

# Intersection between Child Protection and Family Law

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# Family Law and Child Protection

## **Some Child Protection Perceptions of Family Law**

*It is a family law matter, not child protection's business....*

*Their solicitor told them to ring the department....*

*These allegations are historical....*

*Doesn't the family courts have a role in assessing risk?*

## **Family Law Perceptions of Child Protection**

*They (child protection) are NOT INTERESTED...*

*They never intervene....*

*You can never get a hold of anyone to talk to....*

*Child Protection referred the family and have provided NO information to the court....*

# Child Protection

The Victorian Child Protection and Integrated Family Services System is premised on the safety and protection of children being a shared responsibility between the community and statutory services working in partnership with police and courts.

The **Victorian Child Protection Service** is specifically targeted to children and young people who are in need of protection and who do not have a parent or other suitable adult who is **able** or **willing** to **protect** them. The main roles of child protection are to:

Receive and review reports concerning the wellbeing or protection of children under 17 years

Investigate allegations that children have been harmed or are at risk of harm

Refer children and families to services (including Child FIRST providers) that assist in providing the ongoing safety and wellbeing of children

Initiate applications before the Children's Court where children are in need of protection because "their parents have not protected or are unlikely to protect them from harm."

Provide care for and make decisions for children who are subject of orders granted by the Children's Court where the state has parental responsibility.

Provide and fund accommodation services, specialist support services, and adoption and permanent care to children and adolescents in need.

# Children, Youth & Families Act 2005

The Children, Youth & Families Act 2005 was passed by the Victorian parliament in 2005 and its provisions came into effect in April 2007. This Act consolidated and replaced the previous Children & Young Persons Act 1989.

This new act enshrined a child's best interests as being at the heart of all decision making.

In 2014, the Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014 significantly amended the CYFA, particularly in relation to the family division of the Children's Court. The amending Act reforms were largely intended to deal with delays in the placement of children in permanent care. It meant a recalibration of the concept of permanency planning for children subject to child protection involvement.

# Children, Youth & Families Act 2005 & Children's Court Orders

Under the Children, Youth & Families Act 2005, the court may make any one of the following orders:

- An order requiring a person to give an undertaking
- A family preservation order
- A family reunification order
- A care by Secretary order
- A permanent care order
- An interim accommodation order
- A temporary assessment order

# When is a Child in Need of Protection?

s162 of the Children, Youth and Families Act 2005:

- (a) The child has been abandoned by his or her parents and after reasonable inquiries (i) the parents cannot be found and; (ii) no other suitable person can be found who is willing and able to care for the child;
- (b) The child's parents are dead or incapacitated and there is no other suitable person willing and able to care for the child
- (c) The child has suffered, or is likely to suffer, significant harm as a result of a physical injury and the child's parents have not protected, or are unlikely to protect, the child from harm of that type
- (d) The child has suffered, or is likely to suffer, significant harm as a result of sexual abuse and the child's parents have not protected, or are unlikely to protect, the child from harm of that type
- (e) The child has suffered, or is likely to suffer, emotional or psychological harm of such a kind that the child's emotional or intellectual development is, or is likely to be, significantly damaged and the child's parents have not protected, or are unlikely to protect, the child from harm of that type
- (f) The child's physical development of health has been, or is likely to be, significantly harmed and the child's parents have not provided, arranged or allowed the provision of, or are unlikely to provide, arrange or allow the provision of, basic care of effective medical, surgical or other remedial care.

# Child Protection – The Mechanics

There are five phases of child protection intervention....

- 1) Intake – will classify the report as a protective intervention report or child well being report. Usually one of two decisions are made:
  - a) Close with or without referrals to support services
  - b) Progress to investigation
- 2) Investigation – at the conclusion of an investigation, a decision is made as to whether there is grounds to substantiate harm. The outcome of an investigation can be:
  - 1) Close with or without referrals to support services
  - 2) Substantiate harm and progress to the protective intervention phase
  - If during the period of investigation, the child is assessed as in need of protection, then a protection application may be issued.

# Child Protection – The Mechanics

## 3) Protective Intervention

- When harm has been substantiated and further child protection intervention is considered necessary, the case will move to the protective intervention phase.
- Case planning occurs with families involvement in this process being critical.
- This period of intervention may or may not involve an application to the Children's Court
- At the conclusion of the protective intervention phase one of two things usually occurs:
  - a) The protective concerns are addressed and the case is closed with or without referrals to support services
  - b) The protective concerns are addressed and a further period of protective intervention is required, this can be with or without an application to the Children's Court.

# Child Protection – The Mechanics

## 4) Protection Order Phase

If a child has been assessed as being at risk of significant harm pursuant to s162 of the CYFA (2005) and a Protection Application has been issued, the Children's Court may make any of the following Protection Orders:

- Family Reunification Order
- Family Preservation Order
- Care by Secretary Order
- Permanent Care Order

# Child Protection – The Mechanics

## 5) Closure

- When the protective concerns have been addressed and the child is no longer considered to be at significant risk of harm, child protection will cease involvement.
- This can occur following an investigation, a period of voluntary protective intervention or after the conclusion of a protection order.

**Intervention** into family life should be to the minimum extent that is necessary to secure the protection of the child.

All reasonable steps must be taken by the Secretary to provide the services necessary to enable the child to remain in the care of her or his parents.

# Child Protection - Numbers

The following numbers are the total number of child protection reports received across the state:

- 2013 /2014 82,102
- 2014/2015 91,628
- 2015/2016 107,062
- 2016/2017 111,029
- 2017/2018 115,672

Just over 70% of child protection reports are closed at the intake phase.

Less than 5% of child protection reports proceed to the Children's Court.

