

**THE BEST INTERESTS  
OF THE CHILD?  
THE INTERACTION OF  
PUBLIC AND PRIVATE  
LAW IN AUSTRALIA**

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# **THE BEST INTERESTS OF THE CHILD?**

## **THE INTERACTION OF PUBLIC AND PRIVATE**

### **LAW IN AUSTRALIA**

#### **Abstract**

In the context of relationship breakdown, where allegations of child abuse are raised, the care and protection of children via the interaction of public (State child protection jurisdiction) and private law (Commonwealth family law jurisdiction) is problematic. Women and children find themselves in a “catch 22” situation where one jurisdiction cannot act and the other is reluctant to act.

The Family Court determines disputes arising between individuals, usually the parents on relationship breakdown, that is private law matters. The court has jurisdiction to determine with whom the child should live, residence, contact and specific issues orders on the application of the parents, the child or any other person concerned with the welfare, care and development of the child.

When parties raise allegations of child abuse, the High Court made it clear that the duty of the Family Court is not to resolve an allegation of abuse, but to determine whether any order it considers would expose a child to an unacceptable risk of abuse. When there is an allegation of abuse the Family Court is required to notify the state child protection authority, in NSW the Department of Community Services. The Family Court cannot make orders that over-ride or displace orders made by the Children’s Court.

The NSW Children’s Court determines whether a child is in need of care and protection. The State via DoCs is the applicant, intervening to protect children, that is public law matters. DoCs are the statutory body charged with protecting children in NSW. Once Family Court proceedings are on foot when women contact DoCs to notify them of the abuse, it is our experience that DoCs will not act on the notification, citing reasons such as the child is not residing with the abuser or because of the Family Court involvement.

The Centre submits that this is a ‘systemic problem’ causing further harm and leaving children exposed and vulnerable to abuse. Women must navigate the maze of systems involved with little realistic possibility of getting adequate protection for themselves or their children.

## Women's Legal Resource Centre

New South Wales Women's Legal Resources Centre (hereafter "WLRC") is a Community Legal Centre specialising in women's legal issues. WLRC provides free legal advice for all women of NSW through telephone legal advice services (with a specified advice line for indigenous women) and legal outreach services for women in Western Sydney. The Centre provides community legal education programs to women and innovative, targeted rural legal services.

### What We Hear and Know

- Women deal with the special factors that affect them as a group, violence and sexual assault.
- Poverty disproportionately affects women. Women are less represented in the full time labour market, are more represented in poorly paid jobs
- Women continue to have the major responsibility for child rearing and work in the home.
- As women have less access to financial resources than most men, and because of the special factors that affect them as a group, there is inequality in women accessing legal services.
- Women, particularly those subject to abuse and violence, are less confident about approaching police, courts and other institutions to assist them.
- In 2000-2001 **over 10,000** women contacted WLRC, for legal advice, information and referral. 71% sought advice in relation to the breakdown of their relationship, private family law matters.
- A principal area of concern expressed by women utilising the service is the need to protect their children from child abuse. They are frustrated by the maze of systems they must deal with principally because of the division of legislative powers between the Commonwealth Parliament and the State and Territory Parliaments.

## Private Law

The Australian Constitution divides legislative powers between the Commonwealth Parliament and the State and Territory Parliaments. The Commonwealth Parliament is given power to legislate in respect of specific matters identified in the Constitution. The Commonwealth has express power to make laws with respect to (1) marriage and (2) divorce and matrimonial causes and 'in relation thereto parental rights and the custody and guardianship of children.' Commonwealth Constitution s51

The Family Court of Australia commenced in 1976, and was established by the Family Law Act 1975 (Cth). It is a Federal Court and deals with private family law matters, marriage, divorce and related parental rights. The parties within this jurisdiction are primarily parents applying to the court, to finally determine issues dealing with the dissolution of their marriage, property, children's residence, contact and support.

The court operates as a service, utilises a case management system and provides for parties to attend alternative dispute resolution.

Parents or any person who has an interest in the welfare of the child can commence an application with regard to the child in the Family Court. In NSW, Local Courts are invested with jurisdiction to make orders under the Family Law Act, notably with the consent of both parties.

The Federal Magistrates Court created by the *Federal Magistrates Act 1999* has jurisdiction to deal with family law matters. This jurisdiction is primarily for less complex matters and such matters are transferred to the family court.

Reform of the *Family Law Act* in 1995 (Family Law Reform Act 1995) introduced clear objects and principles, subject to the paramount consideration "the best interest of the child."

Section 60B(2) states the four principles that underlie these objects. These principles are however always subject to the rider that they not be contrary to a child's best interests. The four principles are:

1. Children have a right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and,

2. Children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and,
3. Parents share duties and responsibilities concerning the care, welfare and development of their children; and,
4. Parents should agree about the future parenting of their children.

