Discussion Paper

Towards a protocol between the Federal Circuit Court of Australia and the NSW Department of Family and Community Services to operate a Parramatta based Pilot involving Aboriginal and Torres Strait Islander Children known to the Department and not at immediate risk

Background

Since Federation there has been a division of public and private law disputes between State and Federal Courts. Attempts have been made to address jurisdictional issues without success[1]).

The State Care & Protection jurisdiction and Federal Family Law system have in common a focus upon the protection of children and the attainment of arrangements that meet their best interests[2].

Both jurisdictions are concerned to ensure that children from an Aboriginal or Torres Strait Island background (ATSIB) have their cultural needs identified and met[3].

Increasing and appropriate scrutiny is applied to the rate of removal and out of home care for ATSIB children. Recent State reforms have also highlighted the sensitivities surrounding placement principles referrable to ATSIB children and a desire to see therapeutic intervention to minimise separation of ATSIB children from their family of origin and extended family and kinship groups.

The availability of support structures, services and appropriate community based services for families is a challenge within both State and Federal systems and the jurisdictional bases upon which engagement with such services as are available varies between the two systems as does the incurrence of cost with respect to those services..

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[1] See for example Cross Vesting legislation and its reading down by the High Court.

[2] Whilst the fundamental jurisdiction establish by the *Children and Young Persons (Care and Protection) Act* (*C&YP(C&P)A)* is established by a finding that a child is in need of care the subsequent discharge of duties under the State Act is guided by similar objects and principles to those under the Family Law Act (being ss.8 and 9 of the *C&YP(C&P)A* and s.60B of the *Family Law Act(FLA)*). The *FLA* also prioritise protection over relationships (see s.60CC(2A)).

[3] Consistent with obligations created by International Instruments such as the *International Convention on the Rights of the Child* and as address through Chapter 2 Part 2 of the *C&YP(C&P)A* and ss. 60CC(6) and s.61F *FLA.*

Fundamentally, the powers of Courts operating under State and Federal legislation respectively are disparate with Courts operating under the Family Law Act having greater scope and freedom to:

1. Allow participation of broader family as parties (and so that such persons can seek relief and receive the benefit of orders);

2. Mandate therapeutic interventions designed to build strength and resilience and address deficiencies in parenting (and to enforce and Police engagement and compliance);

3. Case manage proceedings without specific time constraints or direction.

Scope of power under the Family Law Act

The *Family Law Act* contains a number of significant powers that are not directly reflected in State legislation and which could be of significant assistance in addressing both the protection and best interests of children.

s.65C of the *FLA* allows an application for parenting orders to be made by any person *"concerned with the care, welfare or development of the child".* This clearly includes the Department and readily includes broader family and kinship relations. In determining who might be considered to be "concerned" with a child's welfare cultural considerations would be relevant.

The ability of kin to apply and/or be joined would allow:

1. Family members to apply with support or at the suggestion of the Department (if they are involved at that stage of Departmental involvement); and,

2. Allow the joinder of Family members once proceedings have been commenced.

Once a person (whether family member, parent, the Department or otherwise) is a party to proceedings then orders can be made which bind them and/or made in their favour (such as a child's placement in their care or allocation of parental responsibility).

The FLA has a focus on Family Dispute Resolution and Family Counselling[4] . The Court has an obligation to inform parties of the availability of such services[5] , an

[4] For definitions see ss.10B and 10F
[5] S.62B

obligation to consider the utility and benefit of using those services[6] and is mandated (with some exceptions relating to consent and family violence and abuse) to compel the parties to attend before concluding the proceedings[7] .

FDR and Family Counselling services can be used together or separately and can be used at any stage in the proceedings. The only tests as to the use of such services are the child's best interests and the appropriateness of those services.

As therapeutic interventions can be Court ordered and ordered at any time the Court has the ability to both address changing therapeutic needs and to monitor compliance[8]. In this fashion the power to require Court ordered attendance upon therapeutic services of broad scope[9] may be seen, in some circumstances and as an interim arrangement, comparable to a "*Griffiths remand*".

Whilst Family Counselling and FDR are, by and large, confidential and evidence of that which occurs within that process inadmissible, other "…courses, programs or…services" (such as Drug rehabilitation services for example) would not be and thus forensic purpose is also served and compliance and benefit can be duly monitored and ascertained.

A broad variety of orders, interim, interlocutory and final can be made by the Court[10] including:

- the person or persons with whom a child is to live;
- the time a child is to spend with another person or other persons;
- the allocation of parental responsibility for a child;
- if 2 or more persons are to share parental responsibility for a child--the form of consultations those persons are to have with one another about decisions to be made in the exercise of that responsibility;

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[6] See for example ss.11F, 60I and

[7] See ss.13C and 65F

[8] Indeed, any agency to which parties are referred by order has an obligation to advise the Court of non-compliance by the mandated party

[9] Family Counselling is defined by s.10B as "*a process in which a family counsellor helps..one or more persons to deal with personal and interpersonal issues in relation to marriage..or..one or more persons (including children) who are affected, or likely to be affected, by separation or divorce to deal with either or both of the following…personal and interpersonal issues..[or]..issues relating to the care of children"* and s.13C allows the Court to order attendance at FDR, Family Counselling or *"… an appropriate course, program or other service*".

