Aboriginal Legal Service (NSW/ACT) Limited

50+ YEARS STRONG

RESPONSE TO SUPPLEMENTARY QUESTIONS:

NSW PARLIAMENTARY INQUIRY INTO CHILD PROTECTION AND SOCIAL SERVICES SYSTEMS

RESPONSES:

1. **Can you identify any specific decisions in the Federal Circuit and Family Court relating to Aboriginal families in NSW, where parental responsibility for unsupervised contact has been given to child abusers?**

For the reasons set out below, it is difficult to answer this question and it is necessary to define the scope of the terms used in this question in terms relevant to the family law jurisdiction to effectively do so.

Firstly, the definition of "child abuse" in the *Family Law Act 1975* (Cth) ("the FLA") is broader than the common use of this term. The term "child abuse" is defined in section 60A(b) of the FLA as assault or sexual assault of a child; facilitating sexual abuse of a child by another person; causing a child to suffer serious psychological harm including through exposure to family violence; and serious neglect.

Therefore, the term "child abuser" in the family law context is broad and encompasses persons who perpetrate a spectrum of emotional, physical and sexual violence against children. It also includes conduct that can be mitigated or resolved such that exposure of a child to person who has perpetrated child abuse does not put that child at an unacceptable risk of harm. We note that some child safety risks cannot be mitigated, such as in the case of persons who have perpetrated sexual abuse, and the term "child abuser" in the prompt may be directed to those cases. If so, the ALS has not been involved in any family law proceedings where an order was made that we consider, on the evidence filed in the proceedings, placed a child at unacceptable risk of abuse.

Secondly, the term 'parental responsibility' has a more flexible meaning under the Act than the *Children and Young Persons (Care and Protection) Act 1998* (NSW) ("the Care Act"). Parental responsibility includes a number of aspects, and pursuant to section 79(2) of the Act, they are categorised as residence, contact, education an training of the child and young person, the religious and cultural upbringing of the child and medical and dental treatment. Under the FLA, parental responsibility is defined as a scope of duties and powers parents have in relation to their children, rather than a list of discrete responsibilities and can be divided into "day to day issues" and "long term decisions".

Under the FLA there is a presumption that both parents will have equal parental responsibility for making decisions about major long-term issues, such as where a child goes to school or major health issues. The presumption does not apply for a parent who has engaged in abuse of the child or family violence.

Shared parental responsibility does not mean that by default each parent will have equal time with the subject children. The presumption of equal shared parental responsibility relates only to how parents make decisions about their children. Issues in relation to whom a child lives with or spends time with are considered in their own right and not under the umbrella of parental responsibility. The question may have been intended to only be directed to these aspects of FCFCOA orders. However, absent express limiting terms, this response will address parental responsibility in cases involving at-risk children as a holistic concept.

It should also be noted that parties to family law court proceedings are not limited to parents. Persons who are not parents of a child may obtain orders for parental responsibility. Section 65C of the Act sets out those persons that may bring an application to the family law courts which includes parents, the child, grandparents or a person concerned with the care, welfare and development of a child. There are no clear criteria in the Act to determine who is a person concerned with the care, welfare and development of a child. In our experience, this can be any person who has played a significant role in the child's life and/or who have brought an application due to concerns about a risk of harm to a child. It is possible for the Minister for Families, Communities and Disability Services to make an application in the FCFCOA for parenting orders as an alternative to Children's Court proceedings and we are aware of a case where this has in fact occurred.

Our clients that fall within non-parent category are usually family members or kin who are caring for the child, such as grandparents, aunts, uncles, siblings or other relatives who have sought assistance through the FCFCOA. The Aboriginal and Torres Strait Islander Families List of the Sydney Registry recognises the scope, complexity and strength of kinship networks and protects informal family arrangements through enforceable orders. The scaffolding done by the FCFCOA has proven to be an effective tool for many of our clients to minimise pathways into child protection, intervention and removal. Being in the FCFCOA does not prevent the involvement of DCJ in their lives but is a Court that empowers families in participating in decision-making for their children.

