

Protocol between the  
**Department of Human Services,  
the Family Court of Australia and  
the Federal Magistrates Court**

May 2011



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the Federal Magistrates Court**

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## Acknowledgements

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Manager, Child Protection Policy and Practice

Legal Services Branch

### **Family Court**

The Honourable Justice Cronin  
Sally Field, Regional Coordinating Registrar

### **Federal Magistrates Court**

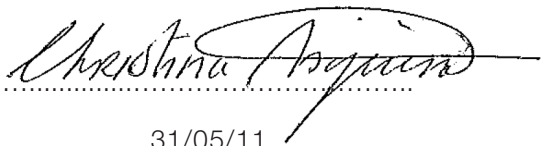
Federal Magistrate Hughes  
Adele Byrne, Principal Registrar

## Endorsement

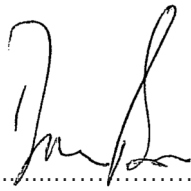
In accordance with the principles underlying this protocol, we the undersigned, on behalf of our respective department and court, agree that this protocol will provide guidelines for our staff to ensure the cooperative framework necessary for the safety and protection of Victoria's children.

Signed by:


Christina Asquini  
Executive Director  
Children, Youth and Families  
Department of Human Services

Signed   
Dated ..... 31/05/11 .....

Chief Justice Diana Bryant  
Family Court of Australia

Signed   
Dated ..... 31/05/11 .....

Chief Federal Magistrate John Pascoe  
Federal Magistrates Court of Australia

Signed   
Dated ..... 31/05/11 .....

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## 1. Introduction

- 1.1 This protocol has been established to facilitate contact between the Department of Human Services Child Protection program, the Family Court of Australia and the Federal Magistrates Court in order to ensure that a child's need for protection is met and to ensure the best possible outcomes for a child.
- 1.2 The protocol is designed to assist cooperation, clarify procedures and improve decision making in cases that may occur in either or both the Commonwealth and state jurisdictions.
- 1.3 This protocol articulates the statutory and non-statutory responsibilities of the Department of Human Services, the Family Court and Federal Magistrates Court to each other. While the Department of Human Services has mandatory responsibility for investigating allegations of child abuse or neglect, it requires the cooperation of the Family Court and Federal Magistrates Court in cases that also involve those courts.
- 1.4 While the protocol aids effective communication between the Department of Human Services Child Protection Program, the Family Court and the Federal Magistrates Court, it does not replace the requirement for open and collaborative relationships between each at the operational level. The Department of Human Services, the Family Court and the Federal Magistrates Court are committed to providing the highest level of service. Working together will ensure professional, sensitive and well-targeted responses to those children and young people who are at significant risk of harm.

## 2. Department of Human Services Child Protection Program

- 2.1 Most Victorian children and young people are adequately cared for and nurtured by their family. It is only when parents or caregivers are unable or unwilling to protect children against significant harm that the Department of Human Services must take up this responsibility. The Victorian Child Protection Program is specifically targeted to those children and young people at risk of significant harm. The child protection system has three broad aims for children and young people with whom it is involved:
  - to protect the child from harm
  - to protect the child's rights
  - to promote the child's stability and healthy development (taking into account their age and stage of development).
- 2.2 The statutory responsibilities of the Department of Human Services are outlined in the *Children, Youth and Families Act 2005* (Vic) in relation to child protection services for children in Victoria under the age of 17 years (see comments in paragraph 2.5 in reference to a child's age). This includes the principles, grounds and procedures for intervening in the life of a child and the child's family when there are serious concerns about the wellbeing or safety of a child or an unborn child.

- 2.3 Child protection services are based on the legal framework set out in the Children, Youth and Families Act. The main principle underpinning the Children, Youth and Families Act is that the best interests of the child must always be the paramount consideration (s. 10 of the Children, Youth and Families Act). In determining whether any decision or action is in the best interests of the child, the need to protect the child from harm, to protect the child's rights, and to promote the child's development must always be considered in addition to the other best interest considerations, where relevant.
- 2.4 Child protection intervention is child centred and family focused, and is limited to that which is necessary to secure the safety and wellbeing of the child.
- 2.5 In relation to child protection, the Children, Youth and Families Act gives statutory powers and responsibilities to the Department of Human Services only in relation to children under the age of 17 years, and children who are 17 years of age who are also the subject of a child protection order. This differs from the *Family Law Act 1975* (Cth), which is concerned with all children who are under 18 years of age. Accordingly, there may be instances in which a child under the FLA is not considered a child under the Children, Youth and Families Act, where a child is 17 years of age and is not the subject of a child protection order.
- 2.6 This difference may preclude the Department of Human Services from taking action following receipt of correspondence from the Family Court or the Federal Magistrates Court regarding a child. For example, child protection will not accept and investigate a notification from the Family Court or the Federal Magistrates Court regarding the alleged abuse of a 17-year-old child because the child is not a child to whom the Children, Youth and Families Act applies. However, in cases in which a request for information is made by the Family Court or the Federal Magistrates Court to the Department of Human Services regarding a child under the age of 17 years, the department will comply with the request.
- 2.7 The Department of Human Services must also have regard to its obligation pursuant to the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter'), to act compatibly with the human rights set out in the Charter and to properly consider relevant rights when making a decision.



### 3. The role of Victoria Police in child protection

- 3.1 Victoria Police is responsible for dealing with criminal matters that arise in child abuse and neglect investigations.
- 3.2 Therefore, in cases in which a person may have committed a criminal offence against a child, the Department of Human Services will, in accordance with the protocol between Victoria Police and the Department of Human Services, immediately refer the matter to Victoria Police. In these cases, the protective investigation will usually be planned and conducted in conjunction with Victoria Police.
- 3.3 Victoria Police members are mandatory reporters under the Children, Youth and Families Act. Accordingly, pursuant to the Children, Youth and Families Act, Victoria Police must report all allegations and situations of physical and sexual abuse of a child or young person to the Department of Human Services. Further, the protocol between Victoria Police and the Department of Human Services provides that where police are notified that a child has been, or is likely to be, physically, sexually or emotionally abused or neglected, and the parents are not able to protect the child, the police must notify child protection as soon as possible.

## 4. The Family Division of the Children's Court

4.1 The Family Division of the Children's Court has jurisdiction under the Children, Youth and Families Act. It can hear and determine a range of applications and make orders in relation to the protection and care of any child under the age of 17 years, or a child aged 17 years who is the subject of a protection order. The following orders are 'protection orders' under the Children, Youth and Families Act:

- an order requiring a person to give an undertaking
- a supervision order
- a custody to third party order
- a supervised custody order
- a custody to Secretary order
- a guardianship to Secretary order
- a long-term guardianship to Secretary order
- an interim protection order.

4.2 Under the Children, Youth and Families Act, the Family Division of the Children's Court can make any of the following orders, which will generally result in the child being placed in the care of a person other than their parent or guardian:

- a therapeutic treatment placement order
- an interim accommodation order
- a custody to third party order
- a supervised custody order
- a custody to Secretary order
- a guardianship to Secretary order
- a long-term guardianship to Secretary order, or
- a permanent care order.

4.3 The Family Division of the Children's Court may also make the following orders, under which the child will generally remain in the care of their parent or guardian:

- a temporary assessment order
- a therapeutic treatment order
- an order requiring the child, the child's parent, or the person with whom the child is living, to give an undertaking
- a supervision order, or
- an interim protection order.

## 5. The Family Court of Australia and the Federal Magistrates Court

### 5.1 Jurisdiction

- 5.1.1 Both the Family Court of Australia and the Federal Magistrates Court have jurisdiction under the *Family Law Act 1975* (Cth) ('the FLA'), to make orders in relation to parental responsibility, including with whom a child should live, spend time and communicate, and concerning the financial support of children under the age of 18 years.
- 5.1.2 In making any parenting order the Court must regard the best interests of the child as the paramount consideration. In determining what is in the child's best interests the Court must have regard to the matters set out in s. 60CC(2), (3) (4) and (4A) of the FLA.
- 5.1.3 The primary considerations set out in s. 60CC(2) are as follows:
- (i) the benefit to the child of having a meaningful relationship with both of the child's parents
  - (ii) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.
- 5.1.4 Additional considerations are set out in s. 60CC(3). These include matters such as the views of the child, the nature of the child's relationship with significant people, parental capacity and attitude, any family violence involving the child or a member of the child's family, the cultural heritage of the child and practical issues.
- 5.1.5 The Court's power to make a parenting order is governed by ss. 65C and 65D of the FLA. Such power is subject to the presumption of equal shared parental responsibility pursuant to s. 61DA.
- 5.1.6 If the Court makes an order for equal shared parental responsibility, the Court must also consider in accordance with s. 65DAA, whether an order should be made for a child to spend equal time or substantial and significant time with each parent. In arriving at such a decision, the Court will consider whether spending equal time or substantial and significant time with each of the parents, is in the best interests of the child and whether spending equal time or substantial and significant time with each of the parent is reasonably practicable.