The terminology changed from custody to residence (with whom the child shall live) and access changed to contact, (when the non-resident parent sees the child). This was to disrupt the win-lose mentality that was seen to accompany the language, to shift thinking of children as property and to encourage parents to take an active shared parental role.

In resolving disputes about residence and contact the paramount principle applied in determining the dispute is “The best interests of the child are to be determined after consideration of the matters listed in section 68F(2).”

**68F(2)** The court must consider:

- (a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;
- (b) the nature of the relationship of the child with each of the child's parents and with other persons;
- (c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
  - (i) either of his or her parents; or
  - (ii) any other child, or other person, with whom he or she has been living;
- (d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
- (e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;
- (f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or

- Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant;
- (g)** the need to protect the child from physical or psychological harm caused, or that may be caused, by:
    - (i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or
    - (ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;
  - (h)** the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
  - (i)** any family violence involving the child or a member of the child's family;
  - (j)** any family violence order that applies to the child or a member of the child's family;
  - (k)** whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;
  - (l)** any other fact or circumstance that the court thinks is relevant.

Research into the operation of the Family Law Reform Act 1995, identifies that there is now a presumption operating in favour of contact with the non-resident parent, despite the requirement to consider the best interest of the child (Rhoades, Graycar & Harrison, 2000). The introduction of children having a right of contact with both parents, subject to the paramount consideration the best interests of the child, has had unintended consequences, in that “no-one is prepared to say no contact anymore” (Rhoades, Graycar & Harrison, 2000; Family Law Council, 1992).

The workload of the Family Court has substantially increased. With limited Legal Aid funding for family law matters, women often appear unrepresented before the court. Proceedings become lengthier and more frustrating for clients, court staff, legal practitioners and judicial officers.

A large number of disputes are settled via case conferences or court counselling. There is pressure on litigants to come to an agreement in relation to parenting issues. While this suits many litigants in a dispute, it does not work well where there are allegations of child sexual assault. Many mothers

are reluctant to compromise or come to an agreement that may make further abuse of their children a strong possibility via the operation of contact orders.

At times facing the pressure of a stalemate with little supporting evidence, mothers do agree to consent orders for contact between the child and the father.

These contact orders soon become unworkable as the mother witnesses the emotional effects on her children who continue to have contact with the alleged abuser.

These contact arrangements (whether by consent or otherwise) leave the mother at risk of contravention proceedings in the Family Court, which incur serious penalties. Where there are Family Court orders in place for contact women have positive obligations to make the child available according to the orders.

If they do not make the children available for contact they are in breach of the court orders and may be dealt with for contravention of orders by the court (Family Law Act 1975 (Cth) s112AD).

A breach of court orders by a mother places them in a situation where their actions may be seen as equally abusive by the court, in that they are seen as denying their child contact with the other parent.

If they do agree to contact, it is our experience, that they risk having the character of their protective acts attacked in cross-examination for making the child available if they had concerns for their welfare and safety.

The High Court of Australia stated that, “the resolution of an allegation of sexual abuse against a parent is subservient and ancillary to the determination of what is in the best interest of the child. The Family Court’s consideration of the paramount issue cannot be diverted by the supposed need to arrive at a definitive conclusion on the allegations of sexual abuse.” And then “In resolving the wider issue the court must determine whether on the evidence there is a risk of sexual abuse occurring if contact is granted and assess the magnitude of that risk.”<sup>1</sup>

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<sup>1</sup> In the Marriage of M and M (1988) FLC 91-979.

The high cost of being involved in Family Court proceedings without legal representation cannot be overstated. Litigants who have no choice but to appear before the courts unrepresented walk into a proverbial mine field.

Without an understanding of the legal process or the rules of evidence they find themselves unsure about the legal tasks of using subpoenas, calling witnesses and the rules of cross examination.

For an unrepresented mother trying to protect her children, even if she has some evidence of sexual abuse, it is difficult to adduce the evidence required to persuade the court of the risk to her child of contact with the alleged offender.

The very nature of sexual abuse, in terms of active and continued manipulation by the offender to maintain the secrecy of his crime, makes it difficult to substantiate. Most commonly the sole witness, other than the offender, is the child, coerced into silence and confused by the fact that the abuser is someone they love and trust.

The fear surrounding children who have been abused usually means that, should they disclose it would most often be to someone they hope will believe them and keep them safe. This is commonly their mother. Having taken the huge step of confiding in someone children will often be hesitant to again tell someone else, making the investigative interview with children all the more difficult to achieve.

If the child is still having contact with the alleged offender, as in the case of contact visits, that hesitation will be exacerbated.