Having defined these terms, this question asks whether any decisions of the FCFCOA in relation to family disputes occurring in NSW, and involving Aboriginal families, have led to someone who has perpetrated any aspect of abuse against a child having any aspect of parental responsibility for a child, or being permitted to spend unsupervised time with a child.

Under s 60CA of the act, the FCFCOA must make parenting orders that are in the best interests of the subject child. Even where an order is made for equal parental responsibility between one or more parents or other persons, the Court can only make an order for a child to live with and/or spend time with a party if this is in the child's best interests. In accordance with section 60CC (2) of the Act, in determining what is in a child's best interests the Court must give the greatest weight to the need to protect

the child from an unacceptable risk of "physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence."

The majority of family matters in which our service appears begin with a series of allegations and often include allegations of child abuse within the scope as defined in section 60A(b). All child abuse is serious, however, the level of risk to a child differs in each individual case and unique set of circumstances. It is often possible to mitigate the risk through addressing those issues which cause a risk to the safety of a child such as a party completing a men's behaviour change programs and/or addiction counselling.

Indeed, not all risks can be addressed to the extent that there is no longer an unacceptable risk, such as where there are allegations of child sexual abuse. The FCFCOA takes child abuse seriously. Webb et al's (2021) review of FCFCOA decisions between June 2012 – May 2019 found that where an allegation of sexual abuse was made against a parent, the FCFCOA awarded sole parental responsibility to the other parent in 93% of cases where the allegations were uncontested[i].

However, Webb et al's review also appears to indicate that the FCFCOA is invested in striking a hard balance between the risks of child abuse, and the imperative to give the subject children the opportunity to maintain meaningful relationships with both parents. The Court found that a risk of sexual harm existed in 46% cases where allegations were uncontested and just 12% of cases where allegations were challenged and sustained. Sole parental responsibility was only granted in 43% of cases where allegations were contested and sustained. Contact with the allegedly unsafe parent was increased in 63% of cases where allegations were challenged and sustained, and in 67% cases where allegations were uncontested.

These statistics speak to the hard choices judicial officers must make in managing the risks of child sexual abuse. This decision-making is impaired by the absence of an investigative function, as DCJ performs in the Children's Court. This situation has been somewhat improved by the recent information-sharing provisions implemented in accordance with the Australian Law Reform Commission *Family Law for the Future* (2019) inquiry. Under section 69ZW of the FLA, supplemented by section 248 of the *Care Act*, the FCFCOA may request material held by DCJ and NSW Police in relation to any child protection issues relevant to parties to proceedings.

However, the FCFCOA's capacity to reach safe decisions in regard to child abuse risks would be assisted by greater participation of DCJ in family law proceedings. Under section 91B of the FLA, the FCFCOA can request that DCJ be joined as a party to proceedings. The family law courts will ask DCJ to intervene when the material available to the court indicates that there are serious concerns about the capacity of either party in the proceedings to appropriately care for the child.

Where DCJ does intervene in the proceedings, the Court is greatly assisted by the Department's investigative powers and their ability to obtain relevant reports. It also means the FCFCOA may make orders for a child to live with persons who are not parties to the family proceedings. This is highlighted by the recent FCFCOA decision in *Secretary, Department of Communities and Justice & Opunui* [2021] FedCFamC1A 41. In this case DCJ accepted an invitation to be joined as intervenor in the

proceedings. The Court found that the subject child was at an unacceptable risk of harm in both the parents' care and was able to place the child under the parental responsibility of the Minister and a safe home was found with authorised carers, as determined by the Minister's delegates.