### 5.2 Limitations to jurisdiction

- 5.2.1 The jurisdiction of the Family Court and the Federal Magistrates Court is limited by s. 69ZK of the FLA. The Family Court and the Federal Magistrates Court must not make an order in relation to a child who is under the care (however described) of a person under a child welfare law, unless:
- (i) the order is expressed to come into effect when the child ceases to be under that care, or
  - (ii) the order is made with the written consent of the relevant child welfare officer which, in Victoria, is the Secretary to the Department of Human Services.
- 5.2.2 Further, where it appears to the Court that a state court proposes to make an order (for example, an interim order or a protection order under the Children, Youth and Families Act in the Children's Court of Victoria), or take any other action, the Court may adjourn any proceedings before it in relation to that child.

## 6 Application to the Family Court or Federal Magistrates Court

### 6.1 General

- 6.1.1 Applications to the Family Court or Federal Magistrates Court in respect of a parenting order for a child may be made by the following people:
- (i) either or both of the child's parents
  - (ii) the child
  - (iii) a grandparent of the child, or
  - (iv) any other person concerned with the care, welfare or development of the child.
- 6.1.2 Where an application for a parenting order is already before the Court, a statutory third party may become a party to the proceedings in the following ways:
- (i) under s. 68L of the FLA an independent children's lawyer may be appointed to represent the interests of the child
  - (ii) under s. 91B of the FLA, the Court may request the intervention in the proceedings of an officer of the appropriate state child welfare department (which, in Victoria, is the Secretary to the Department of Human Services).

### 6.2 Where allegations of child abuse are present

- 6.2.1 Section 92A of the FLA provides that in proceedings under the FLA in which it has been alleged that the child has been abused or is at risk of being abused, each of the following is entitled to intervene in those proceedings:
- (i) a guardian of the child
  - (ii) a parent of the child with whom the child lives
  - (iii) a person with whom the child is to live under a parenting order
  - (iv) a person who has parental responsibility for the child under a parenting order
  - (v) any other person responsible for the care, welfare or development of the child
  - (vi) a prescribed child welfare authority (in Victoria, the Secretary to the Department of Human Services)
  - (vii) a person who is alleged to have abused the child or from whom the child is alleged to be at risk of abuse.
- 6.2.2 Where a person intervenes in proceedings pursuant to s. 92A, the person is, unless the Court otherwise orders, to be taken to be a party to the proceedings with all the rights, duties and liabilities of a party.

## 6.3 The Magellan list in the Family Court

- 6.3.1 The Magellan list was established in the Family Court of Australia to better deal with parenting disputes involving allegations of serious physical and sexual abuse. The aim is to reduce the distress to children by achieving faster and more lasting resolution of disputes while also reducing the costs associated with these cases. Major features of this case management system include the imposition of strict timelines, early 'front loading' of resources (such as the appointment of an independent children's lawyer), provision of information from the Department of Human Services, and close liaison on case management between external information providers and a small team of court personnel.
- 6.3.2 If the Department of Human Services receives a notification from the Family Court and an order requesting the department to provide a written report regarding a child who is the subject of proceedings in the Magellan list, child protection will:
- (i) make a decision regarding the investigation of the notification in accordance with normal practice, and this protocol
  - (ii) determine whether the department should intervene in the Family Court proceedings.
- 6.3.3 If the Department of Human Services undertakes an investigation, it will endeavour to provide written information to the Family Court within five weeks of the order. Such information will be provided in a report attached to a letter. The report will outline the actions taken by the department including the names of those interviewed for the report, the department's views regarding the risk to the child, and will explain the reasons for these decisions and actions, based on a consideration of the child's best interests.

The Department of Human Services will advise the Family Court either by telephone or, preferably, in writing, if more time is required to complete the investigation. The child protection practitioner conducting the investigation should liaise with the independent children's lawyer and the Magellan registrar.

The Children, Youth and Families Act contains a number of provisions relating to privacy and the management and sharing of client information held by the Department of Human Services. The *Information Privacy Act 2000 (Vic)* ('IPA') and the *Health Records Act 2001 (Vic)* ('HRA') also apply to the collection, management and exchange of personal and health information. The HRA deals with health information and the IPA deals with all other personal information. Both the IPA and the HRA incorporate a number of principles governing the collection, management and exchange of personal information and health records.

All information collected and recorded by child protection practitioners must be handled sensitively and in accordance with the relevant provisions of the Children, Youth and Families Act, the IPA, the HRA and departmental guidelines. In some circumstances, this may mean that a child protection practitioner cannot provide information directly to an independent children's lawyer unless the independent children's lawyer serves a subpoena on the Secretary to the Department of Human Services requesting that information.

## 7. Notifications<sup>1</sup> from the Family Court or Federal Magistrates Court to the Department of Human Services

### 7.1 Notifications during court proceedings

7.1.1 Notifications of alleged child abuse when Family Court or Federal Magistrates Court proceedings are underway are made under different sections of the FLA, according to who is making the notification. These sections are as follows:

- (i) Section 91B relates to a request by the Family Court or Federal Magistrates Court that the relevant state child welfare authority intervene in the proceedings (in Victoria, the Secretary to the Department of Human Services).
- (ii) Section 67Z relates to a notification by a party to the proceedings.
- (iii) Section 67ZA relates to a notification by a professional person such as a member of court staff or an independent children's lawyer involved in the proceedings.

7.1.2 A request to intervene, or a notification made by a party or by a professional person in accordance with the FLA, will be regarded as a report to the Secretary to the Department of Human Services in accordance with either section 28 or section 183 of the Children, Youth and Families Act.

### 7.2 Request for the Secretary to intervene

7.2.1 Section 91B of the FLA provides that in proceedings that affect, or may affect, the welfare of a child, the Family Court and the Federal Magistrates Court may request the intervention of the person who is responsible for administering child welfare laws in that state (in Victoria, the Secretary to the Department of Human Services).

7.2.2 The section further provides that once such a request has been made, the relevant person may intervene in the proceedings and, upon doing so, will be deemed to be a party to the proceedings.

7.2.3 This provision provides for the involvement of the Department of Human Services at an early stage in the proceedings. It also provides a procedure by which particular cases may be promptly brought to the attention of the Secretary to the Department of Human Services for consideration and assistance.

### 7.3 Notification by a party

7.3.1 Section 67Z of the FLA provides that where a party to proceedings under the FLA alleges that a child to whom those proceedings relate has been abused or is at risk of being abused, the following must take place:

- (i) That person must file a notice in a prescribed form and serve a copy of the notice upon the person who is alleged to have abused the child or from whom the child is alleged to be at risk of abuse.
- (ii) The registry manager must, as soon as practicable, provide a copy of the notice to a prescribed child welfare authority (in Victoria, the Secretary to the Department of Human Services).

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<sup>1</sup> The use of the terms 'notification' and 'notify' are used throughout the FLA. It is, however, acknowledged that such terms have been replaced in the CYFA with the terms 'reporting' and 'report'. Accordingly, the use of these terms throughout the protocol will vary depending on which legislation is being referred to.

## 7.4 Notification by court personnel or professionals

- 7.4.1 Section 67ZA of the FLA provides that the following people may notify a prescribed child welfare authority (in Victoria, the Secretary to the Department of Human Services) of child abuse (s. 67ZA(2)) or maltreatment (s. 67ZA(3)):
- (i) the registrar or a deputy registrar of a registry of the Family Court of Australia
  - (ii) the registrar or a deputy registrar of the Family Court of Western Australia
  - (iii) a registrar of the Federal Magistrates Court
  - (iv) a family consultant
  - (v) a family counsellor
  - (vi) a family dispute resolution practitioner
  - (vii) an arbitrator, or
  - (viii) a lawyer independently representing the child's interests.

## 7.5 Types of abuse that must be notified by court personnel or professionals

- 7.5.1 Section 4(1) of the FLA defines 'abuse' in relation to a child as being an assault, including a sexual assault of the child, which is an offence under the law of the state in which the act in question occurred, or sexual activity involving the child where the child is used as a sexual object and where there is unequal power in the relationship between the child and the person using the child.
- 7.5.2 Section 67ZA(2) and (4) of the FLA provide that where a person to whom this section applies has reasonable grounds for suspecting that a child has been abused or is at risk of being abused, that person must, as soon as practicable, notify a prescribed welfare authority (in Victoria, the Secretary to the Department of Human Services) of their suspicion and the basis for the suspicion, unless the person knows that the prescribed welfare authority has previously been notified about the abuse or risk of abuse.

## 7.6 Types of maltreatment that may be notified by court personnel or professionals

- 7.6.1 Section 67ZA(3) and (4) (Appendix 2) provide that where a person to whom this section applies has reasonable grounds for suspecting that a child:
- (i) has been ill treated, or is at risk of being ill treated, or
  - (ii) has been exposed or subjected, or is at risk of being exposed or subjected, to behaviour that psychologically harms the child, that person may notify a prescribed welfare authority (in Victoria, the Secretary of the Department of Human Services) of their suspicion and the basis for the suspicion unless the person knows that the prescribed welfare authority has previously been notified about the abuse or risk of abuse.

