Are we protecting our children from harm and what have we learned?

In this paper I focus on the current difficulties of protecting children in our existing child protection framework.

Over the last year there has been a renewed interest in our child protection systems. A familiar theme emerges from this discourse – the acknowledgement, at all levels, that Australian children are 'falling between the cracks' of the various child protection systems in place.

Partly to address this issue, in May 2008 the Federal Government released a discussion paper on establishing a National Child Protection framework. This can be seen as an important small step in the right direction. Many agencies have fed into that consultation process. I formally acknowledge the assistance of the National Legal Aid submission to that consultation in informing my views.

Today I intend to focus on how all agencies engaged in child protection need to work together in order to protect our children from harm.

The child protection system in Australia consists of 7 systems in the various States and Territories and the Commonwealth family law system. Australia is also bound by international conventions dealing with child protection. While the models of intervention are very similar, the different legislative and operational frameworks result in a great deal of variability across the country.

There are a number of areas of the child protection system that require reform. In this paper I intend to specifically focus on the need for better collaboration between services particularly at Commonwealth and State level.

Currently there is little collaboration between Commonwealth, State government and non government agencies about the sharing of information that would assist in protecting children from harm. This is an inevitable consequence of federalism.

It is not uncommon for parents to move between States with children. However if the family was subject of a child protection assessment or risk of harm reports this information is not automatically transferred to another state. The movement of families from State to State, whether to avoid the intervention of welfare authorities or not, is a regular occurrence. Workers in the area of child protection will cite many examples of the current difficulties obtaining information about children requiring protection whose families move between States.

One model adopted in jurisdictions overseas is the maintenance of a national register of children. Such a register contains information of children who are considered to be in need of

protection but where their best interests suggest that they should remain in the family home with a high level of support.

The register is available to service providers in health, education, welfare and the police. It allows these agencies to ensure they are aware that these children must be closely monitored when there is contact with their services.

Of course a register of this nature must be national to ensure families who move between states don't become lost in the system. I should at this point acknowledge the privacy and 'labeling' issues the arise for the children who's information appears on the register. This is certainly an issue that would need to be carefully considered.

There are other methods of information sharing that could also be considered in order to better protect our children from harm.

If a national register of information was not viable there is a pressing need for welfare and policing agencies throughout Australia to consider entering into protocols and/or Memoranda of Understanding to allow information sharing about families moving between States and territories. It is hoped that the National Child Protection framework will address this issue.

It is also time to consider mandating government departments to provide information to child protection agencies including Family Courts. I should at this point acknowledge that in October 2008 the Prime Minister announced that a new national protocol will be developed for Centrelink to release information to child protection agencies to help locate children at serious risk of abuse and neglect when their whereabouts are unknown. Notably this did not extend to protocols for sharing with the Family Court.

This omission has an unfortunate consequence because it again creates a system where certain children fall through the gaps of the child protection and family law systems. By way of example, a mother leaves one State for another with her children, without the father's knowledge or consent. The father's only remedy is to apply under the Family Law Act for a location order. In most such cases at least 8 weeks would elapse from the time the father has filed this Application until the information about the mother and children's location has been released and the Application served. A court may at that point refer the parties back for mediation in order to comply with the compulsory dispute resolution requirements. In many such cases the party seeking the location order may be alleging that the children are at risk of harm. Due to the lack of cooperation between agencies, months can elapse before those allegations can even be tested or considered by the court exercising jurisdiction under the Family Law Act.

It has also to be acknowledged that privacy laws currently inhibit the effective exchange of information between agencies about child protection matters. Amendments to these provisions

need to be considered in the framework of imposing obligations on agencies to release information.

Currently there is no uniform legislation that enables the automatic recognition of orders made in separate states or which facilitates and simplifies the procedures for transfer of orders between States and territories. This is partly because different States make different types of protection orders, some of which cannot be recognized in another State because mirror legislation does not exist. Ideally a nationally accepted set of definitions of family violence, child abuse and neglect would allow better understanding and less court time from one jurisdiction to another.

There is also a need for improved co-operation between Commonwealth, State and Territory Governments to streamline the process for federal and interstate police checks in all matters about children. Currently there are lengthy delays (sometimes of weeks not just days) in obtaining police clearances.

This can particularly have an adverse impact on children in the welfare jurisdiction – especially indigenous children. Consider an indigenous child from NSW who is removed from the care of his parents under 'emergency' provisions. The child would initially be placed in foster care. Under the Act there is an obligation to place the child in a culturally appropriate placement but often no such placements are available on an emergency basis. A number of members of the child's extended family may seek to be assessed as potential placement options. Some may have resided in another State. Weeks can pass while the welfare authorities wait for a police clearance and in the meantime the child languishes in foster care sometimes unnecessarily.

Stretching the extension of this, a Local/Magistrates Court has access the antecedents of defendants who come before them. Should such information at a minimum be available to all courts considering allocating parental responsibility for a child? Is there a reason why any court determining parental responsibility for a child couldn't obtain a report on all Police involvement with any person who proposes to exercise parental responsibility for a child?

This leads me to raise the need for better collaboration between the Family Court and Children's Courts.

Family Courts determine welfare issues for children of separating couples or between grandparents/ extended families and parents. These actions are private law – that is the matter is initiated by a person concerned about the welfare of a child. That party funds the matter and takes responsibility for putting appropriate evidence before the court e.g. expert reports, issuing subpoenas and filing affidavits.

Children's Courts determine welfare issues for children who may be in need of protection. This is public law because it is the Department that initiates the action and effectively prosecutes it.

