

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

**Legal Aid NSW submission
to the
Family Law Council**

April 2015

1. Introduction

The Family Court and Children’s Court jurisdictions overlap and there are significant ‘investigatory’¹ and ‘jurisdictional’² gaps between the two systems. Legal Aid NSW lawyers and our clients find many aspects of the current ‘fragmented, overlapping system’³ frustrating and difficult to navigate.

We concur with the Family Law Council’s observation that ‘[t]he reality for a separating family experiencing contentious issues in respect of parenting capacity is that there is no single judicial forum that can provide them with a comprehensive response to address their disputes, particularly where there are underlying issues of family violence and/or child abuse.’⁴ We are particularly concerned that vulnerable children are susceptible to falling between the cracks in matters involving a ‘crossover’ of state and federal jurisdictions. Reforming the way that the two jurisdictions interact will enhance outcomes for our clients and enable matters to be dealt with in a more seamless way, potentially with fewer legal aid resources. In our view, there is a strong case for change.

¹ Australian Law Reform Commission, *Family Violence – A National Perspective*, Report 114 (2010) 19.87.

² Australian Law Reform Commission, *Family Violence – A National Perspective*, Report 114 (2010) 19.92.

³ Peel and Croucher, ‘Mind(ing) the gap’(2011) *Family Matters* No 89, 23.

⁴ Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009) 7.2.

Recent legislative change in NSW has further compounded the difficulties arising from the intersection of the family law and care and protection jurisdictions. The legislative framework in care and protection in NSW is shifting from a focus on 'care and protection' per se to 'preservation and restoration' and now places a greater emphasis on permanency placement principles.⁵ Under the current legislative regime in NSW, the Children's Court is asked to prefer placing children with their parents first and if that is not possible, then with a guardian. Both scenarios confer all aspects of parental responsibility. Under these types of care orders, children's legal status 'more closely resemble[s] that of children in the realm of "private" family law type arrangements.'⁶

There is also an increasing understanding that family violence is a 'public responsibility' rather than a purely 'private' matter.⁷ It has been observed that 'family law has transformed over the past 200 years from an essentially private space to a public one.'⁸

These legal and societal changes require a shift in legal frameworks to accommodate matters which have both a 'public' and 'private' aspect to them.

One federal court system could be established to deal with family law and care and protection matters. This would unequivocally resolve the tensions that arise from the two jurisdictions operating side by side and unify the fundamentally different legal and philosophical approaches taken in the Family Court and Children's Court. However, Legal Aid NSW appreciates this may not be an achievable aim in the foreseeable future. Given this, we have focussed our recommendations on a range of other practical jurisdictional and legislative changes that would improve the responses and outcomes for children and families who go between the two systems.

1.1 Corresponding jurisdictions - administrative and practical considerations

Legal Aid NSW considers that the most workable and practical reform solution, short of creating a single court with comprehensive powers, is to create 'corresponding jurisdictions' to enable greater adherence to the 'one court principle'.

The creation of 'corresponding jurisdictions' in the Family Court and the Children's Court would require a referral of powers from the States and Territories to the Commonwealth for the Family Court and a referral of Commonwealth powers from the Commonwealth to the States and Territories for the Children's Court. This could be a referral of all or limited care and protection jurisdictional powers to the Commonwealth. The 'corresponding jurisdictions' model proposed below, as opposed to a 'one court' model, is based on the assumption that a limited referral of State and Territory referral of power is more likely.

⁵ See for example the *Child Protection Legislation Amendment Act 2014* (NSW) and the Second Reading Speech made by the Honourable Pru Goward, then Minister for Family and Community Services and Minister for Women, 31 October and 1 November 2013.

⁶ Callander N, 'Section 69ZK of the Family Law Act and the Implications for the *Children and Young Person (Care and Protection) Act 1998*', Paper prepared for Legal Aid NSW Care and Protection Conference 2014, 9.

⁷ Astor and Croucher, 'Fractured Families, Fragmented Responsibilities' (2010) 33(3) *UNSW Law Journal*, 854-855.

⁸ Astor and Croucher, *Fractured Families, Fragmented Responsibilities*, UNSW Law Journal Volume 33(3) (2010) 854.

Under this ‘corresponding jurisdictions’ model, the Family Court should have the power to make some Children’s Court orders and compel the Secretary of the New South Wales Department of Family and Community Services (FaCS) to intervene in family law proceedings. We agree with the Australian Law Reform Commission (ALRC) recommendation that ‘the law should allow family courts to confer parental rights and duties on a child protection agency, in cases where there is no other viable and protective carer’ and that ‘family courts should have the power to join a child protection agency as a party in this limited class of cases.’⁹

Similarly, the Children’s Court should have the power to make parenting orders by consent, recovery orders, airport watch list orders and injunctions for personal protection, as well as much greater enforcement powers. The Children’s Court should also have the power to compel FaCS to expend resources to give effect to certain orders of the court, such as providing funding for contact. We also support the ALRC recommendation that ‘[t]he *Family Law Act 1975* (Cth) should be amended to give children’s courts the same powers as magistrates’ courts.’¹⁰ This would mean that the powers currently vested in courts of summary jurisdiction pursuant to sections 69J and 69N of the *Family Law Act* would also extend to Children’s Courts, enabling them to make a parenting order or orders regarding the living arrangements for children by consent. These changes would facilitate a more streamlined response to families with complex needs and ensure that in appropriate circumstances, one court could deal with the range of legal issues arising from a single matter or family.

At present, the Family Court and Children’s Court operate differently and have different resources available to them. There are also significant cultural differences between the Family Court and Children’s Court. In our view, the expertise of the Judges and family consultants in the Family Court, as well as the Crown Solicitors appearing for FaCS when it does intervene, means that families with complex needs receive a more effective response from the Family Court system.

Any structural reform to the way these jurisdictions are able to interact and overlap must also include an appropriate allocation of resources and education to enable the Children’s Court and Family Court to facilitate their expanded functions without impacting on the effectiveness and efficiency of each court.

Further, any legislative change in this area needs to be coupled with measures to facilitate coordination between the two systems. A current example of effective co-operation between the Family Court and the child protection system is the Magellan program in the Family Court. Key aspects of this program are:¹¹

- having a judge manage the process
- cooperation with other organisations, such as state welfare authorities, which have had contact with the family

⁹ Australian Law Reform Commission, *Family Violence – A National Perspective*, Report 114 (2010) 19.100.