## 8. Procedures for referring cases of suspected child abuse and neglect to the Department of Human Services

### 8.1 Request for the Secretary to intervene

8.1.1 Where the Family Court or Federal Magistrates Court makes an order under s. 91B:

- (i) the parties to the proceedings will receive a sealed copy of the order
- (ii) the registry manager shall promptly notify the appropriate Department of Human Services regional office of the request and the next court date
- (iii) the registry manager shall promptly provide necessary and relevant information from the court file, including affidavit material, to the appropriate Department of Human Services regional office to enable the Department of Human Services to respond appropriately to that request.

### 8.2 Notification by a party

8.2.1 Where a Notice of Child Abuse or Family Violence (Form 4) is filed by a party to the proceedings pursuant to s. 67Z of the FLA, a return date will be written on the front of the notice.

8.2.2 The registry manager shall forward the notice within five days to the appropriate Department of Human Services regional office.

8.2.3 The Department of Human Services regional office shall acknowledge receipt of the notice in writing directly to the registry manager or their nominee.

### 8.3 Notification by court personnel or professionals

8.3.1 Where a notification of child abuse is made by a person to whom s. 67ZA applies, such notification shall be made to the Department of Human Services child protection intake in the region in which the child normally resides or, if appropriate, the After Hours Emergency Child Protection Service (Appendix 4).

8.3.2 The Department of Human Services regional office shall acknowledge receipt of the notification directly to the person who made the notification.

### 8.4 Timelines following a request to intervene or notification

8.4.1 Wherever possible, the Family Court and the Federal Magistrates Court will set a return date that allows the Department of Human Services sufficient time to adequately respond to the request to intervene under s. 91B or notification under s. 67Z or s. 67ZA.

8.4.2 The Department of Human Services will usually require a minimum of 21 days to prepare its response in the form of a letter. If there is inadequate time to prepare a response in time for the next hearing date, the Department of Human Services will notify the Court as soon as practicable, prior to the next court date.

8.4.3 A further adjournment may be necessary if the Department of Human Services has not been able to complete the investigation. If the Department of Human Services believes an adjournment is necessary, the department will fax a request for an adjournment to the registry manager. The registry manager will notify the Department of Human Services, either by telephone or fax, of the outcome of their request. The registry manager will also advise the other parties if an adjournment is requested.



8.4.4 Generally the Court will defer making a determination until it receives the Department of Human Services' response, and if this is not the case, they will advise the Department of Human Services accordingly.

## 9. Action by the Department of Human Services upon receiving a request or notification from the Family Court or Federal Magistrates Court

- 9.1 When a request to intervene or a notification is received, the Department of Human Services will initially seek the following information:
- (i) name of the child and relevant family members
  - (ii) address of child and relevant family members
  - (iii) preferred language spoken by the child and family
  - (iv) dates of birth of the child and parent(s)
  - (v) whether the child is Aboriginal (if so the Aboriginal Child Specialist Advice and Support Service must be contacted)
  - (vi) reasons for concern about the child
  - (vii) the notifier's involvement with the child and family
  - (viii) any other people or agencies involved with the child and family
  - (ix) any concerns about the child protection practitioner's safety when visiting the family
  - (x) the optimal time to meet with the parents at home
  - (xi) whether the family know that a notification has been made.
- 9.2 If the Department of Human Services determines that the age of the child precludes the notification from being accepted as a report under the Children, Youth and Families Act (that is, if the child is aged 17 years), the Department of Human Services shall advise the Family Court or Federal Magistrates Court in writing that it does not intend to take any further action. However, if applicable, the Department of Human Services will inform the Court in writing that it has information in which the Court may be interested.
- 9.3 Where the Department of Human Services has been requested to intervene in family law proceedings, the regional office to which the notification was made will acknowledge receipt of the report in writing directly to the registry manager or their nominee.
- 9.4 Where the Department of Human Services has received a notification, the relevant regional office will acknowledge receipt of the notification directly to the person who made the notification.
- 9.5 Upon receipt of a notification made in accordance with the FLA, the Department of Human Services will make a determination as required under s. 187 of the Children, Youth and Families Act (Appendix 3). If the Department of Human Services determines that the notification is a protective intervention report, it will investigate the notification in accordance with legislative requirements and current policy and practice guidelines.
- 9.6 If a notification is made by an employee of the Family Court or Federal Magistrates Court, during the investigation (if an investigation occurs), the person who made the notification has a continuing responsibility to advise the relevant child protection practitioner of any information that may have a bearing on the protection of the child, including any new facts and circumstances that have arisen since the person made the notification.

## 10. Information exchange

### 10.1 The principles that underlie the exchange of information between the Department of Human Services, the Family Court and the Federal Magistrates Court

- 10.1.1 Any action or decision taken by the Department of Human Services, the Family Court of Australia or the Federal Magistrates Court in relation to a child will be based on the best interests of the child, recognising that the best interests of the child are the paramount consideration.
- 10.1.2 The best interests of a child are better secured by the exchange of relevant information between those concerned with the child and family.
- 10.1.3 Courts are in a better position to make appropriate orders if they are fully aware of proceedings in other jurisdictions.
- 10.1.4 Information exchange must always be subject to any privacy and confidentiality obligations in relevant legislation with which the parties must comply.

### 10.2 Department of Human Services access to information from the Family Court and Federal Magistrates Court (this applies whether or not there is notification from the Family Court)

- 10.2.1 In cases in which the Department of Human Services Child Protection practitioner becomes aware (in the course of their duties) of past or current proceedings in the Family Court or the Federal Magistrates Court, the practitioner should try to ascertain all possible information from the child's family (for example, the information set out in item 10.2.2).
- 10.2.2 Should the child's family fail to cooperate, or should the Child Protection practitioner wish to confirm any of the information provided by the child's family, the practitioner may obtain from the Family Court or the Federal Magistrates Court the following information, by contacting the registry manager or nominee:
  - (i) what proceedings have taken place or are taking place
  - (ii) in which registry of the Family Court or the Federal Magistrates Court the proceedings have been, or are, taking place
  - (iii) what orders have been made, and what orders are being sought
  - (iv) the status of the court proceedings and the date fixed for any future proceedings
  - (v) the names of any lawyers acting on behalf of the parties to the proceedings and the name of any independent children's lawyer
  - (vi) if there is a family consultant involved in the proceedings and the name of that family consultant
  - (vii) copies of relevant orders and affidavits (such requests may require referral to the relevant judicial officer for consideration).
- 10.2.3 The information may be given by telephone to the Department of Human Services Child Protection practitioner. Information exchange must always be subject to any privacy and confidentiality obligations in relevant legislation with which the parties must comply.

### 10.3 Family Court and Federal Magistrates Court access to information from the Department of Human Services

10.3.1 If there are proceedings pending in the Family Court or the Federal Magistrates Court relating to a child, and the Court becomes aware that there is, or has been, protective involvement with the Department of Human Services, the registry manager or a registrar of the Court may obtain relevant information from the Department of Human Services regional office in the area where the child currently resides.

10.3.2 The information that may be provided following such an enquiry shall be:

- (i) whether a notification has been received in respect of the child
- (ii) the name of the allocated Department of Human Services child protection practitioner
- (iii) the status of any investigation by the Department of Human Services of allegations concerning the child, including whether the Department of Human Services has substantiated any allegations of abuse or neglect
- (iv) the status of any protective proceedings, including:
  - (a) whether there are proceedings pending and, if so, in which court
  - (b) what orders have been made and what orders are being sought
  - (c) relevant future court dates.

10.3.3 The information may be given by telephone to the registry manager. Information exchange must always be subject to any privacy and confidentiality obligations in relevant legislation with which the parties must comply.

10.3.4 All information collected and recorded by child protection practitioners must be handled sensitively and in accordance with the relevant provisions of the Children, Youth and Families Act, the IPA, the HRA and departmental guidelines. In some circumstances, this may mean that it is not possible to provide information directly to the Family Court or the Federal Magistrates Court unless a subpoena is served on the Department of Human Services requesting the information be produced or an order is made under s. 69ZW of the FLA.

### 10.4 Court order for documents and/or information from the department

10.4.1 Pursuant to s. 69ZW of the FLA, the Family Court or Federal Magistrates Court may make an order in child-related proceedings requiring a state or territory agency (in Victoria, the Department of Human Services) to provide the Court with documents or information about one or more of the following matters:

- (i) any notifications to the agency of suspected abuse of a child to whom the proceedings relate or of suspected family violence affecting the child
- (ii) any assessments by the agency of investigations into a notification of that kind or the findings or outcomes of those investigations
- (iii) any reports commissioned by the agency in the course of investigating a notification.

