

Submission to Family Law Council

Your details

Name/organisation	Queensland Family and Child Commission
Contact details	Queensland Family and Child Commission PO Box 15217 Brisbane City East QLD 4002 Web: http://www.qfcc.qld.gov.au/ Email: info@QFCC.qld.gov.au Phone: (07) 3900 6000

Confidentiality

Submissions received may be published on the Family Law Council's webpage, except where requests have been made to keep them confidential or where they relate to particular cases or personal information. Would you prefer this submission to remain confidential? NO

Your submission

Please note that your submission may address the questions in the call for submissions or a letter you received (simply provide the number of the question/s you are responding to), or provide any information you consider relevant to the Council's terms of reference about families with complex needs and the intersection of the family law and child protection systems.

Queensland Family and Child Commission

Submission

To: Family Law Council

Date: 27 April 2015

Topic: **Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems**

Submission summary:

This submission will jointly address the Family Law Council's request for information and comment to guide an interim report and discussion paper for reference on, "*Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*".

Submission recommendations:

The Family Law Council provide advice to the Attorney-General, Senator the Hon George Brandis QC, which:

- Seeks to ensure that the best interest of children are routinely sought and applied as a determining factor in all decision making processes.
- Legal representatives are sympathetic to and demonstrate understanding of the emotional impacts of family and protection matters on a child or young person.
- Considers the implications of implementing legislative and judicial amendment to the current model of the Family Law Court and Children's Court roles, and recommends further targeted consultation at the State and Federal level.
- Promotes and advocates for adequately funded legal representation resources for families and children within the family law system.
- Ensures that vulnerable families are provided with access to appropriate secondary services to address pre-existing risk factors identified in, or prior to, progressing a family law matter.

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The Queensland Family and Child Commission (QFCC) is pleased to provide a submission to the Family Law Council (the Council) regarding *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*.

(NOTE: The QFCC has limited the information contained in this response to those terms of reference which are relevant to our legislated advocacy and promotion functions).

Queensland Family and Child Commission (QFCC)

The QFCC was established on 1 July 2014 to ensure all Queensland children and young people are cared for, protected, safe and able to reach their full potential. To achieve this the QFCC functions include, though are not exclusively limited to, the following:

- The promotion and advocacy of the shared responsibility of families and communities to ensure the protection and care for children and young people.
- Educating parents, families, communities and professionals and providing information on services available that will strengthen and support the family unit.
- Collaborating with government, non-government, tertiary and vocational education and training partners to develop the capability and capacity of the child protection workforce and to improve the services provided to children and their families.
- Providing oversight of the Queensland child protection system.
- Development and coordination of a multidisciplinary research program to inform policies and practices, in consultation with stakeholders and relevant agencies.

Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems

Recommendation

The Family Law Council provide advice to the Attorney-General, Senator the Hon George Brandis QC, which:

- Seeks to ensure that the best interest of children are routinely sought and applied as a determining factor in all decision making processes.
- Legal representatives are sympathetic to and demonstrate understanding of the emotional impacts of family and protection matters on a child or young person.

Question 1 – What are the experiences of children and families who are involved in both child protection and family law proceedings? How might these experiences be improved?

Child wellbeing

Both child protection and family law systems *‘know and try to ensure that safety is a non-negotiable outcome of systems that make decisions about children and young people’*.¹ However, ensuring safety needs to be balanced with protecting and promoting the wellbeing of the child or young person throughout both child protection and family law court proceedings. Regardless of the level of

¹ Fraser, E. (2010). Commissioner for Children and Young People and Child Guardian, *Speech to the Family Law Pathways*.

exposure a child may have had with either system, or the difficulties experienced within the family unit, interactions in a formal legal setting and the potential separation from a parent/s and family unit can be a traumatic experience for a child or young person. For professionals across both systems, children's emotional wellbeing should be supported by:

- Legal and child protection representatives who:
 - understand and can adapt their professional manner to suit the developmental level and cognitive functioning of each child.
 - apply consideration to approaching formal legal procedures while, where able, being sensitive to the emotional needs of the child.
- Legal decisions made which consider the child's psychological adjustment to separation and include recovery from parental acrimony (in family law matters) and protection from further conflict.²
- Empowering the child to be heard and voice their opinions, while avoiding placing any decision making burden on the child.³
- Children being encouraged, where appropriate, to seek assistance and advice from a support person or legal advocate to represent their interests.
- Engagement that is child and family focused and places the best interests of the child or young person at the center of any decisions.⁴
- Ensuring that the needs of the child or young person are not overlooked when the issues of the parent or family are addressed.⁵

Representation and advocacy

As pointed out by Walsh and Douglas (2011), it is difficult to argue against the value of legal support a lawyer or legal advocate provides when families participate in judiciary systems that rely on detailed legislation and involve the question of rights and interests and (can) result in significant impact on children and parent's lives.⁶

Many families who came into contact with a court or tribunal process however often possess one or more characteristics of social disadvantage or vulnerability which is often compounded by their inability or lack of knowledge to obtain sufficient legal representation, from the initial stages of engagement, with the court process.⁷ When families and children are left to navigate their way through complicated legal proceedings of their own accord and without formal support, their ability to provide their views and to self-advocate, as well as having awareness of their general rights in the legal process, is impaired.

Joint proceedings

While not directly applicable to the functions of the family law system, it may be of interest to the Council to note the issues associated with joint proceedings for complex families noted in the recent Queensland Child Protection Commission of Inquiry (the Inquiry).

² McIntosh, J. (2007). *Child Inclusion as a principle and as evidence-based practice: Applications to family law services and related sectors*, Australian Institute of Family Studies.

³ McIntosh, J. (2007). *Child Inclusion as a principle and as evidence-based practice: Applications to family law services and related sectors*, Australian Institute of Family Studies.

⁴ Keep Them Safe, Senior Officers Group, (Accessed 16/04/2015). *Child Wellbeing and Child Protection – NSW Interagency Guidelines, Principles of Engagement*.

⁵ Keep Them Safe, Senior Officers Group, (Accessed 16/04/2015). *Child Wellbeing and Child Protection – NSW Interagency Guidelines, Principles of Engagement*.

⁶ Walsh, T. & Douglas, H. (2001). *Lawyers, Advocacy and Child Protection*, Melbourne University Law Review.

⁷ Carmody, T. (2013). *Taking Responsibility: A roadmap for Queensland Child Protection*, Queensland Child Protection Commission of Inquiry.

The Inquiry conducted a far reaching review of all aspects of the child protection system in Queensland, including '*children and the legal system*'. As part of this inquiry, a review of complex families (multiple children under child protection orders) and their involvement with the Queensland court system found that sibling's hearings were being held individually and at varying times and locations. Additionally the Inquiry found that the supporting files in complex family hearings related more to the broader family's issues and needs, than to the needs of the individual child.

The Carmody Inquiry recommended to the Queensland Government that the *Child Protection Act 1999* be amended and for the court to transfer and join proceedings related to siblings, if the court decides that this would be in the best interests of justice.

Recommendation

The Family Law Council provide advice to the Attorney-General, Senator the Hon George Brandis QC, which:

- Considers the implications of implementing legislative and judicial amendment to the current model of the Family Law Court and Children's Court roles, and recommends further targeted consultation at the State and Federal level.

Question 3 – What are the possible benefits for families of enabling Children's Courts to make parenting orders under Part V11 of the *Family Law Act*? In what circumstances would this power be useful? What would be the likely challenges for practice that would be created by this change?

- AND -

Question 4 – What are the possible benefits for families of enabling the family courts to make Children's Court orders? In what circumstances would this power be useful? What challenges for practice might this create?

The intersection of Family Law and the Children's Court in response to child protection matters has long been a topic of interest and discussion as has the perceived remedies of how to address matters related to jurisdictional overlap. While every effort is made to avoid multiple proceedings in concurrent jurisdictions through the promotion of the 'one court principle'⁸, it is undeniable that the family and child jurisdictions overlap considerably with the regulation of parental responsibility⁹. Providing the Family Law Court and Children's Courts with the judicial responsibility to each make decisions on child protection and family matters, has a number of benefits at a superficial level including (but not limited to):

- Reducing the legal complexities facing families.
- Mitigates risk and reduces instances where neither court acts to protect the child¹⁰.
- Addresses the need for family members or victims of events such as family violence, to avoid continually revisit traumatic events in different courts. This notion is evidenced through related, parallel inquiries into the management of domestic violence processes and reiterated by the Australian Law Reform Commission who state '*empowering courts in*

⁸ Child Safety and Disability Services (2013). *Child Safety Practice Manual*, Department of Communities.

