Submission No 41

INQUIRY INTO CHILD PROTECTION

Organisation: Australian Law Reform Commission

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Australian Government

Australian Law Reform Commission

Professor Rosalind Croucher AM
President

Committee Chair
The Hon Greg Donnelly MLC
Legislative Council General Purpose Standing Committee No. 2
Parliament House
Macquarie St
Sydney NSW 2000

30 June 2016

Dear Mr Donnelly,

ALRC Submission: Inquiry into child protection

The Australian Law Reform Commission (ALRC) welcomes the opportunity to make a submission to the Committee regarding its Inquiry into the role of the Department of Family and Community Services in relation to child protection in New South Wales.

The ALRC's submission draws on the experience of the ALRC in its 2009–2010 Family Violence inquiry. This inquiry, conducted with the New South Wales Law Reform Commission (NSWLRC), culminated in the final report *Family Violence—A National Legal Response* (ALRC Report 114), released in November 2010. The Inquiry's Terms of Reference required the Commissions to consider, among other things, 'the interaction in practice of State and Territory family/domestic violence and child protection laws with the *Family Law Act* and relevant Commonwealth, State and Territory criminal laws'.

In the context of child protection, the ALRC/NSWLRC made a number of recommendations that may be relevant to the issues considered in this Inquiry. These are identified below for your reference.

Relationship between federal family courts and child protection agencies

The Family Violence Report considered the intersection of child protection and family laws. The Commissions noted that two 'gaps' exist between the family courts and the child protection system. The first is an 'investigatory gap'—caused by the fact that the family courts have no investigatory arm to provide them with independent investigations in cases where child abuse is raised as an issue. The second is a 'jurisdictional gap', where a case involving allegations of child abuse is in the family courts and the court wishes to make an order giving parental responsibility to the child protection agency because the judge considers that there is no other viable option for that child.[1]

To assist in closing the investigatory gap, the Commissions recommended that federal, state and territory governments should, as a matter of priority, make arrangements for child protection agencies to provide investigatory and reporting services to family courts in cases involving children's safety. Where such

[1] Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) [19.77]–[19.79].

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services are not already provided by agreement, the Commissions recommended that urgent consideration should be given to establishing specialist sections within child protection agencies to provide those services.[2]

In relation to the jurisdictional gap, the Commissions recommended that there should be a limited reference from the states to the Commonwealth of powers to enable the courts to make orders giving parental rights and duties to a child protection agency where there is no other viable and protective carer for a child is supported. A power to join a state child protection agency in this very limited class of cases was also recommended.[3]

Information sharing between the federal family courts and child protection agencies

Federal family court proceedings may concern children who have had contact with state child protection agencies. In consultations, the Commissions heard that there were significant problems associated with information flow from state and territory child protection agencies to family courts in some jurisdictions.[4] It appeared that there existed a number of legislative and administrative barriers preventing the federal family courts from accessing important information held by child protection agencies in some jurisdictions.[5]

The Commissions recommended that state and territory child protection legislation should not prevent child protection agencies from disclosing to federal family courts relevant information about children involved in federal family court proceedings in appropriate circumstances.[6]

The Commissions also recommended that protocols be developed between federal family courts and state and territory child protection agencies for dealing with requests for documents and information by the courts.[7] The Commissions further recommended that parties to the information sharing protocols receive ongoing training to ensure that the arrangements are well known and understood and that the protocol arrangements are effectively implemented.[8] The Report emphasised that protocols cannot stand alone and are dependent on the knowledge and involvement of officers and staff. Simply putting protocols in place is not sufficient. These arrangements must be given an ongoing profile among court and agency officers; they must form the basis of an ongoing and responsive relationship between the parties and must be supported and implemented in practice. Ongoing training and liaison arrangements are also essential to ensure that the protocols are actively and effectively implemented.[9]

Family violence, child protection and the criminal law

With regard to information sharing between child protection agencies and the police, the Commissions noted that the investigation, and prosecution, by law enforcement agencies of serious offences alleged to have been committed against a child or young person may be hampered by laws that do not clearly permit relevant information to be shared with the police. Consequently, the ability of the criminal justice system to protect the safety not only of the alleged victim but also of other children and young people may be compromised.[10]

The Commissions recommended that state and territory law enforcement, child protection and other relevant agencies should, where necessary, develop protocols that provide for consultation about law enforcement responses when allegations of abuse or neglect of a child for whom the police have care and protection concerns are being investigated by the police.[11]

The Commissions also considered how to respond to safety concerns about young people who present in the justice system. They noted that mandatory reporting provisions in state and territory child protection laws

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2 Ibid rec 19-1; [19.96]–[19.97].
3 Ibid rec 19-2.
4 Ibid [30.69].
5 Ibid [30.79].
6 Ibid rec 30-4.
7 Ibid rec 30-5.
8 Ibid rec 30-17.
9 Ibid [30.205].
10 Ibid [20.42].
11 Ibid rec 20-2.

apply generally to people who work in organisations that provide health, welfare, education, law enforcement, child care or residential services to children, thus leading to some ambiguity about whether judicial officers and court staff are mandatory reporters.

To resolve any doubt, the Commissions recommended that child protection legislation be amended to provide expressly that judicial officers and court personnel are mandatory reporters and therefore have a duty to report concerns for the safety and welfare of a child or young person to the relevant child protection authority. They further recommended that the 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.[12] The ALRC notes that it is the Department of Family and Community Services' practice to provide information to mandatory reporters about the type of action that will be taken based on a report.[13] However, this does not appear to be a legislative requirement, as recommended by the Commissions.