10.4.2 However, nothing in the order is to be taken to require the Department of Human Services to provide:

- (i) documents or information not in the possession or control of the Department of Human Services, (except when an order has been made in respect to a child who is the subject of proceedings in the Magellan list) (see part 6.3.3), or
- (ii) documents or information that include the identity of the person who made the notification or report to the Department of Human Services.

10.4.3 Section 69ZW overrides the Children, Youth and Families Act, to the extent that the Children, Youth and Families Act would limit the Department of Human Services' compliance with a s. 69ZW order for information.

10.4.4 Any information provided to the Family Court or the Federal Magistrates Court must be admitted into evidence if the Court intends to rely on that information. However, this does not include the identity of the person who made the report to the Department of Human Services, or information that could identify the reporter, which must not be disclosed by the Court, unless:

- (i) the reporter consents to the disclosure, or
- (ii) the Family Court or the Federal Magistrates Court is satisfied that the identity of the reporter, or information that could be used to identify the reporter, is critical to the proceedings and that failure to make the disclosure would prejudice the proper administration of justice. In these circumstances, the Family Court or the Federal Magistrates Court will order that the identity of the reporter, or information that could be used to identify the reporter, be disclosed.

However, before making a disclosure on the latter basis, the Court must notify the Department of Human Services of the intended disclosure and give the department an opportunity to respond, which may involve the department obtaining legal representation in the circumstances.

## 11. Establishing the appropriate jurisdiction

- 11.1 It is not in the interests of the child or the family that there be concurrent proceedings relating to that child in a court exercising family law jurisdiction and the Children's Court.
- 11.2 When deciding in which court the matter should most appropriately proceed, the Department of Human Services should give consideration to the following:
- (i) whether there is evidence to support a finding in the Children's Court that the child is a child in need of protection under one of the grounds in s. 162(1) of the Children, Youth and Families Act
  - (ii) whether the protective concerns can be alleviated by a change in residence or other arrangements for the child
  - (iii) whether there is an appropriate parent or carer prepared to lodge an application under the FLA in relation to residence or other arrangements for the child
  - (iv) where there are family law proceedings pending, and whether the Secretary to the Department of Human Services should seek to appear as *amicus curiae* (friend of the court) or intervene in those proceedings
  - (v) which court is likely to provide the quickest and most effective solution to secure the welfare of the child
  - (vi) which court has jurisdiction to make the orders that it is anticipated the parties to the proceedings will require.
- 11.3 In considering these matters, reference should be made to the memorandum of understanding signed in April, 1995 by Justice Frederico of the Family Court of Australia, Nick Papas, then Chief Magistrate of the Magistrates Court and Robin Clark, then Assistant Director of Child, Adolescent and Family Welfare in the Department of Health and Community Services (now renamed Department of Human Services). (See Appendix 1 for the full document.)

## 12. Response to the Family Court and Federal Magistrates Court by the Department of Human Services upon receiving a report

After receiving and acting on (see 9.5) a report, the Department of Human Services may respond in any of the following ways.

- 12.1 If the child is under 17 years of age, file a protection application in the Children's Court to protect the child.**
- 12.2 Intervene in and become a party to the Family Court or Federal Magistrates Court proceedings pursuant to s. 91B or s. 92A of the FLA.**
  - 12.2.1 Section 91B(1) of the FLA provides that the court may request the intervention of a state or territory child welfare authority.
  - 12.2.2 The officer may intervene in the proceedings and, upon doing so, will be deemed to be a party to proceedings.
  - 12.2.3 Section 92A of the FLA also provides for certain people and a relevant child welfare authority to intervene in the proceedings (see Appendix 2).
- 12.3 Inform the Family Court or the Federal Magistrates Court that the Department of Human Services does not intend to intervene but that the Department of Human Services has information in which the court may be interested.**
  - 12.3.1 The court may then wish to issue a subpoena under the Family Law Rules 2004 or the Federal Magistrates Court Rules 2001 in order that evidence may be provided to the court (see section 14 of this protocol), or
  - 12.3.2 The court may make an order pursuant to s. 69ZW of the FLA (see section 10 of this protocol).
- 12.4 Inform the Family Court or the Federal Magistrates Court that the Department of Human Services does not intend to take any further action.**
- 12.5 Inform the Family Court or the Federal Magistrates Court that the Department of Human Services seeks to appear in the proceedings as amicus curiae (friend of the court).**

## 13. Compliance with Family Court and Federal Magistrates Court orders

- 13.1 Parties sometimes refuse to comply with an order to make a child available to another party on the basis that to do so would place the child at risk of harm.
- 13.2 Section 70NAE of the FLA sets out two broad situations in which a party may be taken to have a 'reasonable excuse' for contravening an order, as follows:
- (i) at the time of the contravention, the respondent to the contravention application did not understand their obligations under the orders and the Court is satisfied they ought to be excused, or
  - (ii) the respondent to the contravention application believed on reasonable grounds that the actions constituting the contravention were necessary to protect the health or safety of a person (including the respondent or the child) and the period during which the child was not made available was not longer than was necessary to protect the health or safety of that person.
- 13.3 The decision not to comply with a court order is a decision made entirely by the party. The Department of Human Services has no legal authority to authorise or compel non-compliance with a court order. Although a protection application before the Children's Court has the effect of suspending an order of the Family Court or the Federal Magistrates Court, accepting a report or conducting an investigation does not.
- 13.4 The Department of Human Services treats allegations made by parties to family law proceedings that non-compliance with a Family Court or Federal Magistrates Court order is necessary to protect a child in the same way as it treats any other reports made in relation to a child. When such allegations are made, the Department of Human Services determines whether it is necessary to investigate the allegations and when any investigation should occur. In such situations, the Department of Human Services should strongly encourage the parties to seek urgent independent legal advice.
- 13.5 The Department of Human Services will not provide legal advice to a person about his or her obligations under the FLA or whether his or her situation falls within section 70NAE.



## 14. Inspection and photocopying of the Department of Human Services case file material subpoenaed by the Family Court and Federal Magistrates Court

### 14.1 Protecting the identity of reporters

- 14.1.1 Where a subpoena is served on the Department of Human Services to produce documents relating to a child, section 41 and section 191 of the Children, Youth and Families Act require that a person must not disclose to anyone other than a protective intervener, the name of any person who makes a report of suspected child abuse, or a wellbeing report, or any other information that is likely to lead to the identification of that person.
- 14.1.2 Section 190 of the Children, Youth and Families Act also provides that in any legal proceedings, evidence that identifies a person who made a report as the reporter, or is likely to lead to the identification of that person as the reporter, is only admissible in the proceedings if the court or tribunal grants leave for the evidence to be given or if the reporter consents in writing to the admission of that evidence.

### 14.2 Procedures to be followed to protect information

- 14.2.1 When a file is subpoenaed by the Family Court or Federal Magistrates Court, the Department of Human Services will remove any evidence or information contained in a report or other document that may identify the reporter, or lead to the identification of the reporter, or which discloses legally privileged information, and place it in a sealed envelope at the front of the file (Appendix 6).
- 14.2.2 The sealed envelope will be marked 'Not to be opened except at the direction of the judge, federal magistrate or registrar'.
- 14.2.3 The registry manager or their nominee is responsible for ensuring that the sealed envelope is removed from the file before inspection of the file by the parties and/or their legal representatives is allowed.
- 14.2.4 The Department of Human Services must place a written warning inside the front of the file advising that if, while perusing a file, a party becomes aware that reporter details or information that may lead to the identification of a reporter remains on the file, that party is responsible for advising the registry manager who, in turn, will notify the Court.
- 14.2.5 The Court will then refer the file to the Department of Human Services regional child protection manager for further vetting.
- 14.2.6 Subject to the following provisions, the Court will ensure that all file inspections are carried out under full supervision by the registry manager or their nominee.
- 14.2.7 A party or their legal representative will not be permitted to photocopy any documents provided by the department unless an order to do so is obtained from the relevant court. In addition, the Department of Human Services regional Child Protection practitioner named as the contact officer on the proforma letter attached to the front of the file must be advised in writing by that party or their legal representative that such an order will be sought at least three business days prior to the date on which it is proposed that the order will be made. The party, or their legal representative, must file an affidavit deposing to the fact that this advice has been provided to the Child Protection practitioner.

- 14.2.8 If a party or their legal representative wishes to inspect any material as described in paragraph 14.1 of this section, and contained in the sealed envelope, an application must be made to the Family Court or the Federal Magistrates Court. The applicant must write to the appropriate Department of Human Services regional child protection manager advising of the application and the hearing date, and provide a copy of the application. The applicant must then complete an affidavit indicating that this procedure has been complied with.
- 14.2.9 Part 15.3 of the Family Law Rules 2004 (Cth) and Division 15A.2 of the Federal Magistrates Court Rules 2001 (Cth), which relate to the administrative release and photocopying of subpoenaed material, will not apply to subpoenas served on the Department of Human Services.
- 14.2.10 The Department of Human Services is entitled to be legally represented when applications of the kind set out in sections 14.2.7 and 14.2.8 of this protocol are heard.
- 14.2.11 The Department of Human Services may object to the production of documents requested under a subpoena in court if it is considered that certain information in the documents, other than the identity of a person making a report, should not be revealed.