⁹ Osborne, M. (2003). *Family law and child protection*, Family Matters Journal No.65.

¹⁰ Osborne, M. (2003). *Family law and child protection*, Family Matters Journal No.65.

*criminal matters to make protection orders (for example domestic violence) on their own initiative are an extremely important way of alleviating the need for a victim to make an application for protection’.*¹¹

- Acts as a mechanism for reviewing the division of legal representation funding in both the federal and state judicial systems.

However, along with the perceived positives there are also concerns noted by the QFCC regarding expanding the jurisdiction on family law and child protection matters, including:

- Any expansion would require significant legal change and fiscal and human resources investment at both a state and federal level.
- The family court does not currently have the expertise or resources to perform an investigatory function into child protection matters and would still be reliant on the state based child protection agencies in child protection matters.
- The expansion of either jurisdiction will not address the existing long-standing issues associated with streamlining collaboration and involvement with all relevant parties involved in the child protection investigation process.
- The ability for a federal and state court to establish the same level of consistency in managing decision making of both parental and child protection orders, including which is the most appropriate order, rather than the most convenient.
- The ability of the expanded jurisdictions to maintain and adhere to the principle of decision making in ‘the best interests of the child’ when competing parental and child protection matters are simultaneously heard.
- Children may have a greater exposure to parental conflict and a higher risk of being drawn into the midst of family law proceedings.¹²

Recommendation

The Family Law Council provide advice to the Attorney-General, Senator the Hon George Brandis QC, which:

- Promotes and advocates for adequately funded legal representation resources for families and children within the family law system.
- Ensures that vulnerable families are provided with access to appropriate secondary services to address pre-existing risk factors identified in, or prior to, progressing a family law matter.

Question 10 – What services are needed to support families and children who use the family law system where child safety concerns are identified?

Historically, the Australian Children’s Commissioners and Guardians and the former Queensland Commission for Children, Young People and Child Guardian have publicly supported and advocated for the broadening of the *Family Law Act 1975* to enable courts and legal representatives to seek out

¹¹ Australian Law Reform Commission (2010). *Family Violence – Improving Legal Frameworks, Chapter 6 – Protection Orders and Criminal Law*.

¹² Fraser, E. (2010). Commissioner for Children and Young People and Child Guardian, *Speech to the Family Law Pathways*.

the voice of the child in family law matters rather than to illicit a choice.¹³ The continued promotion and sustained advocacy of a child or young person's right to voice their concerns in family law matters while avoiding exposure to parental conflict is maintained by the QFCC. As already discussed, to empower a child in a judiciary environment, support and advice from an adequately funded legal advocate or representative is a vital component for communicating a child's story.

Vulnerable families should be directed to secondary services that offer complimentary supports and interventions to address any pre-existing risk factors that contribute to the safety and protection of children within the home environment, particularly when concerns regarding the ongoing safety of a child are raised in the family court environment. Aiding families in this circumstance includes connecting to services such as drug and alcohol abuse programs and domestic violence intervention programs in partnership with traditional counselling and support services. In line with advice from the Australian Institute of Family Studies, child and family focused mediation and dispute resolution should encourage the parental reflective function which develops the capacity of the parent to consider and take on their child's perspective and encourages interventions which aim to improve the safety and wellbeing of the child in their home environment¹⁴.

Conclusion

The QFCC is pleased to be able to provide a targeted response to the Family Law Council request for information and advice regarding *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*.

In keeping with the advocacy and promotion functions of the QFCC, future inclusion in discussion or development activities regarding the intersection of the family law and child protection systems is welcomed.

¹³ Fraser, E. (2010). Commissioner for Children and Young People and Child Guardian, *Speech to the Family Law Pathways*.

¹⁴ McIntosh, J. (2007). *Child Inclusion as a principle and as evidence-based practice: Applications to family law services and related sectors*, Australian Institute of Family Studies.