There are many ooverlaps between State and Federal responsibilities for children who may be in need of protection. It is not uncommon in NSW for the Department to refer a carer of a child to the Family Court to seek orders for parental responsibility of a child. In doing so they argue that the child is not in need of protection because the carer is acceptable to them and the child no longer at risk. The responsibility is then placed on the individual to fund a case and put before court evidence that is in hands of the Department already.

Statistics reveal that grandparents and extended family members are increasingly taking on the care of children due to protection concerns for children with either or both parents. The parental responsibility issues for these children can be confusing. They can be subject to:

- Family Court parenting orders,
- Children's Court protection orders with the Department 'placing' the child with the family members; or
- Orders made by the Children's Court, which provide for someone other than the parents to have parental responsibility with the financial support of the welfare authority. This order takes different forms in different jurisdictions and may not be recognized interstate, in the territories or overseas.

Alternatively there are situations where the Family Court has made orders and the state welfare agency has then commenced fresh proceedings in effect seeking to overturn those orders. There is no issue of 'estoppel' because the jurisdictions are different as are the Orders made. Such actions could be seen as an abuse of process but I am not aware of any successful cases run along such lines.

I do acknowledge that in recent times in NSW there would appear to be a more proactive approach to 'intervention' in Family Court proceedings being taken by the Department of Community Services. At the same time the Magellan program is a good example of co-operation between state welfare agencies and the Family Court. It should however be noted that Magellan does not extend to matters before the Federal Magistrates Court and there is no automatic right to have a matter transferred on the grounds that it would be a suitable matter for Magellan.

There is a need for processes for information transfer/sharing between different Courts dealing with the same families. Protocols or memorandums of understanding need to be developed, or legislative change needs to occur to enable the transfer and/or sharing of information about children.

It is not uncommon for a Children's Court to deal with a child who has been subject to Orders made under the Family Law Act. One such case was before the Children' Court recently. Two years before the Children's Court proceedings Orders about the child were made in the Federal

Magistrates Court (FMC). In my view the same issues were before the court on both occasions. In the FMC proceedings, a Family Consultant prepared a comprehensive report. A range of subpoenas were issued. An Independent Children's Lawyer acted for the child.

When the matter came before the Children's Court in NSW an Independent Legal Representative was appointed for the child. Because it was a different jurisdiction, it was not the same ICL from the FMC proceedings. Guidelines for ICL's require continuity of representation for a child however those guidelines are not recognized in the state welfare jurisdiction. The FMS was asked to provide their file to the Children's Court. The file arrived with a note requiring no photocopying – this was a problem in terms of making the information available to the Children's Court expert. In addition the Family Report could not be released to the expert without an order by the FMS due to the publication restrictions. The Family Consultant who prepared the report for the FMS was obviously not attached to the Children's Court Clinic who prepared a new report. This is unfortunate as not only was the child subject to further interviews with a person unknown (a process identified as systems abuse in the ICL guidelines) but much of the information about the child and her family had to be gathered again. The net effect of separate jurisdictions in a matter such is this is duplication, cost, delay and possibly worse outcomes for the child.

A restructuring of the current jurisdictional arrangements for dealing with children's issues such as an extended cross vested scheme for family law and care and protection matters would improve these outcomes. As a minimum, by transferring the appellate jurisdiction for care and protection matters to the Family Court, a specialist national court of appeal for children's matters would evolve. Of course this is subject to constitutional limitations.

There is also a need for an integrated prevention focus to child protection. Arguably this could be achieved by better sharing and utilisation of Commonwealth services for families.

The Commonwealth funded contact services should be resourced, expanded and increased in number, so that they can also provide similar contact services to families in the care system. In NSW the Department of Community Services often does not agree to provide supervision at the frequency proposed by the court simply due the cost of doing so and despite the court finding that contact is in the best interests of the child. Many Commonwealth funded contact services operate on Friday afternoon, Saturday and Sunday only. These Centre's are therefore well suited and available for use by State welfare agencies organizing supervision from Monday – Friday. The wheel does not need to be re-invented and indeed there is currently a duplication of these services that could be avoided with better co-operation.

The role of the Family Relationship Centres could also be expanded to provide family support services to families in the welfare jurisdiction. Many regional and remote areas lack of resources and programs to assist rehabilitation for parents for example prevention of violence

for perpetrators, parenting programs and drug and alcohol programs. The current lack of resources impinges greatly on the well being of children and young people in these situations. Initiatives such as alcohol bans and an increased police presence in remote communities has had limited effect when the services required to address the concerns are inadequate to meet demand.

Are we 'Working Together' (in the theme of this conference) to protect children from harm in Australia – I think that the conclusion has to be 'no'.

The most recent edition of Australian Law Reform Commission 'Reform' journal reviewed the progress in law since the release of its comprehensive report 'Seen and Heard: Priority for Children" in 1997. It concluded that 'little progress has been made...largely because the recommendations …have been ignored by the Federal government'. The authors went on to say that 'there remain serious problems with children not receiving services or protection they need because of a lack of coordination between departments and other agencies.'

I should acknowledge that there is currently much talk about reform at other levels and I look forward to exciting times ahead. Shortly the Wood Special Commission of Enquiry in NSW will be released and it is anticipated that it will recommend systemic changes to the care and protection jurisdiction in NSW. Whilst the 2010 roundtable group 'A broader look at the family law justice system' agreed that current state/federal system allows children to 'fall between the cracks' I note that there is a continuance of this dialogue. Of course the National Child Protection Framework should also consider many of the issues raised in this paper.

It is time to reinvigorate debate and work together towards policy and legislative change to ensure that our children are better protected from harm.

Kylie Beckhouse

Legal Aid NSW

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