### **14.3 Timelines**

- 14.3.1 The Department of Human Services requires a minimum of seven days within which to comply with a subpoena.
- 14.3.2 If the Department of Human Services is served with a subpoena less than seven days before the date on which it is required to produce documents under the subpoena, the Department of Human Services will endeavour to comply, but will not be expected to comply with the subpoena. If the Department of Human Services cannot produce the documents in the time available, the department will fax a letter to the relevant court to advise that it is unable to comply and to indicate a date by which the documents will be produced.

## 15. Dispute resolution process

- 15.1 Any complaint or dispute between the Department of Human Services and the Family Court or the Federal Magistrates Court should be dealt with by the registry manager and the regional child protection manager, who will decide on a course of action to resolve the problem.
- 15.2 The manager of the Child Protection Policy and Practice Unit, who is responsible for the Department of Human Services' adherence to the protocol, may also be contacted at central office by telephone on 9096 0000 if clarification is required.

# Appendix 1

## Memorandum of understanding

**Memorandum of understanding** between the Family Court of Australia, the Children's Court of Victoria and the Department of Human Services, Victoria.

### Background

1. A number of cases both in Victoria and interstate where families have been subjected to proceedings in the Family Court and intervention from a state welfare authority, have prompted concerns about the overlap of federal and state jurisdictions and the role of State Welfare authorities in such proceedings.
2. A recent case in which Human Services issued a Protection Application in the Children's Court following the making of an order in the Family Court highlighted the difficulties that could occur where the Department was involved in Family Court proceedings.
3. As a result on 22 November 1994 Justice Frederico convened a meeting of Senior Representatives of the Family Court of Australia, the Children's Court of Victoria and the Department of Human Services, formerly the Department of Health and Community Services (Human Service) to discuss these issues in detail and establish a Memorandum of Understanding.

### Agreement

The central principles underpinning this agreement are:-

- A recognition of the specialised nature and separate jurisdictions of the Family Court and Children's Court.
- A recognition that Human Services has statutory responsibilities which may involve, or result in the involvement of, both the Family Court and the Children's Court.
- A recognition that multiple hearings, over prolonged periods of time in separate jurisdictions can be harmful to the child and should where possible be minimised.
- A recognition that parents have a right to have their disputes resolved expeditiously, efficiently and where possible within a single jurisdiction.
- A recognition that the Children's Court should not be utilised as a de facto Court of appeal from the Family Court.

### It is agreed that:

1. Human Services reserves the right to choose the jurisdiction in which protective concerns in relation to children are determined, guided by the principles enunciated above.
2. If Human Services forms the view that the Family Court is the appropriate jurisdiction to decide matters of a protective nature, it may choose not to become a party but to give evidence in support of one or another party, or the child's separate representative, if appointed. This decision will be based on the level of concern, the preparedness of the other parties' legal representative to call the Department's evidence and recognition that the Department, as a witness, will be required to accept the orders of the Court without the avenue of appeal.
3. If Human Services has serious concerns and is not satisfied that its evidence will be fully presented or wishes to raise jurisdictional arguments, it may apply to be made a party to the proceedings.

4. Provided no new protective concerns emerge during the proceedings to suggest that the child is at further risk, Human Services will not apply to change the jurisdiction.
5. During the course of proceedings in the Family Court, if, as a result of new information, Human Services assessed that the child is at significant risk and that none of the parties will protect the child, proceedings will be initiated through the Children's Court.
6. Where the Department decides to initiate proceedings through the Children's Court, it will appear in person before the Family Court at the earliest opportunity to inform the Court of its intentions.
7. If, as a party to the proceedings, Human Services is dissatisfied with the outcome of the Family Court proceedings and considers the child to be at significant continuing risk, an appeal will be initiated through the Family Court.
8. Provided no new protective concerns arise following Family Court proceedings, Human Services will not commence further proceedings in the Children's Court, regardless of judgement.
9. If following the conclusion of Family Court proceedings fresh concerns are raised about the safety and/or wellbeing of a child, Human Services will determine whether the concerns are best addressed through protection application proceedings in the Children's Court or initiation of further proceedings through the Family Court. This decision will be based on the length of time since the Family Court order was made, whether or not any family members are able to adequately care for the child and the level of Departmental supervision required.
10. Where there have been previous proceedings in the Family Court or proceedings are current in the Family Court, Human Services will ensure, to the extent that it is aware, that this information is communicated clearly to the Children's Court in any report submitted to that jurisdiction by the Department.

### **Parties to memorandum of understanding**

Signed by

Justice Frederico  
Family Court of Australia

Nick Papas  
Chief Magistrate  
Magistrate Court of Victoria

Robin Clark  
Assistant Director  
Department of Health and Community Services, Victoria

Dated 19th April 1995

## Appendix 2

### Relevant sections of the *Family Law Act 1975*

#### 1. Definitions

**Section 4** of the FLA, defines the following terms, relevant to this protocol as follows:

**'abuse'**, in relation to a child, means:

- (a) an assault, including a sexual assault, of the child which is an offence under a law, written or unwritten, in force in the State or Territory in which the act constituting the assault occurs; or
- (b) a person involving the child in a sexual activity with that person or another person in which the child is used, directly or indirectly, as a sexual object by the first-mentioned person or the other person, and where there is unequal power in the relationship between the child and the first-mentioned person.

**'child welfare law'** means a law of a State or Territory prescribed, or included in a class of laws of a State or Territory prescribed, for the purposes of this definition.

**'child welfare officer'**, in relation to a State or Territory, means:

- (a) a person who, because he or she holds, or performs the duties of, a prescribed office of the State or Territory, has responsibilities in relation to a child welfare law of the State or Territory; or
- (b) a person authorised in writing by such a person for the purposes of Part VII.

**'family violence'** means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety.

*Note: A person reasonably fears for, or reasonably is apprehensive about, his or her personal wellbeing or safety in particular circumstances if a reasonable person in those circumstances would fear for, or be apprehensive about, his or her personal wellbeing or safety.*

**'independent children's lawyer'** for child means a lawyer who represents the child's interests in proceedings under an appointment made under a court order under subsection 68L(2).

**'prescribed child welfare authority'**, in relation to abuse of a child, means:

- (a) if the child is the subject of proceedings under Part VII in a State or Territory—an officer of the State or Territory who is responsible for the administration of the child welfare laws of the State or Territory, or some other prescribed person; or
- (b) if the child is not the subject of proceedings under Part VII an officer of the State or Territory in which the child is located or is believed to be located who is responsible for the administration of the child welfare laws of the State or Territory, or some other prescribed person.

**'professional ethics'** includes:

- (a) rules of professional conduct; and
- (b) rules of professional etiquette; and
- (c) a code of ethics; and
- (d) standards of professional conduct.

## 2. Power of a court in parenting proceedings

### **Section 60CA The child's best interests is the paramount consideration in making a parenting order**

In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

### **Section 60CC How a court determines what is in a child's best interests**

#### *Determining child's best interests*

- (1) Subject to subsection (5), in determining what is in the child's best interests, the court must consider the matters set out in subsections (2) and (3).

#### *Primary considerations*

- (2) The primary considerations are:
- (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and
  - (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

*Note: Making these considerations the primary ones is consistent with the objects of this Part set out in paragraphs 60B(1)(a) and (b).*

#### *Additional considerations*

- (3) Additional considerations are:
- (a) any views 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 views;
  - (b) the nature of the relationship of the child with:
    - (i) each of the child's parents; and
    - (ii) other persons (including any grandparent or other relative of the child);
  - (c) the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent;
  - (d) 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 (including any grandparent or other relative of the child), with whom he or she has been living;
  - (e) the practical difficulty and expense of a child spending time with and communicating 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;
  - (f) the capacity of:
    - (i) each of the child's parents; and
    - (ii) any other person (including any grandparent or other relative of the child); to provide for the needs of the child, including emotional and intellectual needs;

- (g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;
  - (h) if the child is an Aboriginal child or a Torres Strait Islander child:
    - (i) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and
    - (ii) the likely impact any proposed parenting order under this Part will have on that right;
    - (i) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
    - (j) any family violence involving the child or a member of the child's family;
  - (k) any family violence order that applies to the child or a member of the child's family, if:
    - (i) the order is a final order; or
    - (ii) the making of the order was contested by a person;
    - (l) 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;
  - (m) any other fact or circumstance that the court thinks is relevant.
- (4) Without limiting paragraphs (3)(c) and (i), the court must consider the extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent and, in particular, the extent to which each of the child's parents:
- (a) has taken, or failed to take, the opportunity:
    - (i) to participate in making decisions about major long-term issues in relation to the child; and
    - (ii) to spend time with the child; and
    - (iii) to communicate with the child; and
  - (b) has facilitated, or failed to facilitate, the other parent:
    - (i) participating in making decisions about major long-term issues in relation to the child; and
    - (ii) spending time with the child; and
    - (iii) communicating with the child; and
  - (c) has fulfilled, or failed to fulfil, the parent's obligation to maintain the child.
- (4A) If the child's parents have separated, the court must, in applying subsection (4), have regard, in particular, to events that have happened, and circumstances that have existed, since the separation occurred.