[10] See s.64B

- the communication a child is to have with another person or other persons;
- maintenance of a child;
- the steps to be taken before an application is made to a court for a variation of the order to take account of the changing needs or circumstances of a child to whom the order relates or the parties to the proceedings in which the order is made;
- the process to be used for resolving disputes about the terms or operation of the order;
- any aspect of the care, welfare or development of the child or any other aspect of parental responsibility for a child

Orders can be made in favour of a variety of persons[11] subject to notice, joinder and due process.

The FLA imposes specific obligation to expeditiously address allegations of risk[12] and through injunctive and procedural orders. The Court has an extensive injunctive power to address such concerns[13] and including the power to obtain assistance in enforcement of orders from Federal and State and Territory Police[14]

The FLA imposes no time frame for disposal of proceedings. Accordingly, matters can be addressed within such time frame as appears appropriate. This can allow prompt and expeditious determination or substantial adjournment depending upon the issues involved in proceedings and the needs of the parties and, most importantly, the child/ren whose welfare is the subject of proceedings.

This flexibility of process, (combined with the tools available through Parts II and VII) would allow interim determinations to be made, (both as to placement, protection and therapeutic interventions) and an extended time allowed for services to be engaged with, courses and programs to be completed and the matter then reviewed and, if necessary (ie not resolved) determined. Such process would allow an opportunity for address of impediments to a child's appropriate and safe care and an opportunity to demonstrate capacity for change and, potentially, resumption of care.

[11] See s.64C
[12] See s.67ZBB (and ss.4 and 4AB)
[13] See ss. 68B and s.114
[14] See ss.68C and ss. 65Q, 65Y, 65Z and 67Q

Differences between the two jurisdictions

The primary distinction between the two jurisdictions is the fact that the *C&YP(C&P) Act* operates on a "*Child in Need of Care*" model whereas the *FLA* operates on a Best Interests model[15]. However, the effect of the 2007 amendments is to prioritise, within the best interest's model, protection from harm[16].

Whilst *the C&YP(C&P) Act* encourages and facilitates mediation and family dispute resolution the FLA has an emphasis on self-determination[17].

Importantly the FLA allows proceedings to be commenced and joinder of parties on a far broader basis than the C&YP(C&)) Act[18].

The *FLA* has an emphasis on therapeutic assistance and self-responsibility for parents and other parties and, in fact, largely compels use (including through Court order) of such services before determination[19].

Flexibility of process and time frames is a considerable difference between the jurisdictions. The absence of mandated time frames for determination allows parents (and others) the opportunity to address and remedy behaviours of concern. To some extent delay can be used to advantage where appropriate.

The FLA also contains, in addition to the Objects and Principles[20] a statements of "*Litigation Principles"* which bind the Court in case management including the requirement to consider *"the impact that the conduct of the proceedings may have on the child*" and to conduct the proceedings "*in a way that will promote cooperative and child-focused parenting by the parties*" (and subject always to the requirement (the third principle) to conduct the proceedings "in a manner…that will safeguard…the child [and the parties]…from being subjected to, or exposed to, abuse, neglect or family violence"[21].

Culture is also a specific, important and legislative mandated consideration in any parenting determination and the Court has a dual obligation under the *FLA* to:

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[15] See s.60CA
[16] See s.60CC(2A)
[17] Again see ss.65F, 13C and 60I.
[18] ss.64B and 64C
[19] ss.60I and 65F
[20] S.60B
[21] S.69ZN

- Consider the right of an ATSIB child….to maintain a connection with…culture… and…to have the support, opportunity and encouragement necessary…to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views…and…to develop a positive appreciation of that culture[22]; and,

- Have regard to any kinship obligations, and child-rearing practices, of the child's Aboriginal or Torres Strait Islander culture[23]. The Court must thus ensure that evidence of such matters is specifically available[24].

That is not to suggest that proceedings conducted pursuant to the C&YP(C&P) Act do not have regards to such matters. However, specific legislative mandate combined with the obligation to consider International Instruments[25] prioritise the consideration of such matters[26].

Finally, whilst certain portions of the Evidence Act do not apply to parenting proceedings[27] rules of evidence do generally apply and the Court may:

- Require a strict application of the Evidence Act in exceptional circumstances[28]; and,
- Give such weight (**if any**) [emphasis added] as it thinks fit to evidence admitted as a consequence of a provision of the *Evidence Act 1995* not applying.