The fear of the alleged offender's response, especially if he has threatened the child with retribution, will naturally prevent a child from risking further harm.

These tactics of coercion will make clear and concise evidentiary statements, a difficult task to achieve. Without strong evidence criminal prosecution is difficult.

In the absence of a JIRT investigation, DoCs risk assessment and supporting evidence from DoCs referral agencies, the mother has little evidence to support her application in the Family Court to protect her child.

It is our experience that DoCS will not investigate if they believe the child is no longer at risk. Further it is a commonly held belief that allegations of child

sexual abuse are unfounded and only made by parents for tactical purposes in Family Court proceedings. Research studies have confirmed international experience, finding that in Australia, false allegations are low, making up only 9% of all allegations (Brown, 1998).

## **Public Law**

Child care and protection is the responsibility of the State, and because of this, are known as public law matters. In NSW, DoCs is the government agency, empowered to protect the best interests of children.

The *Children and Young Persons (Care and Protection) Act 1998* commenced in December 2000. This legislation has adopted the same terminology as that used in the Family Law Act. There is a focus on parental responsibility and a range of orders may now be made in relation to children in need of care and protection.

Under the new legislation intervention by DoCs focuses on early intervention and utilises alternative dispute resolution to formulate care plans that can be registered in Court or form the basis for consent orders. There are new grounds for bringing care proceedings. The grounds for a care order will now only need to be proved by the balance of probabilities.

There are new final care orders available to the Court, including: replacing wardship with orders allocating parental responsibility between the Minister and the parents; allowing final orders as to contact; and permitting orders that services be provided to facilitate restoration of a child to his or her parents. The power to commence proceedings in the Children's Court is provided to the Director-General.

In NSW, the process of investigation of child protection matters is handled through the Joint Investigation & Review Team (JIRT) which brings DoCs and the Police together to provide statutory protective intervention. The Police have a responsibility for the investigation of alleged child abuse, which might constitute a criminal offence. The joint investigative response seeks to link the protective intervention system of DoCs with the criminal investigation of Police (Joint Investigation Teams, Policy & Procedures Manual).

DoCs will refer allegations of sexual abuse to JIRT, which will be accepted for further investigation where the child has made a clear disclosure to an adult

and/or there is physical evidence of sexual abuse. The focus for JIRT is on a criminal investigation. A forensically-led interview is conducted by a police officer and DoCs officer, often recorded on video.

JIRT are focussed on having enough evidence to satisfy a court beyond reasonable doubt of the guilt of an alleged offender. This may automatically exclude preschool aged children from being interviewed, as there are difficult evidentiary issues in relation to disclosures from young children.

If a disclosure is not forthcoming, JIRT will often take no further action in the investigation and close the case. JIRT may assess some risk and then refer the case back to the local DoCs office for allocation. Women who contact WLRC state that there is no further action by DoCs who state reasons such as:

- the child is not living with the perpetrator so there is no risk;
- the child is too young to give evidence in court, making a conviction difficult;
- the report is malicious to assist in family court proceedings; or,
- The Family Court are dealing with/ have dealt with the issue.

Of grave concern to WLRC, however, is the inability of DoCs to effectively respond to the overwhelming number of notifications made. DoCS Helpline is the one contact point for people wishing to report the potential risk of harm to children and young persons and for requests for assistance. The Helpline commenced operations on 18 December 2000 and had received 109,000 telephone calls as at June 2001 (DoCs Annual Report 2000-2001). The following statistics provided from DoCs annual report highlight the substantial workload of DoCs.

## What does Assessment/Investigation Determine?

Table 2.4 Contact Reports Received (By Primary Issue)

Percentage of all reports	1998/99	1999/00	2000/01
Harm and/or injury, actual to child	24.3	23.1	19.2
Child at risk	19.1	18.6	19.2
Adult/Carer issues affecting child	34.8	36.6	36.2
Family issues	20.0	20.5	16.7
Requests for assistance	-	-	1.5
Information only	-	-	6.2
Other*	1.8	1.2	1.0
<b>Total</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>

Table 2.7 Assessment / Investigation Of Reports

	1998/99	1999/00	2000/01
Determined to be abuse/neglect	10 053	9 045	10 603
Carer/ family issues identified	12 526	13 578	17 373
No risk or harm issues involved	9 108	9 309	15 211
Ongoing assessment / investigation	7 301	8 582	11 889
<b>Total reports requiring assessment / investigation</b>	<b>38 988</b>	<b>40 514</b>	<b>55 076</b>

Data Source: CIS standard annual statistical extracts  
Produced by Information & Research Services (DoCs Annual Report 2000-2001 p 22)