However, in many cases the FCFCOA will have little recourse to further investigate child safety risks or explore alternative placements, as the Court cannot compel the Minister or Secretary to join proceedings. While access to information held by DCJ about safety risks to a child has increased through the development of information sharing protocols and the co-location of a representative of DCJ within certain registries, the Court is otherwise limited to parties subpoenaing additional information and tendering what they consider relevant for consideration. This is the case even where a child would be at risk in the care of any of the parties; *Secretary of the Department of Health and Human Services v Ray & Ors* [2010] FamCAFC 258. The FCFCOA is therefore presented with special difficulties in circumstances, as in *Opunui*, where both parents, or all proposed carers for a subject child who are joined to proceedings, present an unacceptable risk of harm to the subject child. In the case of *Opunui* the Court ordered that parental responsibility be held by the Minister though this is not an order sought by any of the parties, including DCJ who had intervened in these proceedings. The Court made this order in circumstances the Court found that the children were at unacceptable risk of harm in the care of either parent could not be satisfied that the orders sought by the parties placing the child with the mother was in the best interests of the children. Accordingly, the Court made orders placing parental responsibly for the children with the Minister.

We recently appeared in family proceedings where our client raised allegations that the other party had perpetrated a serious non-accidental injury against their child. Our two requests for DCJ to be joined to proceedings were refused, until a further incident triggered the Department to commence Children's Court proceedings rather than come on-board with the existing FCFCOA proceedings. This was highly distressing for our client and created further delays which increased the child's risk of exposure to further abuse by the other party.

This case study highlights issues presented by the lack of coherence and streamlining between the Family and Child Protection jurisdictions. If DCJ could be compelled to engage in FCFCOA proceedings in circumstances where either or both parents present a risk to the child, the Court could enlist DCJ's assistance to investigate serious allegations of abuse or, where necessary, identify an appropriate kinship or other culturally appropriate placement. This would avoid later, traumatic child protection intervention. Of course, this reform would have to be implemented cognizant of the inherent mistrust Aboriginal communities harbour towards DCJ. Greater engagement of the Department in FCFCOA proceedings may reinforce barriers to accessing the family law system without strict judicial oversight. *Opunui* indicates that where DCJ is joined to proceedings it has the same rights and obligations as any other party, and therefore the FCFCOA could exercise this degree of oversight.

2. **Are there any processes or issues that can disadvantage Aboriginal and Torres Strait Islander parents in matters heard in the Federal Circuit and Family Court?**

Our clients face significant barriers in accessing the family law system. In the 2012 report *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (February 2012), the Family Law Council made a number of recommendations regarding how these can be addressed. Some of these have been implemented recently, such as the inclusion of Indigenous Liaison Officers in FCFCOA registries and the introduction of the specialist Indigenous List.

Placement in the specialist Indigenous List in the Sydney Registry of the FCFCOA, known as the Aboriginal and Torres Strait Islander Families List, is through self-nomination. Parties identify either at the time of filing or during the course of the proceedings that they wish for their matter to be placed in this list. The short film "Our Kids" available on the internet[ii], showcases how the specialist list can be used to keep children safe.

Changes implemented in response to the COVID-19 pandemic have also enabled the ALS to assist clients across NSW in areas where they would not otherwise have access to the family law courts or competent family law legal assistance. The use of video conferencing in the FCFCOA for court events, along with a discrete relaxation of the requirements for the execution of documents, means that we have been able to represent clients in rural and remote areas of NSW in the Sydney Indigenous List.

That said, barriers still exist despite these changes as our clients may not have reliable access to the necessary technology or resources to effectively engage in court proceedings or complete the number of lengthy and often complicated forms required over the course of proceedings. For example, the ALS represented a grandparent in family law proceedings where she faced a number of barriers, including a mistrust of the courts, illiteracy, inability to access transport and lack of support services available due to her location. The client did not have access to the internet, was unable to read or write, could not drive and lived more than two hours from the closest town centre. The ALS expended significant resources in assisting this client, including undertaking a number of flights to regional NSW, vehicle hire and accommodation. These costs would not be met by a grant of Legal Aid and if the ALS had not assisted this client, it is likely she would have been left without legal representation. It is our experience that this situation is not uncommon.