# Family Law

Family Law is referred to as “private law” whilst Child Protection is referred to as “public law”

Australia’s family law system assists families in resolving the legal aspects of family relationship breakdown and encourages people to agree on arrangements without going to court.

Two main courts exercise the Family Law Act (Family Court of Australia and Federal Circuit Court of Australia) and decisions regarding parenting, property and divorce are made.

Magistrates’ Court can also exercise the Family Law Act and can make decisions on recovery orders and parenting orders by consent.

# Family Law

Most individuals resolve decisions about parenting when separation occurs or may access family dispute resolution before accessing the courts

Whilst most parenting disputes resolve those that come before the courts tend to be the more complex matters including allegations about safety, abuse and neglect.

*“Public law issues within a private law matter” and the “grey area” between the two.*

# Family Law

In **family law** the primary considerations are the benefit to the child in having a meaningful relationship with **both** of their parents **and** the need to protect the child from harm.

Greater weight is given to the consideration in protecting the child from harm.

Under the Family Law Act there is a presumption that both parents will have equal parental responsibility – a role in decision making about major long term issues. The presumption does not apply if the parent engaged in abuse of the child or family violence.

Shared parental responsibility is not the same as EQUAL TIME

# Child Protection

In **child protection** the Children Youth and Families Act (2005) requires that the best interests of the child must always be paramount. A decision maker in determining the best interests of a child must always consider the need to:

- Protect the child from harm
- Protect the child's rights
- Promote the child's development (taking into account age, stage of development, culture and gender)

There are additional matters which are to be considered, for example decision making principles for Aboriginal children.

A child is only to be removed from the care of a parent if there is an unacceptable risk of harm to the child.

# Child Protection – When is a Child in Need of Protection

Children Youth and Families Act (2005) – when is a child in need of protection?

S162:

- The child has been abandoned by his or her parents and after reasonable inquiries the parents cannot be found and no other suitable person can be found who is willing and able to care for the child
- The child's parents are dead or incapacitated and there is no other suitable person willing and able to care for the child
- The child has suffered, or is likely to suffer, significant harm as a result of a physical injury / sexual abuse / emotional or psychological harm / neglect to their physical health or development AND the child's parents have not protected or are unlikely to protect the child from harm of that type

# Family Law and Child Protection

## Complexity and Challenge

Families who have experienced family violence or child abuse face challenges in a system that focuses on a “protective parent” AND on ideals of cooperative decision making and shared parental time

Child Protection has previously unwittingly contributed to a process that has held women accountable for the safety of themselves and their children. Emphasis on failure to protect.

# Reports to Child Protection

Reports of alleged child abuse pursuant to the Family Law Act 1975 are made under different sections of the act according to **WHO** is making the report:

- 67Z party to the proceedings (Notice of Child Abuse or Notice of Risk)
- 67ZA family law professional (registrar or deputy registrar of the FCoA, FCCoA or FCWA, family consultant, family counsellor, family dispute resolution practitioner, arbitrator, or independent children's lawyer)
- 91B Judge (requests the intervention of the department)

Note: There are mandatory reporting obligations pursuant to s184. of the Children, Youth and Families Act 2005.

# Magellan List

A case management model established in the Family Court of Australia only.

Disputes involving allegations of serious (and current) physical and sexual abuse.

Focuses on evidence gathering and timely resolution of matters.

Strict timelines for case management and Independent Children's Lawyer is appointed.

Provision of information from the department in the form of a MAGELLAN REPORT, outlining the action taken to investigate the allegations of abuse and outcome of such.

# Memorandum of Understanding

Protocol between the family courts and child protection developed in May 2011 and includes MOU developed in 1995.

## CAUTION

In cases where the department chooses NOT to intervene in family law proceedings there is NO avenue for appeal.

If a decision is made which is contrary to the department's opinion about the best outcome the department should NOT issue Children's Court proceedings unless NEW protective concerns arise.

# DHHS Responses to Reports

A determination regarding the classification of the report is made in the same way as other child protection reports to all 67Z, 67ZA and 91B reports.

If further information is required to complete an assessment in addition to the material received (the affidavit), a request can be made to the court.

DHHS will usually require a minimum of 21 days to prepare its response in the form of a LETTER.

Where possible DHHS will endeavour to meet the court requirements.

# DHHS Responses to Reports

Earlier sharing of information by a letter to the court indicating the department's intentions regarding the family law proceedings can include:

- Issuing Children's Court legal proceedings
- Intervene in and become party to the family law proceedings
- Not intervene in the proceedings but indicate that the department has information to which the court may be interested
- Seek to appear at the hearing as amicus curiae (friend of the court)
- Take no further action

and REASONS

# Request for Information

Subpoenas and court orders under section 69ZW of the Family Law Act are ways in which the courts can obtain information from child protection.

Section 69ZW orders are made by a judge. They are binding unless the court is persuaded to discharge a 69ZW order.

Subpoenas can be issued at the initiative of the court itself (Magellan) however they are more commonly issued at the request of the parties (lawyers) or the Independent Children's Lawyer.

Leave of the court is now required to issue a subpoena against the department.

# Concurrent Proceedings s 69ZK FLA

There are limitations to the FCA and FCC jurisdictions in what actions and decisions the courts may make under s69ZK of the Family Law Act

The FCoA and FCCoA must not make an order in relation to a child who is under the care of a person under a child welfare law, unless:

- The order is expressed to come into effect when the child ceases to be under that care, or
- The order is made with the written consent of DHHS

# Challenges

- Understanding the jurisdictions and demands of both systems
- Shared understanding of risk and safety planning in risk assessment
- Navigating a legal system that does not meet the different needs of a family in one court
- Information sharing
- Promoting safety and lessening the burden of managing matters in different courts
- Cross system collaboration