#### *Consent orders*

- (5) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2) or (3).



*Right to enjoy Aboriginal or Torres Strait Islander culture*

- (6) For the purposes of paragraph (3)(h), an Aboriginal child's or a Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:
- (a) to maintain a connection with that culture; and
  - (b) to have the support, opportunity and encouragement necessary:
    - (i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and
    - (ii) to develop a positive appreciation of that culture

**Section 61DA Presumption of equal shared parental responsibility when making parenting orders**

- (1) When making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

*Note: The presumption provided for in this subsection is a presumption that relates solely to the allocation of parental responsibility for a child as defined in section 61B. It does not provide for a presumption about the amount of time the child spends with each of the parents (this issue is dealt with in section 65DAA).*

- (2) The presumption does not apply if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in:
- (a) abuse of the child or another child who, at the time, was a member of the parent's family (or that other person's family); or
  - (b) family violence.
- (3) When the court is making an interim order, the presumption applies unless the court considers that it would not be appropriate in the circumstances for the presumption to be applied when making that order.
- (4) The presumption may be rebutted by evidence that satisfies the court that it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

**Section 65C Who may apply for a parenting order**

A parenting order in relation to a child may be applied for by:

- (a) either or both of the child's parents; or
- (b) the child; or
- (ba) a grandparent of the child; or
- (c) any other person concerned with the care, welfare or development of the child.

## **Section 65D Court's power to make parenting order**

- (1) In proceedings for a parenting order, the court may, subject to sections 61DA (presumption of equal shared parental responsibility when making parenting orders) and 65DAB (parenting plans) and this Division, make such parenting order as it thinks proper.

*Note: Division 4 of Part XIII AA (International protection of children) may affect the jurisdiction of a court to make a parenting order.*

- (2) Without limiting the generality of subsection (1) and subject to section 61DA (presumption of equal shared parental responsibility when making parenting orders) and 65DAB (parenting plans) and this Division, a court may make a parenting order that discharges, varies, suspends or revives some or all of an earlier parenting order.
- (3) If the application for the parenting order was made as a result of the adjournment under paragraph 70NEB(1)(c) of proceedings under Subdivision E of Division 13A of Part VII:
- (a) the court must hear and determine the application as soon as practicable; and
  - (b) if the court makes a parenting order on the application, the court may, if it thinks it is appropriate to do so, dismiss the proceedings under that Subdivision.

*Note: The applicant may apply to the Family Court or to the Federal Magistrates Court for the application for the parenting order or for the proceedings under Subdivision E of Division 13A of Part VII, or both, to be transferred to the Federal Magistrates Court or to the Family Court, as the case requires (see section 33B of this Act and section 39 of the Federal Magistrates Act 1999)*

## **Section 65DAA Court to consider child spending equal time or substantial and significant time with each parent in certain circumstances**

Equal time

- (1) Subject to subsection (6), if a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child, the court must:
- (a) consider whether the child spending equal time with each of the parents would be in the best interests of the child; and
  - (b) consider whether the child spending equal time with each of the parents is reasonably practicable; and
  - (c) if it is, consider making an order to provide (or including a provision in the order) for the child to spend equal time with each of the parents.

*Note 1: The effect of section 60CA is that in deciding whether to go on to make a parenting order for the child to spend equal time with each of the parents, the court will regard the best interests of the child as the paramount consideration.*

*Note 2: See subsection (5) for the factors the court takes into account in determining what is reasonably practicable.*

Substantial and significant time

- (2) Subject to subsection (6), if:
- (a) a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child; and
  - (b) the court does not make an order (or include a provision in the order) for the child to spend equal time with each of the parents; and

the court must:

- (c) consider whether the child spending substantial and significant time with each of the parents would be in the best interests of the child; and
- (d) consider whether the child spending substantial and significant time with each of the parents is reasonably practicable; and
- (e) if it is, consider making an order to provide (or including a provision in the order) for the child to spend substantial and significant time with each of the parents.

*Note 1: The effect of section 60CA is that in deciding whether to go on to make a parenting order for the child to spend substantial time with each of the parents, the court will regard the best interests of the child as the paramount consideration.*

*Note 2: See subsection (5) for the factors the court takes into account in determining what is reasonably practicable.*

- (3) For the purposes of subsection (2), a child will be taken to spend substantial and significant time with a parent only if:
  - (a) the time the child spends with the parent includes both:
    - (i) days that fall on weekends and holidays; and
    - (ii) days that do not fall on weekends or holidays; and
  - (b) the time the child spends with the parent allows the parent to be involved in:
    - (i) the child's daily routine; and
    - (ii) occasions and events that are of particular significance to the child; and
  - (c) the time the child spends with the parent allows the child to be involved in occasions and events that are of special significance to the parent.
- (4) Subsection (3) does not limit the other matters to which a court can have regard in determining whether the time a child spends with a parent would be substantial and significant.

Reasonable practicality

- (5) In determining for the purposes of subsections (1) and (2) whether it is reasonably practicable for a child to spend equal time, or substantial and significant time, with each of the child's parents, the court must have regard to:
  - (a) how far apart the parents live from each other; and
  - (b) the parents' current and future capacity to implement an arrangement for the child spending equal time, or substantial and significant time, with each of the parents; and
  - (c) the parents' current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind; and
  - (d) the impact that an arrangement of that kind would have on the child; and
  - (e) such other matters as the court considers relevant.

*Note 1: Behaviour of a parent that is relevant for paragraph (c) may also be taken into account in determining what parenting order the court should make in the best interests of the child. Subsection 60CC(3) provides for considerations that are taken into account in determining what is in the best interests of the child. These include:*

- (a) *the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent (paragraph 60CC(3)(c));*
- (b) *the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents (paragraph 60CC(3)(i)).*

*Note 2: Paragraph (c) reference to future capacity--the court has power under section 13C to make orders for parties to attend family counselling or family dispute resolution or participate in courses, programs or services.*

Consent orders

(6) If:

- (a) the court is considering whether to make a parenting order with the consent of all the parties to the proceedings; and
- (b) the order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child;

the court may, but is not required to, consider the matters referred to in paragraphs (1)(a) to (c) or (if applicable) the matters referred to in paragraphs (2)(c) to (e).

(7) To avoid doubt, subsection (6) does not affect the application of section 60CA in relation to a parenting order.

*Note: Section 60CA requires the best interests of the child to be the paramount consideration in a decision whether to make a particular parenting order.*

### 3. Allegations of child abuse

#### **Section 67Z Where party to proceedings makes allegation of child abuse**

- (1) This section applies if a party to proceedings under this Act alleges that a child to whom the proceedings relate has been abused or is at risk of being abused.
- (2) The party must file a notice in the prescribed form in the court hearing the proceedings, and serve a true copy of the notice upon the person who is alleged to have abused the child or from whom the child is alleged to be at risk of abuse.
- (3) If a notice under subsection (2) is filed in a court, the Registry Manager must, as soon as practicable, notify a prescribed child welfare authority.
- (4) In this section:

**prescribed form** means the form prescribed by the applicable Rules of Court.

**Registry Manager** means:

- (a) in relation to the Family Court—the Registry Manager of the Registry of the Court; and
- (b) in relation to the Family Court of Western Australia—the Principal Registrar, a Registrar or a Deputy Registrar, of the court; and
- (c) in relation to any other court—the principal officer of that court.

### **Section 67ZA Where member of the court personnel, family counsellor, family dispute resolution practitioner or arbitrator suspects child abuse etc**

- (1) This section applies to a person in the course of performing duties or functions, or exercising powers, as:
  - (a) the Registrar or a Deputy Registrar of a Registry of the Family Court of Australia; or
  - (b) the Registrar or a Deputy Registrar of the Family Court of Western Australia; or
  - (c) a Registrar of the Federal Magistrates Court; or
  - (d) a family consultant; or
  - (e) a family counsellor; or
  - (f) a family dispute resolution practitioner; or
  - (g) an arbitrator; or
  - (h) a lawyer independently representing a child's interests.
- (2) If the person has reasonable grounds for suspecting that a child has been abused, or is at risk of being abused, the person must, as soon as practicable, notify a prescribed child welfare authority of his or her suspicion and the basis for the suspicion.
- (3) If the person has reasonable grounds for suspecting that a child:
  - (a) has been ill treated, or is at risk of being ill treated; or
  - (b) has been exposed or subjected, or is at risk of being exposed or subjected, to behaviour which psychologically harms the child; the person may notify a prescribed child welfare authority of his or her suspicion and the basis for the suspicion.
- (4) The person need not notify a prescribed child welfare authority of his or her suspicion that a child has been abused, or is at risk of being abused, if the person knows that the authority has previously been notified about the abuse or risk under subsection (2) or subsection 67Z(3), but the person may notify the authority of his or her suspicion.
- (5) If notice under this section is given orally, written notice confirming the oral notice is to be given to the prescribed child welfare authority as soon as practicable after the oral notice.
- (6) If the person notifies a prescribed child welfare authority under this section or subsection 67Z(3), the person may make such disclosures of other information as the person reasonably believes are necessary to enable the authority to properly manage the matter the subject of the notification.