Further, even once our clients gain access to the family law system, they face significant barriers in the form of a shortage of culturally appropriate legal services and processes. Limitations on funding means that even the Aboriginal Legal Service is unable to have family law solicitors in many regions with limited or no access to family law services. As discussed above, the Aboriginal and Torres Strait Islander Families List run by Judge Boyle has been a transformative initiative for the family law system, giving Aboriginal families access to a culturally safe court environment. However, there are too few spaces like this, exemplified by the discrimination many of our clients have faced in court proceedings.

Following the merger of the Family Law Court and Federal Circuit Court, we have seen parenting matters involving Aboriginal and/or Torres Strait Islander children heard before judicial officers with limited background in family law or experience in working with Aboriginal and/or Torres Strait Islander families. We recently represented a client who was the only Aboriginal and Torres Strait Islander party in the proceedings. At the Final Hearing (at which the parties resolved to settle out of court), on not less than two occasions the presiding judge singled out our client for criticism for no discernible reason. Our client was understandably distressed by this treatment and felt it was manifestly unjust that he was targeted in this way and risked derailing the resolution that had been reached between the parties. It appeared that our client was racially profiled by the judge as the likely antagonist in this matter, as a thorough reading of the filed case materials could not possibly have led to this conclusion.

What this case study indicates is that even once our clients are able to access the family law system, they face significant barriers in the form of the latent biases and overt prejudices held by practitioners and even judicial officers within the jurisdiction. This highlights the need for judicial officers in the merged FCFCOA to have appropriate experience in family law and a degree of cultural competency and education when making decisions affecting Aboriginal and Torres Strait Islander families.

3. **Do you think that there are alternatives to judicial proceedings, that could better manage cross-jurisdictional issues between the family law and child protection systems?**

It is the experience of our service that the FCFCOA and Children's Court are effective and essential oversight bodies. It is our view that cross-jurisdictional tensions between the systems and processes of the family law and the child protection systems arise once judicial proceedings are in motion, and that a few key reforms to the operation of these existing institutions, set out below, would greatly enhance and improve their competency to respond in a timely, coherent and effective manner to disputes involving at-risk children.

The effect of section 69ZK of the Family Law Act 1975 (Cth) on the interaction between Family and Care jurisdictions

Principally, as discussed above under Question 1, the FCFCOA needs the capacity to compel DCJ's engagement with family law proceedings. Under section 69ZK, the FCFCOA generally cannot make orders in relation to a child subject to a welfare order made under the *Care Act* unless the FCFCOA order is to come into effect when the welfare order expires, or DCJ has given written consent to the FCFCOA order being made. Further, under this section no FCFCOA order affects the scope of orders that may be made under the *Care Act.*

This legislative framework has created a large functional gap, where DCJ has complete discretion about whether a person can access the family law system, even where child protection concerns no longer exist or they have no parental responsibility for the subject child. This is a particular issue where orders made under the *Care Act* do not set out the arrangements for a child in care, such as where they will live and spend time with arrangements. Where these arrangements are generally only set out

in the Care Plan they cannot be legally enforced. This means that even where a parent or other guardian has been given parental responsibility for a child, they cannot enforce the child's care arrangements or commence proceedings in the FCFCOA to acquire enforceable orders.

We recently appeared in a matter which exemplifies this issue. We assisted a maternal grandmother who had final Care Orders made allocating sole parental responsibility for the children to her in the Children's Court. The children had been in her care for a number of years when the father was released from jail and moved across the street from her. DCJ was unwilling to assist the grandmother as they did not hold parental responsibility and their case was closed. The father coerced the children into coming to live with him and he subsequently kept the children from school and prevented them from having contact with the grandmother. It was our client's position that the children were at risk in his household. We requested permission from DCJ to bring an application to the FCFCOA for an urgent recovery order, to return the children to the safety of their grandmother. We received no response. The grandmother consistently contacted the Department, but her concerns were not prioritised and internal processes moved slowly. Our client was left frustrated and felt she had no option but to allow the children to remain in a risky situation.