¹⁰ Australian Law Reform Commission, *Family Violence – A National Perspective*, Report 114 (2010) 19.121.

¹¹ Family Court of Australia, *Magellan Program*, (10 April 2015) <http://www.familycourt.gov.au/wps/wcm/resources/file/ebe8ff4dcc2861f/MFS_Magellan_1208V1.pdf>.

- a focus on the children in the dispute
- the Court's ability to order expert investigations and assessments from the respective state/territory child protection agency and/or a court family consultant, and
- tight time frames.

2. The Legal Aid NSW experience

Legal Aid NSW lawyers and their clients commonly experience difficulties when FaCS investigates allegations of child abuse but decide not to make a care application in the Children's Court or initiate proceedings in the Family Court. The case studies below highlight the difficulties which can arise when FaCS declines to intervene in proceedings, including the potential risks for vulnerable children and duplication of resources.

Case study 1

FaCS removed two young children from their mother and placed them with an uncle without instigating any court proceedings. By doing this and not commencing Court proceedings, FaCS was acting outside its power. The Mother commenced proceedings in the Federal Circuit Court (FCC) seeking that the children be returned to her and live with her. The Independent Children's lawyer (ICL) issued a subpoena to FaCS which produced 6 reams of records in relation to the children and their parents. The Judge in the FCC asked FaCS to intervene but they refused. The Judge then asked the case worker to attend court. The case worker attended court but reiterated that FaCS would not intervene. The Judge then wrote a formal letter to FaCS setting out the Court's concerns in relation to the children.

The matter was transferred to the Family Court. The Family Court Judge directed the ICL to put together all of the FaCS material produced under subpoena, tag the risk issues identified and attach it to a letter asking FaCS to intervene. FaCS again refused to intervene. The uncle eventually sought to be joined and was joined as the only viable placement option.

Case study 2

Legal Aid NSW currently acts in a matter which commenced in the FCC at Parramatta. A hearing date was set down in early 2015 and FaCS was asked to intervene but declined to do so. Three days before the hearing FaCS removed the three children and commenced care proceedings at Lithgow. These proceedings are now at the Children's Court in Bathurst.

The Family Report in the FCC recommended that FaCS intervene. The Court asked FaCS to intervene on more than one occasion, but FaCS refused. The grand parents were joined in the FCC proceedings but were not joined in the Children's Court proceedings and when the matter commenced in the Children's Court a different child representative was appointed.

Complications also emerge when orders made by the Children's Court expire and matters are then litigated in the Family Court, or when matters in relation to different children in the same or a blended family are litigated in the different jurisdictions.

Case study 3

Seven children were the subject of parenting proceedings in the FCC. FaCS was asked to intervene but refused. They then removed all seven children and filed in the Children's Court seeking parental responsibility of all children.

The father of two of the children argued that the proceedings should be finalised in the FCC and the court heard argument in relation to those two children only. A new child representative had been appointed in the Children's Court proceedings and did not argue either way. The ICL from the FCC was not appointed to act for the children in the Children's Court, but she was reappointed when it came back to the FCC. Ultimately the case involving the two children was managed by the FCC and the case involving the five children by the Children's Court with different legal representatives. Legal Aid NSW funded a direct legal representative in the Children's Court and an ICL instructing Counsel in the FCC proceedings.

Case study 4

FaCS recently made a care application in the Children's Court in relation to a newborn child. This child has a two year old sister who lives with the maternal grandmother. The children's mother is alleged to have threatened both children while she was in a psychotic state and these threats form the basis of the care application in relation to the newborn child. However, FaCS have not included the two year old sister in the care application.

The grandmother has advised FaCS that she is in the middle of family law proceedings in the FCC in Parramatta and has an 'interim order for custody' for the two year old child. There is no reference in the FaCS material associated with the care application of consideration being given to commencing proceedings in relation to the new born child in the FCC, nor had FaCS sought a copy of the orders made in relation to the sibling in the FCC.

It is also particularly resource intensive for Legal Aid NSW when one family has matters before both the Children's Court and the Family Court. From a client's perspective, it is distressing to have to repeat traumatic evidence for the different reports prepared for both courts. Children can also become confused by the different approaches taken in each court. For example, a child might instruct their legal representative in Children's Court proceedings, but have a best interest representative in Family Court proceedings. For children to engage effectively in either Children's Court or Family Court proceedings continuity of representation is important and the need to meet with different child representatives in the different jurisdictions will have a potential negative impact on the child's relationship with his or her representative and the benefits of this representation.

These case studies highlight some of the gaps and problems which can arise under the current two court system, particularly for vulnerable children.

Case study 5 – Koralyn¹²

Koralyn is 15 years old. She grew up outside Australia and moved to Australia to live with her mother and step father when she was 14 years old. She is a permanent resident of Australia. Koralyn travelled overseas with her mother to attend a family wedding. While overseas, members of Koralyn's family indicated that they wished for Koralyn to marry their son. When Koralyn indicated that she did not want to get married to either of her cousins, her mother assaulted her and took away her passport, phone, ipad and clothes. Her mother later indicated that her daughter would not be returning to Australia. Koralyn then travelled to meet her father who took her to the Australian Embassy where she was given assistance to return to Australia.

Koralyn reported the incident to authorities and also made allegations about inappropriate sexual behaviour by her stepfather. The matter was referred to the NSW Police Joint Investigation Response Team (JIRT). FaCS have placed Koralyn in a refuge while the matter is being assessed.

JIRT found that the matter did not meet the threshold for substantiation. However, the Australian Federal Police are currently investigating the mother for offences of attempted forced marriage and confiscation of another person's travel documents. The AFP trafficked people program has provided some case work support to Koralyn while they investigate the matter. Legal Aid NSW is not aware of NSW Police taking any action to lay charges or issue an apprehended violence order to protect Koralyn.

Koralyn does not want to return to her mother's care and is fearful of her mother.

Legal Aid NSW filed in the FCC for a number of orders, including an airport watch list order, an order that Koralyn cannot be married or taken away from her school or residence and an order that FaCS join the proceedings.