### **Section 67ZB No liability for notification under section 67Z or 67ZA**

- (1) A person:
  - (a) must give notice under subsection 67Z(3) or 67ZA(2); or
  - (b) may give notice under subsection 67ZA(3) or (4); or
  - (c) may disclose other information under subsection 67ZA(6);

in spite of any obligation of confidentiality imposed on the person by this Act, another Act, another law or anything else (including a contract or professional ethics).

- (2) A person is not liable in civil or criminal proceedings, and is not to be considered to have breached any professional ethics, in respect of a notification under subsection 67Z(3) or 67ZA(2).

- (3) A person is not liable in civil or criminal proceedings, and is not to be considered to have breached any professional ethics, in respect of a notification under subsection 67ZA(3) or (4), or a disclosure under subsection 67ZA(6), if the notification or disclosure is made in good faith.
- (4) Evidence of a notification under subsection 67Z(3) or subsection 67ZA(2), (3) or (4), or a disclosure under subsection 67ZA(6), is not admissible in any court except where that evidence is given by the person who made the notification or disclosure.
- (5) In this section:  

**court** means a court (whether or not exercising jurisdiction under this Act) and includes a tribunal or other body concerned with professional ethics.

### **Section 69ZW Evidence relating to child abuse or family violence**

- (1) The court may make an order in child-related proceedings requiring a prescribed State or Territory agency to provide the court with the documents or information specified in the order.
- (2) The documents or information specified in the order must be documents recording, or information about, one or more of these:
  - (a) any notifications to the agency of suspected abuse of a child to whom the proceedings relate or of suspected family violence affecting the child;
  - (b) any assessments by the agency of investigations into a notification of that kind or the findings or outcomes of those investigations;
  - (c) any reports commissioned by the agency in the course of investigating a notification.
- (3) Nothing in the order is to be taken to require the agency to provide the court with:
  - (a) documents or information not in the possession or control of the agency; or
  - (b) documents or information that include the identity of the person who made a notification.
- (4) A law of a State or Territory has no effect to the extent that it would, apart from this subsection, hinder or prevent an agency complying with the order.
- (5) The court must admit into evidence any documents or information, provided in response to the order, on which the court intends to rely.
- (6) Despite subsection (5), the court must not disclose the identity of the person who made a notification, or information that could identify that person, unless:
  - (a) the person consents to the disclosure; or
  - (b) the court is satisfied that the identity or information is critically important to the proceedings and that failure to make the disclosure would prejudice the proper administration of justice.
- (7) Before making a disclosure for the reasons in paragraph (6)(b), the court must ensure that the agency that provided the identity or information:
  - (a) is notified about the intended disclosure; and
  - (b) is given an opportunity to respond.

## 4. Intervention

### Section 92A Intervention in child abuse cases

- (1) This section applies to proceedings under this Act in which it has been alleged that a child has been abused or is at risk of being abused.
- (2) Each of the following persons is entitled to intervene in the proceedings:
  - (a) a guardian of the child;
  - (b) a parent of the child with whom the child lives;
  - (ba) a person with whom the child is to live under a parenting order;
  - (bb) a person who has parental responsibility for the child under a parenting order;
  - (c) any other person responsible for the care, welfare or development of the child;
  - (d) a prescribed child welfare authority;
  - (e) a person who is alleged to have abused the child or from whom the child is alleged to be at risk of abuse.
- (3) Where a person intervenes in proceedings pursuant to this section, the person is, unless the court otherwise orders, to be taken to be a party to the proceedings with all the rights, duties and liabilities of a party.

### Section 91B Intervention by child welfare officer

- (1) This section applies to proceedings under this Act in which it has been alleged that a child has been abused or is at risk of being abused.
- (2) Each of the following persons is entitled to intervene in the proceedings:
  - (a) a guardian of the child;
  - (b) a parent of the child with whom the child lives;
  - (ba) a person with whom the child is to live under a parenting order;
  - (bb) a person who has parental responsibility for the child under a parenting order;
  - (c) any other person responsible for the care, welfare or development of the child;
  - (d) a prescribed child welfare authority;
  - (e) a person who is alleged to have abused the child or from whom the child is alleged to be at risk of abuse.
- (3) Where a person intervenes in proceedings pursuant to this section, the person is, unless the court otherwise orders, to be taken to be a party to the proceedings with all the rights, duties and liabilities of a party.

## Appendix 3

### Relevant sections of the *Children Youth and Families Act 2005*

#### 1. Grounds for reporting suspected child abuse and neglect

##### **Section 162 When is a child in need of protection?**

- (1) For the purposes of this Act a child is in need of protection if any of the following grounds exist:
- (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 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 or 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 or effective medical, surgical and other remedial care."
- (2) For the purposes of subsections (1)(c) to (1)(f), the harm may be constituted by a single act, omission or circumstance or accumulate through a series of acts, omissions or circumstances.



## 2. Report to protective intervener

### Section 183 Report to protective intervener

Any person who believes on reasonable grounds that a child is in need of protection may report to a protective intervener that belief and the reasonable grounds for it.

### Section 184 Mandatory reporting<sup>2</sup>

- (1) A mandatory reporter who, in the course of practising his or her profession or carrying out the duties of his or her office, position or employment as set out in section 182, forms the belief on reasonable grounds that a child is in need of protection on a ground referred to in section 162(c) or 162(d) must report to the Secretary that belief and the reasonable grounds for it as soon as practicable—
  - (a) after forming the belief; and
  - (b) after each occasion on which he or she becomes aware of any further reasonable grounds for the belief.

Penalty: 10 penalty units.

- (2) It is a defence to a charge under subsection (1) for the person charged to prove that he or she honestly and reasonably believed that all of the reasonable grounds for his or her belief had been the subject of a report to the Secretary made by another person.
- (3) The requirement imposed by subsection (1)(b) applies to a mandatory reporter referred to in paragraph (f) to (l) of section 182(1) even if his or her belief was first formed before the relevant date under section 182(1) for that paragraph.
- (4) For the purposes of this section, a belief is a belief on reasonable grounds if a reasonable person practising the profession or carrying out the duties of the office, position or employment, as the case requires, would have formed the belief on those grounds.

### Section 185 Report on child in need of therapeutic treatment

Any person who believes on reasonable grounds that a child who is 10 years of age or over but under 15 years of age is in need of therapeutic treatment (as defined in section 244) may report to the Secretary that belief and the reasonable grounds for it.

### Section 186 Grounds for belief

Grounds for a belief referred to in this Division are—

- a) matters of which a person has become aware; and
- (b) any opinions based on those matters.

### Section 187 Determination by Secretary about report

- (1) If a report is made to the Secretary under section 183 or 184, the Secretary may—
  - (a) provide advice to the person who made the report; or
  - (b) determine that the report is a protective intervention report for the purposes of this Act; or
  - (c) determine that the report should be dealt with as a report to the Secretary under section 28.
- (2) If the Secretary makes a determination under subsection (1)(c), the report may be dealt with under this Act as if it were a report to the Secretary under section 28.

<sup>2</sup> Registered medical practitioners, nurses, and teachers as well as school principals and police are mandatory reporters under s.182 of the Children, Youth and Families Act. These are the only groups currently mandated.

## **Section 188 Record of report**

The Secretary must keep a written record of each report made to the Secretary under this Division.

## **3. Protection of reporters**

### **Section 189 Reporters protected**

A report made under Division 2 in good faith—

- (a) does not for any purpose constitute unprofessional conduct or a breach of professional ethics on the part of the person by whom it is made; and
- (b) does not make the person by whom it is made subject to any liability in respect of it; and
- (c) without limiting paragraphs (a) and (b), does not constitute a contravention of—
  - (i) section 141 of the Health Services Act 1988; or
  - (ii) section 120A of the Mental Health Act 1986.