Alternative dispute resolution in child protection

The Report examined the potential use of alternative dispute resolution (ADR) processes in family violence, family law and child protection matters. The use of ADR in child protection matters involving family violence raises a number of concerns, including the risk of compromising the safety of children, as well as parents who are victims of family violence where risks of family violence are unidentified, inadequately assessed or inappropriately managed, are significant concerns. Nevertheless, the Commissions considered that there were significant potential benefits of using ADR in child protection matters involving family violence. ADR processes may be faster and more cost-effective than court processes. ADR may also offer more flexible and culturally responsive procedures, meaning that outcomes may be more effective and sustainable.

The Commissions considered that there was a need for some reforms to ensure that ADR mechanisms in child protection matters address family violence appropriately. The Commissions considered that there would be value in exploring ADR models that can overcome jurisdictional divides to offer seamless and effective responses to family violence.[14] The Report made a number of recommendations regarding ADR:

> **Recommendation 23–8** State and territory legislation and policies for alternative dispute resolution in child protection matters should provide that violence cannot be negotiated or mediated within alternative dispute resolution processes.
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> **Recommendation 23–9** State and territory legislation and policies for alternative dispute resolution in child protection matters should provide for comprehensive screening and risk assessment mechanisms.
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> **Recommendation 23–10** State and territory child protection agencies and alternative dispute resolution service providers should ensure that child protection staff and alternative dispute resolution practitioners undertake training on:
>
> (a) the nature and dynamics of family violence; and
>
> (b) the need for parents, as well as children, who are victims of family violence to have access to appropriate support.
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> **Recommendation 23–11** State and territory governments should take a comprehensive and strategic approach to support culturally responsive alternative dispute resolution—including screening and risk assessment processes—in child protection matters.

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12 Ibid rec 20-7.

13 Department of Family and Community Services (NSW), *What Happens When I Make a Report?* <www.community.nsw.gov.au/preventing-child-abuse-and-neglect/resources-for-mandatory-reporters>.

14 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) [23.1]–[23.5].

Recommendation 23–12 Alternative dispute resolution service providers should ensure that, in intake procedures for child protection matters, parties are asked about relevant:

(a) orders, injunctions and applications under state and territory family violence legislation and the *Family Law Act 1975* (Cth);

(b) family dispute resolution agreements and processes; and

(c) alternative dispute resolution agreements and processes in family violence matters.

Recommendation 23–13 The Australian Government Attorney-General's Department and state and territory governments should collaborate with Family Relationship Services Australia, legal aid commissions and other alternative dispute resolution service providers, to explore the potential of resolving family law parenting and child protection issues relating to the same family in one integrated process.

Information sharing between agencies

The Commissions made a number of recommendations related to information sharing between agencies. These recommendations were intended to ensure that legislative provisions do not prevent the sharing of information in circumstances where there is a risk to an individual's life, health or safety. In addition, the Commissions recommended that family violence and child protection legislation should clearly set out which agencies and organisations may use and disclose information and in what circumstances. The following recommendations are particularly relevant to the current Inquiry into child protection:

Recommendation 30–12 State and territory child protection legislation should expressly authorise agencies to use or disclose personal information for the purpose of ensuring the safety of a child or young person.

Recommendation 30–13 State and territory family violence legislation and child protection legislation should expressly provide for information sharing among specified agencies in specified circumstances, and should include provision to allow information to be shared with specified private sector organisations.

Recommendation 30–14 The Australian, state and territory governments should develop guidelines to assist agencies and organisations working in the family violence and child protection systems to better understand the rules relating to the sharing of information.

Recommendation 30–15 The Australian, state and territory governments should ensure that, in developing any database to allow the sharing of information between agencies and organisations in the family violence or child protection systems, appropriate privacy safeguards are put in place.

The ALRC notes that the Law, Crime and Community Safety Council (LCCSC) is developing a model law framework for domestic violence orders, supported by cross-border information sharing mechanisms.[15] In the Family Violence Report, the ALRC and NSWLRC supported the development of such a national scheme. However, it considered that a central register including information about family violence orders, child protection orders and related federal family court orders would be a more efficient and effective mechanism to ensure that the various systems are aware of orders and proceedings relating to the same family. It would be a significant step towards closing the information gaps between the systems and improving the protection provided for victims of family violence.[16] To that end, the Commissions made the following recommendations:

Recommendation 30–18 A national register should be established. At a minimum, information on the register should:

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15 Michael Keenan MP, 'National Model Law for Domestic and Family Violence Orders' (Media Release, 5 November 2015).

16 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) [30.229]–[30.234].

(a) include interim, final and police-issued protection orders made under state and territory family violence legislation; child protection orders made under state and territory child protection legislation; and related orders and injunctions made under the *Family Law Act 1975* (Cth); and

(b) be available to federal, state and territory police, federal family courts, state and territory courts that hear matters related to family violence and child protection, and child protection agencies.

Recommendation 30–19 The national register recommended in Rec 30–18 should be underpinned by a comprehensive privacy framework and a privacy impact assessment should be prepared as part of developing the register.

Education

Finally, the Commissions recommended that there be regular and consistent education and training for participants in the family law, family violence and child protection systems, in relation to the nature and dynamics of family violence. They recommended that the education and training include material relating to its impact on victims, in particular those from high risk and vulnerable groups.[17]

We trust this submission is of assistance. If you require any further information, please do not hesitate to contact the ALRC.

Yours sincerely,

Professor Rosalind Croucher AM

[17] Ibid rec 31-1.