Aims of the Pilot

1. To ensure that the child/ren the subject of any application are safe and not exposed to unacceptable risk

2. To maximise the possibility of families remaining intact

3. To maximise care by extended family, kin and immediate community

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[22] See ss.60B, 60CC(3)(h) and 60CC(6)
[23] See s.61F
[24] Which might occur through commissioning reports pursuant to s.62G of the *FLA* or Part 15 of the *FCC Rules* or through evidence called by the parties or ICL (see for example s. *78A Evidence Act 1995*)
[25] See s.60B which incorporates the entirety of *the International Convention on the Rights of the Child* as objects of the FLA and *Mabo, Teoh* and *B & B and Minister for Immigration* which authorise consideration of additional international protocols to which Australia is a signatory in informing the application and interpretation of domestic legislation.
[26] Although the paramouncy of the child's best interests (s.60CA) and need for protection (s.60CC(2A) are of greater importance.
[27] See s.69ZT
[28] See s.69ZT(3)

4. To strengthen the skills and abilities of parents irrespective of whether children remain in their care or not

5. To increase the direct participation of extended family and community in the care of and responsibility for aboriginal and Torres Strait Islander children

6. To seek to increase self-determination and responsibility by Aboriginal and Torres Strait Islander families and communities

7. To allow Departmental resources to be focused upon identifying children at risk (but at a level of risk less than would warrant an Emergency Care and Protection Application) and bringing those children and their families to the attention of a judicial process with coercive powers

Relevant and Essential Stakeholders

Clearly the primary collaboration in successfully operating a pilot is between the Department and the Court. However, other significant stakeholders would include:

The Aboriginal Legal Service

The ALS has indicated their support for and willingness to be involved in any pilot.

In light of resourcing implications for ALS they would seek only that a list be conducted on a fixed day of the week (eg Friday) to ensure that a solicitor from the service would be available on a duty basis.

ALS solicitors would also be significantly experienced in practice in both State and Federal jurisdictions.

The Legal Aid Commission of NSW

Solicitors from the LAC Early Intervention Unit would similarly be available on a duty basis to assist any non-aboriginal or conflict clients.

The LAC would also fund and provide Independent Children's Lawyers. Some preliminary discussion has occurred regarding specific creation of a limited pool of private profession panel lawyers with specific training regarding ATSIB children and their representation. Again, to minimise resource concerns a specific list with predictability would be ideal.

Parramatta Family Relationship Centre

The duty list of Judge Harman already operates a pilot with the Parramatta FRC allowing litigants to be directly referred (and appointments allocated by the Court). This allows assessment for appropriate Family Counselling and FDR services (especially when it has not been possible to obtain advice from a Family Consultant as to services that may assist) as well as some degree of case management.

How the List Might Operate

Within the FCC all matters are dealt with on a docket system and managed, at all times, by the same FCC Judge.

Duty work is undertaken in week long blocks and each FCC Judge (at the Parramatta Registry) has duty 7 times per year. In each duty list Family Consultants are available (on a limited basis) to meet urgently with parties for a Child Dispute Conference (which assists in identifying relevant services and issues in dispute). Such Family Consultants services may well be available but, in all probability, supplemented if not replaced by the enquiries already made by the Department.

Ideally the list would operate on a fixed day each 4-6 weeks. This would allow, by and large, the duty weeks to be used. A spacing of each 4-6 weeks also allows for:

- Appointment of an ICL if ordered;
- Evidence to be obtained (through s.69ZW or subpoena);
- Engagement with services ordered;
- Monitoring of arrangements.

That is not to suggest that matters would return before the Court each 4-6 weeks but simply that a shorter time frame for adjournments, whilst it can be accommodated, is frequently inappropriate.

The resources of the Department, Court, ALS, LAC and FRC would also then not be subject to strain or distracted from other necessary commitments.

Ideally no other matters would be listed on the selected days (and that can be managed easily) and so that the entire day and 12-15 new matters and any adjournments could be dealt with.

If operated as pilot it might be best if a particular District Office of the Department were chosen such as Mt Druitt or Campbelltown both of which are within the catchment area of the Parramatta Registry and which have a significant volume of ATSIB clients.

The intent on the first return date of any application would be:

- Identify all persons with an interest in the child's care and wellbeing and, if appropriate, invite those persons to intervene;
- Make appropriate orders for the child's safety;
- Make appropriate orders for the child's placement and relationships;
- Identify and order appropriate courses, programs, family counselling and FDR services;
- Order an ICL if required;
- Make directions for the filing of pleadings and/or further evidence;
- Commission social science material (especially Family Consultants reports).

An ongoing focus in the proceedings would be upon identifying:

- The supervision of arrangements by the Court and, if ordered, the Department;
- Interim placements safeguarding children;
- Parents and other carers then engaging in mandated programs;
- Appropriate carers (whether on an interim or final basis) being located and upon satisfaction that care arrangements are meeting the child/ren's needs the Department being in a position to consider whether they need to continue direct involvement as a party or whether they might, having facilitated the involvement of others, withdraw.

Final conclusion of the proceedings would occur by consent or upon final hearing and after all identified and appropriate therapeutic interventions had been attempted.