### **Section 190 Evidence and legal proceedings**

- (1) In any legal proceeding evidence may be given as to the grounds contained in—
  - (a) a report under section 183 or 184 or a report determined to be a protective intervention report under section 34; or
  - (b) a report under section 185 that a child is in need of therapeutic treatment.
- (2) However in a legal proceeding evidence that a particular matter is contained in a report referred to in subsection (1) or evidence that identifies the person who made that report as the reporter, or is likely to lead to the identification of that person as the reporter is only admissible in the proceeding if—
  - (a) the court or tribunal grants leave for the evidence to be given; or
  - (b) the reporter consents in writing to the admission of that evidence.
- (3) A witness appearing in a legal proceeding must not be asked and, if asked, is entitled to refuse to answer—
  - (a) any question to which the answer would or might identify the person who made a report referred to in subsection (1) as the reporter or would or might lead to the identification of that person as the reporter; or
  - (b) any question as to whether a particular matter is contained in a report referred to in subsection (1)—

unless the court or tribunal grants leave for the question to be asked or the reporter has consented in writing to the question being asked.
- (4) A court or tribunal may only grant leave under subsection (2) or (3) if—
  - (a) in the case of a proceeding in the Court or in any other court arising out of a proceeding in the Court or in VCAT on a review under section 333, it is satisfied that it is necessary for the evidence to be given to ensure the safety and wellbeing of the child;
  - (b) in any other case, it is satisfied that the interests of justice require that the evidence be given.

### **Section 191 Confidentiality**

(1) If a report referred to in section 190(1) is made, a person (other than the person who made it or a person acting with the written consent of the person who made it) must not disclose to any person other than a protective intervener or a community-based child and family service in accordance with subsection (4)—

- (a) the name of the person who made the report; or
- (b) any information that is likely to lead to the identification of the person who made the report.

Penalty: 10 penalty units.

- (2) Subsection (1) does not apply to a disclosure made to a court or tribunal in accordance with section 190.
- (3) Subsection (1) does not apply to a disclosure to the Therapeutic Treatment Board of the name or information leading to the identification of a member of the police force who made a report under section 185.
- (4) If a report is made to the Secretary under section 183 or 184, the information referred to in subsection (1) may be disclosed to a community-based child and family service if—
  - (a) the Secretary has made a determination under section 187(1)(c) in respect of the report; and
  - (b) the matter is referred to the community-based child and family service under section 30.
- (5) A community-based child and family service to which information referred to in subsection (1) is disclosed must not disclose that information to any other person except in accordance with this Part.

Penalty: 60 penalty units.

## 4. Investigation

### Section 208 Protection of givers of information

The giving of information to a protective intervener in good faith during the course of the investigation of the subject-matter of a protective intervention report—

- (a) does not for any purpose constitute unprofessional conduct or a breach of professional ethics on the part of the person by whom it is given; and
- (b) does not make the person by whom it is given subject to any liability in respect of it; and
- (c) does not constitute a contravention of—
  - (i) section 141 of the *Health Services Act 1988*; or
  - (ii) section 120A of the *Mental Health Act 1986*.

### Section 209 Confidentiality

- (1) A protective intervener must not disclose to any person, other than to another protective intervener or to a person in connection with a court proceeding or to a person in connection with a review by VCAT or a panel appointed under section 332 of decisions relating to the recording of information in the central register—
  - (a) the name of a person who gave information in confidence to a protective intervener during the course of the investigation of the subject-matter of a protective intervention report; or
  - (b) any information that is likely to lead to the identification of a person referred to in paragraph (a)—

without the written consent of the person referred to in paragraph (a) or authorisation by the Secretary.

Penalty: 10 penalty units.

- (2) The Secretary may only authorise the disclosure of information to a person under subsection (1) if the Secretary believes on reasonable grounds that the disclosure is necessary to ensure the safety and wellbeing of the child.
- (3) In this section ***court proceeding*** includes a proceeding in the Family Court of Australia.

## Appendix 4

### Department of Human Services – contact details for Child Protection

Region	Regional office	Postal address	Telephone/fax
Barwon-South Western	Barwon-South Western Central Intake		T: 1800 075 599
	Geelong	PO Box 760 Geelong 3220	T: 5226 4540 F: 5226 4550
	Hamilton	50 Thompson Street Hamilton 3300	T: 5571 9114 F: 5572 2451
	Warrnambool	PO Box 675 Warrnambool 3280	T: 5561 9444 F: 5561 9400
	Portland	PO Box 946 Portland 3305	T: 5523 9999 F: 5523 9900
Eastern	Eastern Central Intake		T: 1300 360 391
	Box Hill	Locked Bag 2015 Box Hill 3128	T: 9843 6391 F: 9843 6272
Gippsland	Gippsland Central Intake		T: 1800 020 202
	Bairnsdale	PO Box 486 Bairnsdale 3875	T: 5150 4500 F: 5152 1169
	Leongatha	PO Box 399 Leongatha 3953	T: 5662 4311 F: 5662 4251
	Morwell	PO Box 306 Morwell 3840	T: 5136 2400 F: 5136 2444
	Sale	PO Box 207 Sale 3850	T: 5144 9100 F: 5144 7873
	Warragul	PO Box 244 Warragul 3820	T: 5624 0600 F: 5623 5160

Region	Regional office	Postal address	Telephone/fax
Grampians	Grampians Central Intake		T: 1800 000 551
	Horsham	PO Box 633 Horsham 3402	T: 5381 9777 F: 5381 9720
	Ballarat	PO Box 712 Ballarat 3353	T: 5333 6530 F: 5333 6831
Hume	Hume Central Intake		T: 1800 650 227 F: 5722 0649
	Shepparton	PO Box 460 Wangaratta 3677	T: 5832 1500 F: 5831 1594
	Seymour	PO Box 460 Wangaratta 3677	T: 5793 6400 F: 5793 6408
	Wodonga	PO Box 460 Wangaratta 3677	T: (02) 6055 7777 F: (02) 6055 7792
	Wangaratta	PO Box 460 Wangaratta 3677	T: 5722 0555 F: 5722 0964
Loddon Mallee	Loddon Mallee Central Intake		T: 1800 675 598
	Bendigo	PO Box 513 Bendigo 3552	T: 5434 5555 F: 5434 5670
	Mildura	PO Box 617 Mildura 3502	T: 5022 3111 F: 5022 3199
	Swan Hill	210 Beveridge St Swan Hill 3585	T: 50320100 F: 5032 0143

Region	Regional office	Postal address	Telephone/fax
North & West	Northern Central Intake		T: 1300 664 977
	Preston	PO Box 368 Preston 3072	T: 1300 664 977 F: 1300 669 522
	Footscray	PO Box 224 Footscray 3011	T: 1300 360 462 F: 9275 7222
Southern	Southern Central Intake		T: 1300 655 795
	Cheltenham	3rd Floor 4-10 Jamieson St Cheltenham 3192	T: 8585 6000 F: 8585 6004
	Frankston	Level 1 431 Nepean Hwy Frankston 3199	T: 9784 3100 F: 9784 3111
	Dandenong	PO Box 692 Dandenong 3175	T: 9213 2111 F: 9213 2099

## Appendix 5

### Family Court of Australia – contact details

Location	Address	Telephone/fax
Melbourne	Owen Dixon Commonwealth Law Courts Building  Level 1 305 William Street Melbourne 3000	T: 1300 352 000 F: 8600 4050
Dandenong	53–55 Robinson Street Dandenong 3175	T: 1300 352 000 F: 9767 6286

### Federal Magistrates Court – contact details

Location	Address	Telephone/fax
Melbourne	Owen Dixon Commonwealth Law Courts Building  Level 1 305 William Street Melbourne 3000	T: 1300 352 000 F: 8600 4050
Dandenong	53–55 Robinson Street Dandenong 3175	T: 1300 352 000 F: 9767 6286



## Appendix 6

**To: The Registry Manager  
Family Court of Australia/Federal Magistrates Court**

### **INFORMATION REGARDING INSPECTION AND PHOTOCOPYING OF DEPARTMENT OF HUMAN SERVICES FILE**

**This information is to be attached to the file and should be read and signed by all persons inspecting the Department of Human Services files prior to inspection taking place.**

Parts of this file that identify, or would lead to the identification of the reporter (and which are therefore confidential pursuant to section 41 or 191 (1) of the *Children, Youth and Families Act 2005*) have been removed and placed in a sealed enveloped marked 'Not to be opened except at the direction of the judge or magistrate'.

This envelope should not be opened unless the Family Court or Federal Magistrates Court has heard submissions by the parties and ordered that the information be released.

Furthermore, photocopying of **any** part of the file is not permitted without the order of a judge, federal magistrate or registrar. This is in order to protect the privacy of the child.

It is therefore imperative that:

- (i) all file inspections are carried out under full supervision of the registry manager or their nominee, and
- (ii) photocopying of any material contained in this file, does not occur, unless:
  - (a) ordered by a court, or
  - (b) written permission has been obtained from the Department of Human Services contact person named below.

At the conclusion of proceedings the file should be returned to the contact person at the address below.

**Contact person:**

**Department of Human Services regional office:**

**Telephone number:**

**Date file submitted to Family Court or Federal Magistrates Court:**

I have read, understood and agree to the above.

Name..... Signature.....

Name..... Signature.....

Name..... Signature.....

1 The use of the terms 'notification' and 'notify' are used throughout the FLA. It is, however, acknowledged that such terms have been replaced in the Children, Youth and Families Act with the terms 'reporting' and 'report'. Accordingly, the use of these terms throughout the protocol will vary depending on which legislation is being referred to.