Forced marriage is essentially a child protection issue which is the responsibility of the states and territories but as this scenario highlights, the criminal investigation is conducted by the federal police, and the airport watch list order and associated orders need to be obtained in the family law jurisdiction. While this matter is still on foot, and the outcome for Koralyn is unknown, it does raise concerns about whether the needs of this young woman can be adequately addressed if the agencies and courts involved in this matter at a state and federal level investigate and respond separately, or decline to take any action. As the court has no power to compel FaCS to join the proceedings as a party, Koralyn could be left without financial support, accommodation and care and protection. In our view, the outcomes for this vulnerable young woman would be improved if FaCS could be compelled to join the Family Court proceedings and expend resources in the best interest of a child or young person.

It is also problematic that the young person in the scenario above is required to take this matter to the Family Court. This can place young people at more risk and can potentially have a destructive effect on their family relationships.

¹² The young person's name has been changed.

Case Study 6 - Jason¹³

Legal Aid NSW acted for Jason in Children's Court proceedings and subsequent District Court proceedings. Jason was removed from his mother's care at approximately 18 months old because of concerns about her mental health. Jason was placed with his father on assumption.

During the Children's Court proceedings, Jason's mother took steps to address the concerns about her mental health and sought a shared care arrangement. Ultimately, the court made an order placing the child under the sole parental responsibility of the father. There were a number of allegations about each party in these proceedings and the key issues centred on what relationship the mother should have with the child. These issues were essentially 'family law' type issues which could not be adequately dealt with by the Children's Court magistrate.

The mother appealed to the District Court and an updated assessment was ordered. The assessor was a person who is an experienced Chapter 15 report writer in the Federal Court of Australia (FCA). The report recommended Family Law Style Orders for the mother's time with the child. All parties agreed to resolve the matter as recommended. It was agreed that the Orders were 'family law style' however, FaCS would not consent to the parties filing consent orders in the FCA, even though they acknowledged there were no current child protection concerns. FaCS agreed that orders should be made for a short period only, during the anticipated length of the mother's continuing recovery, and that parental responsibility should be shared after that.

This meant that orders had to be made under the *Children and Young Persons (Care and Protection) Act 1998* (the Care and Protection Act) which covered a two year period for contact by the mother and parental responsibility to the father. There was no certainty about the orders after the two year period.

Although the Legal Aid NSW solicitor drafted the orders so that the contact arrangements operated as a Parenting Plan after the expiry of the Orders, the best and most certain outcome for the child would have been for family court orders to be made. This would have provided certainty for the parents and the child in the long term.

Under the 'corresponding jurisdictions' model proposed, the Children's Court would have the power to make long standing family law orders by consent. However, it is likely these orders would need to be enforced in the FCA or FCC. In addition to giving the family in this matter and other families in a similar situation more certainty, the Children's Court having the power to make family law orders by consent would also reduce the resources required to represent this family over the course of their contact with the justice system. In our experience, the Children's Court does not make contact orders when the Minister is given long term parental responsibility. Ordinarily, future contact is outlined in the care plan which is subject to the case workers discretion and cannot be enforced. Further, NSW legislation has recently been amended to restrict contact orders to 12 months only where there is no restoration. In our view, giving the Children's Court the power to make family law orders by consent would allow longer term contact orders to be made and enforced in appropriate situations.

¹³ The child's name has been changed.

3. Further reform required

3.1 Requiring child protection agencies to assist and intervene in family court proceedings

As highlighted in the case studies above, it can be particularly difficult for practitioners and their clients when FaCS declines to intervene in Family Court proceedings and the court is prevented from giving the Minister parental responsibility, where all of the parties are 'found wanting as carers for the children.'¹⁴ While the Family Court can request a child protection agency to assist the court and become a party to the proceedings, they do not have the power to compel the Secretary FaCS to become involved in proceedings.

We support the ALRC recommendation that where a child protection agency investigates child abuse, locates a viable and protective carer and refers that carer to a family court to apply for a parenting order, the agency should, in appropriate cases:

- (a) Provide written information to a family court about the reasons for the referral
- (b) Provide reports and other evidence, or
- (c) Intervene in the proceedings.¹⁵

If implemented, this recommendation would ensure that child protection agencies worked more collaboratively with the Family Court in family law proceedings involving care and protection issues. It would also alleviate the financial burden on private parties to initiate proceedings and fund their legal representation in the Family Court.

3.2 Parties other than the Secretary of FaCS commencing proceedings in the Children's Court

Family members who notify FaCS about children at risk or have concerns that children are in need of care and protection cannot file in the Children's Court and are referred to the Family Court where there can be significant delay and costs. Legal Aid NSW appreciates the challenges that would arise if parties other than the Secretary of FaCS were able to apply for care orders in the Children's Court. However, we can see considerable benefits for the parties and children if family members, or parties with a sufficient interest in the welfare of children, could file in the Children's Court.

Legal Aid NSW does not suggest redirecting applications to the Children's Court away from the FCA and the FCC. As outlined above, we consider that the FCA and FCC are the most appropriate forum for parenting orders to be made as they are better equipped and resourced to hear these matters. However, in our view, legislative change is required to address the current jurisdictional impasse where, if the Secretary of FaCS declines to file a care application, interested parties have no choice but to file in the Family Court. Reform is also required to compel the Secretary of FaCS to lodge with the Children's Court any relevant information about protective concerns for the child and any other evidence that might be required.

¹⁴ See for example *Secretary of the Department of Health and Human Services & Ray and Ors* [2010] Fam CAFC 258 (22 December 2010).

¹⁵ Australian Law Reform Commission, *Family Violence – A National Perspective*, Report 114 (2010) Recommendation 19.3.

3.3 Advantages of reform

Requiring child protection agencies to assist and intervene in family court proceedings, and allowing parties other than the Secretary of FaCS to commence proceedings in the Children's Court would give parties more options to effectively resolve matters involving children who are at risk. In our view, unless reforms are introduced to compel child protection agencies to provide information and participate in proceedings about children with child protection concerns, there will continue to be significant shortcomings in the way that the courts can respond to the needs of families with complex needs, particularly children. In addition, requiring child protection agencies to assist and intervene in family court proceedings, together with increased resources, would enhance the effectiveness of the Family Court to deal with children where there are child protection concerns.