Effective and integrated operation of the Family and Child Protection systems in NSW requires that DCJ implement a transparent and timely process for reviewing section 69ZK requests. The case study above demonstrates that delay and arbitrary refusal of these requests can lead to the escalation of risk issues that could be dealt with swiftly in the FCFCOA at the initiation of affected parties.

Enforcement mechanisms for orders

The above case study also highlights the difficulties that may be faced where a final care order cannot be enforced by a carer and/or provides no guidance about how time with a parent or other significant person can occur in a safe and planned manner. Parenting orders made in the FCFCOA in relation to children who have experienced abuse or are at risk of abuse, are generally developed by practitioners with extensive experience in family and child protection law respectively, complemented by input from family and family violence specialists. This combination of expertise produces orders that are considered realistic and effective tools for protecting children from abuse. However, the effectiveness of these orders is currently frustrated by the absence of enforcement mechanisms for any care orders.

There needs to be effective coordination between the FCFCOA and the Children's Court and the relevant NSW agencies to enforce parenting orders and contact arrangements.

We note that this proposal is not tantamount to support for a State-based unitary care and family system, a reform floated by some peak bodies including the Australia Law Reform Commission (ALRC). This recommendation has been soundly rejected by the NSW State Government, which in our view reflects considered insight into the significant resources and costs it would take to harmonise the – at times – significantly different laws, procedures and processes of the two systems.

Rather, enforcement could take the form of the mechanisms recommended by the ALRC's *Family Law for the Future* (2019) inquiry. Following resolution of proceedings, families could be referred to a family consultant to assist parties to understand and implement the orders. This would be complemented by a contravention list administered by the FCFCOA, which could impose certain penalties on parties in breach of the orders, like further post-separation counselling. Family consultants would have authority to refer parties to the contravention list.

DCJ internal processes often determine which Court deals with children at risk

We have also found that DCJ internal processes often determine which Court deals with children at risk. This year we represented a client whose grandson was placed in his care by the Department. Rather than commence proceedings in the Children's Court, the managing caseworker recommended that the grandfather commence proceedings in the Family Court to get orders permitting the child to live with him while the mother was not in a position to have the child live with her. We appeared for the grandfather in these proceedings and were successful in obtaining Interim Parenting Orders granting our client parental responsibility for the child and compelling the mother to provide the child's birth registration and Medicare details. The grandfather was therefore able to access primary healthcare services, childcare subsidies and the Centrelink Parenting Payment without further intervention by DCJ.

This is not a unique circumstance. We have represented several clients who have been recommended by DCJ caseworkers to seek orders in the FCFCOA for parental responsibility for children at risk of harm in the care of their parent or guardian. It appears that DCJ caseworkers will use referral to the family law jurisdiction as an early intervention measure that allows Aboriginal families to retain control over the placement of a child at risk.

What this case study indicates is that DCJ caseworkers may often determine which jurisdiction they will intervene or commence proceedings in where a child is at risk of abuse in the care of their parents or carers. It would be useful for both the Care and Family jurisdictions to understand more about this internal referral policy, to ensure it is being used in an appropriate and consistent way across the state to ensure the best outcomes for at-risk children.

Sincerely,

Michelle Hayward
Managing Solicitor – Family Law

14 September 2022

Zoe De Re
Managing Solicitor – Care & Protection

14 September 2022

[i] Nola Webb et al., 'Allegations of Child Sexual Abuse: Empirical Analysis of Published Judgments from FCOA 2012-2019' (2021) 56 *Australian Journal of Social Issues* 322
[ii] https://www.youtube.com/watch?v=FQzkqrdnGU4