. INTERVENTION IN CHILD ABUSE CASES

SECTION

92A (as amended by S37 of the *Family Law Reform Act 1995*)

(1) This section applies to proceedings under this Act in which it has been alleged that a child has been abused or is at risk of being abused.

(2) Each of the following persons is entitled to an interest in the proceedings:

(a) a guardian of the child;

(b) a parent of the child with whom the child lives;

(ba) a person who has a residence order in relation to the child;

(bb) a person who has a specific issues order in relation to the child under which the person is responsible for the child's long-term or day-to-day care, welfare or development;

(c) any other person responsible for the care, welfare and development of the child;

(d) a prescribed child welfare authority;

(e) a person who is alleged to have abused the child or from whom the child is alleged to be at risk of abuse.

5 INTERVENTION BY CHILD WELFARE OFFICER

SECTION

91B (1) In any proceedings under this Act that affect, or may affect, the welfare of a child, the Court may request the intervention in the proceedings of an officer of a State, or a Territory or of the Commonwealth, being the officer who is responsible for the administration of the laws of the State or Territory in which the proceedings are being heard that relate to child welfare.

(2) Where the Court has, under subsection (1), requested an officer to intervene in proceedings:

(a) the office may intervene in those proceedings; and

(b) where the officer so intervenes, the officer shall be deemed to be proceedings with all the rights, duties and liabilities of a party.

APPENDIX 3

RELEVANT SECTIONS OF THE CHILDREN AND YOUNG PERSONS ACT 1989

(Incorporating Amendments from the Children and Young Persons (Miscellaneous Amendments) Act 1994)

1. GROUNDS FOR REPORTING SUSPECTED CHILD ABUSE AND NEGLECT

SECTION 63 When is a child in need of protection?

For the purposes of this Act a child is in need of protection if any of the following grounds exist:

(a) The child has been abandoned by his or her parents and after reasonable inquiries-

(i) the parents cannot be found; and

(ii) no other suitable person can be found who is willing and able to care for the child;

(b) The child's parents are dead or incapacitated and there is no other suitable person willing and able to care for the child;

(c) The child has suffered, or is likely to suffer, significant harm as a result of physical injury and the child's parents have not protected, or are unlikely to protect, the child from harm of that type;

(d) The child has suffered, or is likely to suffer, significant harm as a result of sexual abuse and the child's parents have not protected, or are unlikely to protect, the child from harm of that type;

(e) The child has suffered, or is likely to suffer, emotional or psychological harm of such a kind that the child's emotional or intellectual development is, or is likely to be, significantly damaged and the child's parents have not protected, or are unlikely to protect, the child from harm of that type;

(f) The child's physical development or health has been, or is likely to be, significantly harmed and the child's parents have not provided, arranged or allowed the provision of, or are unlikely to provide, arrange or allow the provision of, basic care or effective medical, surgical and other

remedial care.

2. NOTIFICATION TO PROTECTIVE INTERVENER (As amended by C&YP (Miscellaneous Amendments) Act 1994)

SECTION

64(1) Any person who believes on reasonable grounds that a child is in need of protection may notify a protective intervener of that belief, and of the reasonable grounds for it.

(1A) A person referred to in any of the paragraphs of subsection (1c) to whom this subsection applies who, in the course of practicing his or her profession or carrying out the duties of his or her office, position or employment as described in that paragraph, forms the belief on reasonable grounds that a child is in need of protection on a ground referred to in paragraph (c) or (d) of section 63 must notify the Secretary of that belief and of the reasonable grounds for it as soon as practicable -

(a) after forming the belief; and

(b) after each occasion on which he or she becomes aware of any further reasonable grounds for the belief.

(1B) Grounds for a belief referred to in sub-section (1) or 1A) are:-

(a) matters of which a person has become aware; and

(b) any opinions based for those matters.

(Subsections (1C) (a) - (h) which lists the persons to whom subsection (1A) applies, and subsections (1D) - (1H) are not included here)

(2) The following persons are protective interveners:-

(a) The Secretary;

(b) All members of the Police force.

(3) A notification made under any subsection (1) or (1A):-

(a) does not for any purpose constitute unprofessional conduct or a breach of professional ethics on the part of the person by whom it is made; and

(b) if made in good faith, does not make the person by whom it is made

subject to any liability in respect of it; and

(d) does not constitute a contravention of section 141 of the **Health Services Act 1988** or section 120A of the **Mental Health Act 1986**.

(3A) In any legal proceedings evidence as to the grounds contained in a notification made under subsection (1) or (1A) for the belief that the child is in need of protection may be given but evidence that particular matter is contained in such a notification or evidence that identifies the person who made such a notification as the notifier, or is likely to lead to the identification of that person as the notifier, is only admissible in the proceeding if the court or tribunal grants leave for the evidence to be given or if the notifier consents in writing to the admission of that evidence.

(3B) A witness appearing in a proceeding referred to in subsection (3A) must not be asked, and if asked, is entitled to refuse to answer:-

(a) any question to which the answer would or might identify the person who made a notification under subsection (1) or (1A) as the notifier, or would or might lead to the identification of that person as the notifier; or

(b) any question as to whether a particular matter is contained in a notification made under subsection (1) or (1A):-

unless the court or tribunal grants leave for the question to be asked or the notifier has consented in writing to the question being asked.

(3C) A court or tribunal may only grant leave under subsection (3A) or (3B) if:-

(a) in the case of a proceeding in the court or in any other court arising out of a proceeding in the court or in the AAT on a review under Section 122, it is satisfied that it is necessary for, evidence to be given to ensure the well being and safety of the child;

(b) in any other case, it is satisfied that the interests of justice require that the evidence be given.

(4) If a notification is made under subsection (1) or (1A), a person (other than the person who made it or a person acting with the written consent of the person who made it) must not disclose to any person other than a protective intervener:-

(a) the name of the person who made the notification: or

(b) any information that is likely to lead to the identification of the person who made the notification.

Penalty points applying to this subsection: 10 penalty units.

(5) Sub section 4 does not apply to a disclosure made to a Court or Tribunal in accordance with this section.

3. PROTECTION OF INFORMATION (Obtained during the course of an investigation)

SECTION

67 (1) The giving of information to a protective intervener during the course of the investigation of the subject matter of a notification under section 64 (1) or (1A):-

(a) does not for any purpose constitute unprofessional conduct or a breach of professional ethics on the part of the person by whom it is given; and

(b) if given in good faith, does not make the person by whom it is given subject to any liability in respect of it; and

(c) does not constitute a contravention of section 141 of the **Health Services Act 1988** or section 120A of the **Mental Health Act 1986**.

(2) A protective intervener must not disclose to any person, other than to another protective intervener or to a person in connection with a court proceeding or to a person in connection with a review by the Administrative Appeals Tribunal or a panel appointed under Section 121 (3) of decisions relating to the recording of information in the central register referred to in section 65 (1) (b):-

(a) the name of a person who gave information in confidence to a protective intervener during the course of the investigation of the subject-matter of a notification under Section 64 (1) or (1A); or

(b) any information that is likely to lead to the identification of a person referred to in paragraph (a) or authorisation of the Secretary.

without the written consent of the person referred to in paragraph (a) or

authorisation by the Secretary.

Penalty: 10 penalty units.

(3) The Secretary may only authorise the disclosure of information to a person under subsection (2) if he or she believes on reasonable grounds that the disclosure is necessary to ensure the safety and well being of the child.