4. The benefits of corresponding jurisdictions

4.1 One court – fewer legal aid resources

A clear benefit of a corresponding jurisdictions model is that matters which would ordinarily straddle two jurisdictions could be dealt with in one court. This would have a range of flow-on benefits. From our perspective, it would enable Legal Aid NSW to streamline its services in these 'crossover' matters, and in turn create cost savings. Proceedings taking place in one jurisdiction would mean that Legal Aid NSW would generally only need to fund one children's legal representative and the children would have continuity of representation for the duration of their matter. There would also be the savings to costs currently associated with funding the legal representation of the other parties in both jurisdictions, duplicating case work and obtaining evidence such as issuing subpoenas and funding expert reports.

4.2 Cross-border matters

It is not uncommon for families who have come into contact with the child protection system in one state to then move to another state. The proposed corresponding jurisdictions model would be particularly useful for 'cross-border' matters, where care proceedings are on foot in one jurisdiction and a child from the same family is before a Children's Court in another jurisdiction. Under the proposed model, the care and protection matters could both be dealt with in one court and in the one jurisdiction. The 'corresponding jurisdictions' model could also give the Children's Court powers to make orders in relation to children residing in another state, by agreement with the Children's Court in that state.

4.3 Family violence

The ALRC made a number of recommendations to increase the capacity of the Family Court to protect the personal safety of parties and to increase the effectiveness of Family Court orders in relation to family violence. The only injunctive orders available under the Care and Protection Act are section 90A orders. These orders are unenforceable and yet the Children's Court deals with the most disadvantaged and vulnerable families in which, more often than not, drug and alcohol abuse, domestic violence and child abuse are significant contributing factors.

It is crucial that both the Family Court and Children's Court have the power to make enforceable orders to protect parties from family violence. For example, these recommendations would provide Koralyn, the young woman in the case study above, with the ability to seek protection from her mother and take action for breach of an order in the one court.

Legal Aid NSW supports recommendations 17-3¹⁶, 17-4¹⁷ and recommendations 20-3 through to 20-6¹⁸ of the ALRC Family Violence Report. Legal Aid NSW also supports recommendation 20-7(b) that 'state and territory child protection legislation should require child protection agencies to provide timely feedback to mandatory reporters, including an acknowledgement that the report was received and information as to the outcome of the child protection agency's initial investigation'.¹⁹

5. Other alternatives to corresponding jurisdictions

5.1 Co-location of courts

The siloed nature of the child protection system and the family system can cause delays and lead to inefficiencies which impact on the parties in the proceedings. In international jurisdictions, one approach to overcome the impact of the siloed child protection and family systems is to co-locate courts exercising different jurisdictions in the same building. These co-location models are designed to expedite the transfer of matters between courts, to bring multiple services together under the one roof, to break down traditional barriers and improve working relationships among agencies. As well as the physical advantages, co-location has fostered a more productive and collaborative culture, as staff better understand the needs and functions of other agencies, and IT systems can be integrated. In the context of family law and child protection some advantages of a co-location model would be:

- potentially faster access to critical FaCS and police information about risk through linked IT databases
- a single court complex for court users, and
- greater emphasis on continuity of representation for children.

¹⁶ Australian Law Reform Commission, *Family Violence – A National Perspective*, Report 114 (2010) 17.246.

¹⁷ Australian Law Reform Commission, *Family Violence – A National Perspective*, Report 114 (2010) 17.246.

¹⁸ Australian Law Reform Commission, *Family Violence – A National Perspective*, Report 114 (2010) 20.153.

¹⁹ Australian Law Reform Commission, *Family Violence – A National Perspective*, Report 114 (2010) Recommendation 20-7(b).

5.2 Tie Commonwealth funding to the adoption of uniform state laws by child protection agencies

The United States of America has made far greater inroads to protecting vulnerable children in their legal systems than we have in Australia. Like Australia, principles of constitutional federalism strictly limit the Federal Government's authority to directly legislate in child protection (and family law more broadly).²⁰ However, since 1974 a number of national laws have been passed which provide federal statutory direction to States about the protection of children.²¹ States must comply with these Acts to secure significant amounts of funding necessary to provide services to children and families. The enactment of these laws has arguably led to better practices and may be relevant to the challenges we currently face in Australia. For example:

- the *Child Abuse Prevention and Treatment Act* (1974)²² brought a federal focus to preventing and responding to child abuse and neglect by offering funding. Under this legislation states are required to maintain confidential records of child abuse or neglect reports and investigations which they must be prepared to release to federal, state, and all other government offices in need of the information.²³
- the Family Preservation and Family Support Services Program was passed in 1993 to provide funding to assist parents whose children are at risk of being removed. This funding is administered by the Children's Bureau which is part of the office of the US Administration of Children and Families in the Department of Health and Human Services. It has been argued that as a result of this legislation, national performance standards for child representatives and courts have been articulated, and training and education have been tailored to national models.²⁴ This legislation created a National Court Improvement Program, which enables state courts and agencies to join together to improve collaboration and performance.

In Australia there is an annual national collaboration forum for Family Courts' representatives, legal and policy makers from state child protection agencies and legal sector representatives. This is a positive step to encourage better collaborative practices. However, the establishment of state networks modelled on the Federal "Pathways" system would likely lead to the formation of on the ground networks focussed on collaboration. In addition, many Australian reports have recommended the co-location of child protection workers at Family Court registries to enable better information exchange. If funding were tied to a legislative instrument

²⁰ V Sankaran, 'Innovation Held Hostage: Has Federal Intervention Stifled Efforts to Reform the Child Welfare System?' *Journal of Law Reform Volume 41 Issue 1 Fall 2007*.

²¹ For example a national child support system and the P.L. 93-247 *Child Abuse Prevention and Treatment Act* (1974) were introduced. Then later, P.L. 105-89 *Adoption and Safe Families Act* (1997) and P.L. 110-351 *Fostering Connections Act* (2008) were introduced. Six additional pieces of legislation were passed between 1980 and 2001 that dealt with concerns ranging from ending foster care drift to the inclusion of community agencies in protective service delivery.

²² P.L. 93-247 *Child Abuse Prevention and Treatment Act* (1974), most recently amended by P.L. 111-320: *Child Abuse Prevention and Treatment Act Reauthorization Act of 2010* <<https://www.govtrack.us/congress/bills/111/s3817>>.

²³ Children's Bureau, Washington, DC: United States Department of Health and Human Services, *About CAPTA: A legislative history* (2011).