### Total Contact Reports : 107 394 100%

Classified by Primary Reported Issue

Harm	Risk	Carer	Family	Other
20 582	20 636	38 847	17 982	9 347
19.2%	19.2%	36.2% <sup>1</sup>	6.7%	8.7%

DoCS workers implement operational guidelines to deal with the report

**Reports potentially requiring further Assessment / Investigation**

72 047  
67.1%

**Assessment / Investigation Concluded**

43 187  
59.9%

**Ongoing Assessment / Investigation**

11 889  
16.5%

**No further action required or possible**

16 971  
23.6%

**Handled at intake or no further Assessment / Investigation required or possible**

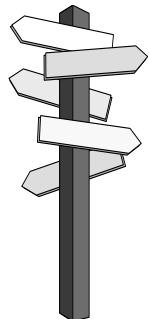
35 347  
32.9%

**Report determined to be:**

<b><i>Abuse / Neglect Issues</i></b>	<b><i>Carer / Family issues</i></b>	<b><i>No safety, risk wellbeing issues</i></b>
10 603	17 373	15 211
24.6	40.2%	35.2%

Data Source: CIS standard annual statistical extracts (DoCs Annual Report 2000-2001 p 23).

**Systemic Abuse**



A principal area of concern expressed by women utilising the service is the need to protect their children from child abuse. They are frustrated by the maze of systems they must deal with principally because of the division of legislative powers between the Commonwealth Parliament and the State and Territory Parliaments.

In the context of relationship breakdown, where allegations of child abuse are raised, the care and protection of children via the interaction of public (state jurisdiction) and private law (commonwealth jurisdiction) is problematic. Women and children find themselves in a “catch 22” situation where one jurisdiction cannot act and the other is reluctant to act.

The Australian Constitution does not contain a power permitting the Commonwealth Parliament to make laws concerning children or their protection. These matters are left to the States and Territories and remain the domain of the States.

Where child protection issues are raised in these different jurisdictions the scope of the court’s power to examine and determine the facts, interpret and apply the law, make orders and declare judgment, is determined by the various legislative instruments that each is governed by. The Family Court resolves disputes in relation to breakdown of private relationships about children in accordance to the paramount principle “the best interest of children.”

The Family Court is unable to make orders when there is an order under the Child Care and Protection Act.<sup>2</sup> Child Protection remains the responsibility of the State. Women are required to notify DoCs on a child’s disclosure of sexual abuse. If DoCs do not investigate the complaint the Family Court has no evidence before it in relation to the child abuse disclosure. In these circumstances when considering the ‘best interest of the child’ the Family Court will observe the principle “children have a right to know and be cared for by both parents”<sup>3</sup> and ensure orders are made for regular contact.

**WLRC Recommends:**

One single Federal system that deals with family law and child protection, *or at the very least:*

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<sup>2</sup> s69ZK Family Law Act 1975.

<sup>3</sup> s60B Family Law Act 1975.

- That where allegations of child abuse are raised in Family Court proceedings the matter is adjourned, immediately transferred to DoCs and JIRT to investigate, assess and report to the Family Court.
- The establishment of a specialised case management system for dealing with Family Court matters involving allegations of child sexual abuse such as 'Project Magellan' in Victoria.
- The establishment of protocols between Family Court and DoCs for dealing with matters involving child abuse allegations, that detail a timely, coordinated and accountable all systems approach.
- In interim applications for contact with children, where there are allegations of child sexual assault, the Family Court should either suspend all contact or increase the use of supervised contact centres.
- Allegations of child sexual assault arising within the context of a private family law dispute must be properly investigated by DoCs via the use of the protocol and results of that investigation be made available to the Family Court.
- It is this organisation's experience, from client reports, that DoCS delays taking action if there are proceedings before the Family Court. A discussion around the interaction between the Family Court and the state child protection instrumentalities is without meaning if there is no interaction between those bodies. In our view, in all cases where there are allegations of child sexual assault and/or physical assault there should be an independent assessment by DoCS where appropriate or a policy to consider intervention in family law matters where necessary to implement the principles relating to care of children.
- These problems often arise where there are jurisdictional clashes. Whilst the State body is empowered to override the Family Court it would appear that there is a great reluctance to do this. It is possible that this problem could be overcome if the organisations were exercising Federal legislation in a Federal Court. In addition this would assist where children are taken between state jurisdictions thereby losing the state of origin's supervision. It is our experience that Indigenous children are particularly vulnerable to interstate flight. A child taken from NSW to Queensland can then be subject to a Residence Application, without the input from the NSW child

protection agency. In these cases it is open for Family Court orders to be made which may place the child at risk.

- Education within DoCs so that they are aware of the scope of power of the Family Court and the fact that action taken in the Children's Court can override any Family Court Orders. In this jurisdiction, DoCs action in the Children's Court stops any action in the Family Court.

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