²⁴ Duquette, D & Haralambie, A, "Child Welfare Law and Practice"^{2nd} Edition Bradford Publishing Company (2010) p. xxxv.

along the lines of those in the United States, collaboration between courts and agencies currently providing services to families between the two jurisdictions could be improved.

5.3 A consistent legislative framework

Much work has been done and continues to be undertaken around a national framework and strategy for child protection. In the context of that work the relatively small issue of inconsistent legislation understandably remains an unaddressed issue. Any discussion of corresponding jurisdictions needs to be mindful of the very different legislative regimes which govern child protection and domestic violence across Australia. This presents a particular challenge in New South Wales where cross border issues can be acute. Our lawyers in northern New South Wales constantly deal with families, and orders, made in Queensland. The same difficulty arises in other towns serviced by Legal Aid NSW where the Federal Circuit Court visits from another State or Territory. For example, judicial officers from South Australian provide services to Broken Hill and judicial officers from the Australian Capital Territory provide services to Wagga Wagga.

Model national legislation in domestic violence and child protection would be one way to achieve consistency between State approaches and would assist judges working under a corresponding jurisdictions model.

Some countries have developed interstate compacts which are reciprocal contractual agreements between States rather than uniform laws. They are used to reach agreement about the laws that might, for example, apply to a family who moved between States particularly when there are domestic violence or child protection histories. It is argued that interstate compacts should be preferred over uniform laws because States can adopt uniform legislation and then change the legislation. Over time, courts in different States may also interpret the provision of uniform laws differently with no way of reconciling divergent views.²⁵ An Interstate Compact on the Placement of Children has been adopted by all 50 states across the USA with the intention of establishing uniform legal and administrative procedures governing the interstate placement of foster children.²⁶

5.4 Amend federal legislation to require the provision of information on at risk children and families

Courts are currently in a position to order records from police and child protection authorities under to section 69ZW of the *Family Law Act*. However, practices are not consistent and orders, when made, tend to be on the application of a child representative and late in the proceedings. In the experience of Legal Aid NSW, there are different approaches to the use of section 69ZW by judicial officers across New South Wales. Whilst the information obtained under section 69ZW is arguably critical early on, orders made early at the instigation of the judicial officer are rare. Arguably section 69ZW provides useful machinery for obtaining critical information early. We are of the view that the barriers to achieving a consistent national approach by judicial officers should be explored further.

²⁵ National Centre for Interstate Compacts, Council of State Governments *Understanding Interstate Compacts* <http://cglg.org/media/1313/understanding_interstate_compacts-csgncic.pdf>.

²⁶ Haralambie, A "Interstate and International Issues' in Duquette, D and Haralambie, A supra p. 367.

Instead of using section 69ZW, hundreds of thousands of dollars are spent annually by legal practitioners issuing subpoenas to police and child protection authorities to obtain access to records. Legal aid commissions, funded by government to provide legal services, use federal government funds to ensure that state government information is available to federal courts. These subpoenas are issued for the sole purpose of ensuring that federal courts and child representatives are informed of the safety and risk issues for the families and children involved in legal proceedings. In addition to the money spent, a workload is created for practitioners. In addition, police and child protection agencies are allocating scarce resources to meet subpoena production requests and courts are expending scarce resources on administering the requests and managing the material produced.

A consistent approach by courts to section 69ZW would ensure that more appropriate information about children and families at risks is available on early in the family law system. Alternatively, the section could be strengthened by passing legislation similar to the *American Child Abuse Prevention and Treatment Act* which requires States to provide information on child protection risks to any Federal, State, Local government entity or agency that has a need for such information in order to carry out its responsibilities to protect children. The definition of 'agency' should extend to legal aid commissions administering child legal representation schemes.

In the United Kingdom, the Children and Family Court Advisory and Support Services (CAFCASS) have 'statutory responsibility to safeguard and promote the welfare of children who are involved in Family Court proceedings.'²⁷ CAFCASS Family Court Advisers 'provide judges with the advice, information and recommendations they need to make a safe decision about each child's future.'²⁸ Their principal functions are to:²⁹

- safeguard and promote the welfare of children
- give advice to the family courts
- make provision for children to be represented, and
- provide information, advice and support to children and their families.

The CAFCASS Officer 'has a statutory right in public law cases to access and take copies of local authority records relating to the child concerned and any application under the *Children Act 1989*.'³⁰ They also have to power to access other records 'that relate to the child and the wider functions of the local authority, or records held by an authorised body that relate to that child'.³¹ The legislation underpinning this model could inform proposals developed by the Family Law Council for federal legislation facilitating the provision of information about at risk young people to Family Courts.

²⁷ Children and Family Court Advisory Support Services <<https://www.cafcass.gov.uk/about-cafcass.aspx>>.

²⁸ Ofsted report, *Children and Family Court Advisory and Support Service – Inspection of Cafcass as a national organisation 2014*, 5.

²⁹ Ofsted report, *Children and Family Court Advisory and Support Service – Inspection of Cafcass as a national organisation 2014*, 5.

³⁰ Department for children, schools and families, Working together to safeguard children, A guide to inter-agency working to safeguard and promote the welfare of children, December 2009.

³¹ Department for children, schools and families, Working together to safeguard children, A guide to inter-agency working to safeguard and promote the welfare of children, December 2009.

In the event that a national database or legislative measures were introduced, there would be savings to legal aid commissions and other agencies which could be allocated towards the co-location of representatives from child protection agencies and the police in registries across Australia. These reforms would save the Federal Government a large amount of money that could be used to enhance the FCC and Family Court's response to families with complex needs.

6. Key challenges

6.1 Adequate resources and expertise in the Children's Court and Family Court

Legal Aid NSW is concerned that the benefits of the proposed scheme of corresponding jurisdictions would be undermined if it was not accompanied by an injection of additional resources for both the Children's Court and the Family Court and an investment in education and comprehensive training for judicial officers. Without appropriate resourcing, the added workload in both courts, but particularly in the Family Court, could result in significant delay before matters could be heard and finalised. Social research informs us that decisions regarding care arrangements for children need to be made with as little delay as possible and the younger the child, the more important it is that decisions are made in a timely fashion.³²

The ALRC highlighted a number of the concerns associated with expanding the jurisdiction of the Children's Courts to hear *Family Law Act 1975* (Family Law Act) matters, particularly given the legislation for each contains 'many significant and fundamental differences'³³ including:³⁴

- magistrates may not be familiar with their powers under the *Family Law Act*
- legal representatives may not be familiar with those powers and may not request that they be used or argue effectively for their use
- decisions under Pt VII of the *Family Law Act* are complex and there may be concerns about falling into appealable error, and
- magistrates courts have limited time available in busy court lists, and making these decisions would be an added burden.

These concerns highlight the need for extensive training and resourcing.

In our experience, the care and protection matters in the Children's Court are very much welded to the administrative machine of FaCS. This stands to reason given they are the statutory body charged with the responsibility for children in need of care in New South Wales. FaCS initiate proceedings and magistrates rely on the information provided to the court by FaCS.

³² McIntosh and Chisholm, 'Cautionary Notes on the Shared Care of Children in Conflicted Parental Separation' (2008) Vol 14(1) *Journal of Family Studies*, 7.

³³ Chief Justice of the Family Court of Australia and Chief Federal Magistrate of the Federal Magistrates Court of Australia, Submission FV 168, 25 June 2010 in Australian Law Reform Commission, *Family Violence – A National Perspective*, Report 114 (2010) 19.130.

³⁴ Australian Law Reform Commission, *Family Violence – A National Perspective*, Report 114 (2010) 19.141.

The dynamic in a Family Court is considerably different. A system which enabled Children's Court Magistrates to make Family Court type orders would rely on them developing independent expertise in the area of family law. With appropriate resources, this is an achievable aim. It is not uncommon for Children's Court Magistrates to have a background in criminal law before hearing care and protection matters. With appropriate training, Magistrates should also be able to acquire the necessary skills and knowledge to preside over *Family Law Act* matters as required.

Given that the Legal Aid NSW Family Law practice is a mixed model, incorporating both family and care and protection, our solicitors are often expected to appear in both courts, and they are able to work across both jurisdictions and navigate the relevant legislation in each. As such, our solicitors are well placed to work under a 'one court' model, or a corresponding jurisdictions model.

6.2 Representation of children

Different models for the representation of children operate in the Family Court and Children's Court. It is the experience of Legal Aid NSW that the model of representation in the Family Court works well. However, children do not have a right of appearance in the Family Court as they do in the Children's Court.³⁵ All children are legally represented in Children's Court proceeding. In the Family Court, an application for an Independent Children's Lawyer (ICL), needs to be made by a party to the proceedings or by the Court.

An important feature of the representation of children in the Children's Court is that there is a rebuttable presumption that a child who is not less than 12 years of age is capable of giving proper instructions and is directly represented.³⁶ There is a rebuttable presumption in the reverse for children 11 years and younger.

These aspects are specific to New South Wales and highlight the inconsistency that could arise without uniform state legislation. Careful consideration will need to be given to how children are represented if the 'corresponding jurisdictions' model is adopted. A practice note could be developed to outline when an ICL should be appointed in 'child protection' matters.

6.3 Appeals and review mechanisms

In NSW, decisions of Children's Court Magistrates sitting in care proceedings can be appealed to the District Court or to the Supreme Court of NSW. The usual avenue of appeal is to the District Court pursuant to section 91 of the Care and Protection Act. This appeal process involves a 'de novo' hearing, although the Court has a discretion to admit evidence, including the transcript, from the Children's Court proceedings.³⁷ An appeal to the Supreme Court is either an appeal from a judgement of the President of the Children's Court because he is a District Court Judge or an application for judicial review under section 69 of the *Supreme Court Act*. Section 247 of the Care and Protection Act provides that 'nothing in this Act limits the jurisdiction of the Supreme Court.'³⁸

³⁵ *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 98.

³⁶ *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 99A.

³⁷ *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 91(3).

³⁸ *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 247.

In NSW, children and young people can also be subject to orders of the Supreme Court under the *parens patriae* jurisdiction, such as secure location and therapeutic orders. In any corresponding jurisdictions model, consideration would need to be given to conferring these powers on the Family Court to the extent they are not already enshrined in the legislation.³⁹

There are examples of States and Territories legislating to allow magistrates courts and/or Children's Courts to make *parens patriae* jurisdiction types orders. For example, in the Australian Capital Territory, section 542 of the *Children and Young People Act 2008 (ACT)* requires the Children's Court to give initial consideration to an application for a therapeutic protection order. Any associated legislative reform in this area should set out how these types of orders are to be made under the new system.

As an alternative to creating corresponding jurisdictions there would be clear benefits if the States and Territories referred a more limited jurisdiction for appeals arising out of state child protection legislation, adoptions and the *parens patriae* jurisdiction to Federal Courts. Some advantages include:

- increasing the familiarity of child protection workers and services with the Family Courts and the family law system
- developing a more uniform and nationally consistent body of jurisprudence, and
- using the more relevant and better aligned skill set of the Family Court practitioners, judges and therapeutic services.⁴⁰

6.4 Enforcing and varying orders

The appropriate forum for orders to be enforced and varied will also need to be considered. For example, if a parenting order is made in the Children's Court under the Family Law Act, legislation will need to outline the court in which this parenting order should be enforced or varied.

Further, the Children's Court currently has very limited enforcement powers. Enhancing the enforcement powers of the Children's Court would enable it to be more effective, and would go some way to addressing the gaps in the existing system.

³⁹ Note: LANSW does not support any move to allow courts other than the Federal and Supreme Courts to make orders in the nature of *parens patriae* orders.

⁴⁰ For example, the body of jurisprudence around special medical procedures is very similar to *parens patriae* matters before Supreme Courts.

7. Minimising the duplication of reports when families move between the family courts and the Children's Courts

7.1 The Sharing of Experts Reports between the Child Protection System and the Family Law System

Legal Aid NSW supports Professor Richard Chisholm's recommendations about the sharing of expert reports.⁴¹

7.2 NSW Legislation and agreements – a model for collaboration and information sharing

As addressed in recommendation 5, Chapter 16A of the Care and Protection Act enables and encourages information to be exchanged between a number of state based agencies.

The objects and principles of this chapter provide that:⁴²

(1) The object of this Chapter is to facilitate the provision of services to children and young persons by agencies that have responsibilities relating to the safety, welfare or well-being of children and young persons:

- (a) by authorising or requiring those agencies to provide, and by authorising those agencies to receive, information that is relevant to the provision of those services, while protecting the confidentiality of the information, and
- (b) by requiring those agencies to take reasonable steps to co-ordinate the provision of those services with other such agencies.

(2) The principles underlying this Chapter are as follows:

- (a) agencies that have responsibilities relating to the safety, welfare or well-being of children or young persons should be able to provide and receive information that promotes the safety, welfare or well-being of children or young persons,
- (b) those agencies should work collaboratively in a way that respects each other's functions and expertise,
- (c) each such agency should be able to communicate with each other agency so as to facilitate the provision of services to children and young persons and their families,
- (d) because the safety, welfare and well-being of children and young persons are paramount:
 - (i) the need to provide services relating to the care and protection of children and young persons, and
 - (ii) the needs and interests of children and young persons, and of their families, in receiving those services,

take precedence over the protection of confidentiality or of an individual's privacy.

⁴¹ Chisholm, R, *The Sharing of Experts Reports between the Child Protection System and the Family Law System*, A report by Professor Richard Chisholm AM for the Attorney-General's Department, Canberra, March 2014.

⁴² *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 245A.

This chapter provides a platform for state based agencies to share information and work collaboratively to provide services to children and their families. This has the benefit of giving legislative force to the principles of collaboration and information sharing. A legislative scheme which encourages and enables information sharing should be incorporated in any legislative reform introduced to support a new corresponding jurisdictions regime.

Legal Aid NSW also has an Information Sharing Agreement with FaCS about ICLs in proceedings under the *Family Law Act*. We are currently in the process of reviewing and updating this agreement in consultation with FaCS.

The existing agreement refers to the 'one court' agreement between FaCS and the Family Court:⁴³

It is also recognised that at any time during the proceedings information may come to the attention of the ICL which raises the possibility of involvement by DOCs⁴⁴ either in investigation and responding to new concerns for the child or in considering court action by DOCs such as intervention in the current proceedings or the commencement of care proceedings before a State Children's Court. In this regard, the Memorandum of Understanding between DOCs and the Family Court of Australia includes an acknowledge of the "one court principle" that DOCs will wherever possible and appropriate, seek to intervene in any current family law proceedings rather than commence fresh proceedings in the State Children's Court.

The draft updated agreement emphasises the difficulties arising from the intersections of the two jurisdictions and highlights the 'one court principle' as one of the key principles underpinning the agreement. It provides that:⁴⁵

The simultaneous involvement of separate courts in issues relating to a particular child can cause added cost, confusion, delay and distress for family members involved, and inefficient and wasteful use of scarce public resources, particularly where one court in effect overrules the previous decision of another. The parties will therefore take all practical steps to ensure that proceedings relating to a child occur only in one court, being the most suitable court for the particular child or family.

When these agreements are followed, Legal Aid NSW lawyers find that they can have a productive and collaborative working relationship with FaCS lawyers and case workers which assists to mitigate the difficulties arising from the intersection of the two jurisdictions. However, compliance with the ICL MOU and the 'one court' agreement is not consistent.

The following studies highlight the difficulties which can arise and the extra expense involved when the 'one court principle' contained in these agreements is not followed.

⁴³ Memorandum of Understanding between Department of Community Services and the Legal Aid Commission of NSW Re: Independent Children's Lawyers in proceedings under the *Family Law Act 1975*, 3.8.

⁴⁴ Now referred to as 'FaCS'.

⁴⁵ Information sharing agreement about Independent Children's Lawyers in proceedings under the *Family Law Act 1975* between FaCS and Legal Aid, 3.

Case study 7

Parents of a four year old child were in the FCC in Canberra for parenting order proceedings. The Court had made a number of recovery orders due to the mother's non-compliance with orders. The mother was refusing to return the children to the father and was making allegations about the father to ACT Care and Protection Services.

The FCC asked the Department to intervene and it declined to do so. The solicitor for the mother indicated that workers from the Department were in the court and they had told her that they would assume the care of the child if the court made the recovery order. The court made the recovery order and the departmental officers accompanied the mother to change over where the order required the child to be returned to the father. The departmental officers removed the child when the father attempted to take her as agreed.

The Department also removed the children of the woman who was the new partner of the father, and who were not involved in the FCC proceedings.

The Department then commenced proceedings in Parkes Children's Court in NSW. Legal Aid NSW provided a new children's representative (ILR) in the care proceedings as the ICL appointed in the ACT withdrew. Legal Aid NSW also provided a direct legal representative for the children removed from the father and his current partner. Neither child representative came to the matter with any knowledge of the FCC proceedings in the ACT.

The ICL pointed to the "one court" MOU and attempted to persuade the Children's Court that the proceedings should not have been commenced in that court, but was not successful. The matter proceeded to finality in the Children's Court.

This scenario highlights the difficulty that arises when different States and Territory agencies are involved. Arguably it should not have occurred if the matter involved the NSW FaCS because of the MOU. However, as indicated above, the 'one court principle' contained in these agreements is not always followed.

Case study 8

Legal Aid NSW funded an ICL to appear in proceedings before the Family Court because of a number of serious abuse allegations. Six months after proceedings commenced in the Family Court, FaCS sought and obtained an emergency care and protection order in the Children's Court. Legal Aid NSW funded the Family Court ICL to appear in the Children's Court proceedings. After the Emergency Care and Protection Order was made the FaCS withdrew its application and was eventually joined in the Family Court proceedings.

In our view, principles and procedures such as those outlined in the ICL MOU and one court agreement should be enshrined in legislation and/or regulations in both the Family Court and Children's Court jurisdictions to ensure they are adhered to.

Legal Aid NSW also suggests that while there may be constitutional difficulties in a Commonwealth family court making laws with respect to children and families who are subject to state welfare legislation, this may not preclude the Commonwealth from making laws that compel state agencies to co-operate with federal agencies.

Legal Aid NSW will address the issue of information sharing in more detail in future submissions to this Family Law Council reference, particularly in response to the third term of reference: the opportunities for enhancing collaboration and information sharing within the family law system, such as between the family courts and family relationship services.

8. Recommendations

1. The States and Territories should be asked to refer care and protection jurisdictional powers to the Commonwealth Government to create ‘corresponding jurisdictions’ in the Family Court and State and Territory Children’s Courts and, at a minimum, enable the Family Court to:
 - a. join a State or Territory child protection agency in proceedings under the *Family Law Act*
 - b. confer parental rights and duties on a State or Territory child protection agency⁴⁶
 - c. determine appeals arising out of State and Territory child protection legislation
 - d. exercise jurisdiction in adoption proceedings, and
 - e. exercise the *parens patriae* jurisdiction.

2. The Commonwealth should legislate to amend the *Family Law Act* to confer power on State and Territory Children’s Courts to exercise limited jurisdiction under the *Family Law Act*, including:
 - a. amending sections 69J and 69N of the *Family Law Act* to extend the powers currently vested in courts of summary jurisdiction to Children’s Courts to enable them to make a parenting order or orders regarding the living arrangements for the children by consent,⁴⁷ and
 - b. to enable Children’s Courts to make recovery orders, airport watch list orders and injunctions for personal protection,
 - c. to give Children’s Courts greater enforcement powers.

3. The Commonwealth should repeal or amend section 69ZK of the *Family Law Act* so that it does not undermine the referral of power from the States and Territories to the Commonwealth.

⁴⁶ Australian Law Reform Commission, *Family Violence – A National Perspective*, Report 114 (2010) 19.100.

⁴⁷ Australian Law Reform Commission, *Family Violence – A National Perspective*, Report 114 (2010) 19.145.

4. Where a child protection agency investigates child abuse, locates a viable and protective carer and refers that carer to a family court to apply for a parenting order, the agency should be required to provide written information about the child protection concerns to a family court, including the reasons for the referral, reports and other evidence and/or intervene in proceedings.⁴⁸
5. The *Family Law Act* should be amended to enable the Family Court to require a representative of a State and Territory child protection agency to attend court and give evidence about the agencies involvement with a child and/or family if the court determines that the information provided to the court under recommendation 4 is not sufficient to enable the court to make a determination in the best interests of a child.
6. The Commonwealth should introduce legislation similar to the *American Child Abuse Prevention and Treatment Act* requiring States and Territories to provide information on child protection risks to any Federal, State, Local government entity or agency that has a need for this information to carry out its responsibilities to protect children.
7. The States and Territories should amend care and protection legislation to place a positive obligation on the State and Territory child protection agency to:
 - a. file any information or orders made in Family Court proceedings that are related to any application for care and protection in the Children's Court, and
 - b. negate a presumption that a child protection agency should join any existing Family Court proceedings before it can commence proceedings in the Children's Court.
8. The Family Law Council should investigate options to introduce model national legislation on domestic violence and child protection and/or interstate compacts. Consideration should be given to tying funding for Commonwealth funded family law services to the adoption and maintenance of uniform state laws.
9. The Family Law Council should investigate co-location models for the Family Court and Children's Court in overseas jurisdictions. If it is determined that this is a viable option in the Australian context, the Family Law Council should recommend a co-location model that could be trialed in one site and evaluated to assess the effectiveness of this approach for possible application across the country.

⁴⁸ Australian Law Reform Commission, *Family Violence – A National Perspective*, Report 114 (2010) Recommendation 19.3.

9. Conclusion

Referring powers that enable the Children's Courts to make some orders under the *Family Law Act* and enable the Family Court to make Children's Court orders would be of considerable benefit to families with complex needs. In order to ensure that the needs of vulnerable children at the intersection of the family law and child protection systems are met, it is essential for the Family Court to have the power to compel child protection agencies in each state and territory to join proceedings in appropriate cases. It is also necessary for the Family Court and Children's Courts to have the power to order child protection agencies to expend resources to facilitate the courts orders. Enshrining the 'one court principle' in legislation would also ensure that all agencies and parties involved in a matter had an obligation to take all practical steps to ensure that proceedings relating to a child occur in the most suitable court and that scarce legal aid and child protection resources are not wasted in having two separate proceedings before two separate courts.

10. Background

The Legal Aid NSW Family Law Division provides services in Commonwealth family law and State child protection law. Specialist services focus on the provision of Family Dispute Resolution Services and early triaging of clients with legal problems via Family Law Early Intervention Service.

Our Child Protection Legal Services include the provision of advice and representation in:

- child protection proceedings before the Children's Court NSW under the Care and Protection Act and appeals arising from such proceedings;
- proceedings in the *parens patriae* jurisdiction of the Supreme Court of NSW;
- applications for compulsory schooling orders under the *Education Act 1990*;
- adoption matters; and
- applications before the Administrative Decisions Tribunal (NCAT), to review a decision by FaCS to remove a child from an authorised carer.

The Family Law Early Intervention Unit (EIU) is a state wide specialist service of Legal Aid NSW. It provides free family law services in courts and community organisations in a number of locations around NSW to help people resolve their family law and care and protection issues as early as possible without the need to go through lengthy litigation. This service has a special focus on reaching disadvantaged communities who have difficulty accessing legal services. This includes people living in rural and remote areas, homeless people and Aboriginal communities.

Legal Aid NSW also provides a duty services at a range of courts including the Parramatta, Sydney and Newcastle Family Courts and at all six (6) Specialist Children's Courts.

The Family Dispute Resolution (FDR) Service of Legal Aid NSW helps people to resolve their family law dispute without going to court by inviting the parties involved in the dispute to attend a conference. The FDR offers a specialised service for mediating contact disputes in care and protection matters and is available to provide ADR to parties during care and protection proceedings.

Legal Aid NSW also provides specialist representation for children in both the family law and care and protection jurisdictions. In the Children's Court, all children are appointed a legal representative and the model of representation will depend on the child's age and capacity to give instructions. When an application for a care order is filed by the Department, the children in the matter will be represented either by the in house practice or by a solicitor from the care and protection children's panel, (a panel of private practitioners qualified to do children's representation work in care and protection matters).

In the family law jurisdiction, Independent Children's Lawyers (ICLs) are usually appointed by the court upon application by one of the parties or of the Courts own motion. When orders are made in the Family Court or Federal Circuit Court for an ICL, Legal Aid NSW is asked to make arrangements for the assignment of an ICL to the matter. ICLs will be appointed from the in house practice or from the ICL panel (a panel of private practitioners qualified to do ICL work) ICLs are appointed where one or more of the following circumstances exists:

- there are allegations of abuse or neglect in relation to the children
- there is a high level of conflict and dispute between the parents
- there are allegations made as to the views of the children and the children are of a mature age to express their views
- there are allegations of family violence
- serious mental health issues exist in relation to one or both of the parents or children, or
- there are difficult and complex issues involved in the matter.

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